TRADE CASES

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TRADE CASES

1948–1949

Cited 1948-1949 Trade Cases

Texts of decisions rendered by federal and state courts throughout the United States in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems, with table of cases and topical indexes

1950

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FOREWORD

TRADE CASES reports the full, official texts of all decisions rendered by the higher courts, state and federal, in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems. In addition, many lower court decisions and attorney generals' opinions are included, either in full or in digest. For extra good measure, antitrust consent decrees are included in full text.

The Sherman and Clayton Antitrust Acts, the Robinson-Patman Price Discrimination Act, and the Federal Trade Commission Act are the principal federal laws interpreted and applied by these decisions. The state fair trade acts (involving resale price maintenance), unfair practices act (involving sales below cost), and price discrimination and basic antitrust laws are the state laws concerned in these cases.

This volume, cited 1948-1949 TRADE CASES, contains exact reproductions of the decisions as reported in the "'48-'51 Court Decisions" volume of the CCH *Trade Regulation Reports* from January 1948 through December 1949.

Decisions are designated by the identical paragraph numbers under which they originally appeared in the *Trade Regulation Reports*, thus facilitating direct and cross reference.

Each decision is preceded by: (a) the full name of the case; (b) the name of the court, the docket number, and the date of the decision; (c) an accurate, succinct and informative headnote, with emphasis on the main issue; (d) a reference to all paragraphs in the compilations of the Ninth Edition of the *Trade Regulation Reports* which are pertinent to the subject matter of the case; and (e) the names of attorneys representing the litigants, whenever available.

Effective indexing is provided to afford quick and convenient contact with any case by reference to its paragraph number. The indexing system includes:

(a) Table of Cases (blue pages). Alphabetical, with complete listings under plaintiffs' names and cross references under defendants' names. The official and national reporter citations are included when available.

(b) Indexes (yellow pages). Complete and detailed. In addition to the General Topical Index, covering all of the decisions in the volume, special indexes are provided to:

- (i) Antitrust Consent Decrees
- (ii) Attorney Generals' Opinions
- (iii) Federal Trade Commission Cases
- (iv) Robinson-Patman Act Cases
- (v) State Fair Trade Act Cases
- (vi) State Unfair Practices Act Cases

This thorough indexing affords instant contact with any case (a) by case name, and (b) by subject matter.

In planning and producing TRADE CASES, the aim of the publishers throughout is to make this volume of the utmost utility in the important and extensive field of trade regulation. The user's time is saved by the concentration on the subject of trade regulation (no time is lost leafing through irrelevant cases); by the single reporting medium for courts of all jurisdictions; and by the explanatory headnotes—clearly stated captions written by specialists in trade regulation law.

COMMERCE CLEARING HOUSE, INC.

TRADE CASES

A Comprehensive Reporter of Decisions Rendered by Federal and State Courts Throughout the United States on Antitrust, Federal Trade Commission, and Other Trade Regulation Law Problems

1948–1949

TABLE OF CASES

for

TRADE CASES

1948-1949

A COMPLETE LIST OF THE CASES REPORTED IN THIS VOLUME, ARRANGED ALPHABETICALLY BY NAMES OF PLAINTIFFS, WITH CROSS REFERENCES UNDER DEFENDANTS' NAMES *

Each case name is followed by the name of the court rendering the opinion, the official or national reporter citation if available at the time of printing, and the number of the paragraph in this volume at which the case is reported.

* Cases in which the "United States" is a party are listed under the name of the other party only.

COURT DECISIONS

1948-1949

[¶ 62,202] Consumers Home Equipment Co., Avery B. Chereton and E. Mallinson v. Federal Trade Commission.

Harry H. Chereton v. Federal Trade Commission.

In the United States Circuit Court of Appeals for the Sixth Circuit. No. 10298, 10299. Decided December 22, 1947.

On petitions to review a cease and desist order of the Federal Trade Commission.

Federal Trade Commission Act

FTC Order Affirmed—Relevancy of Evidence.—A Federal Trade Commission order prohibiting petitioners, who were engaged in the sale and distribution of silverware, blankets, etc., direct to the purchasing public through house to house canvassers, and usually upon an installment basis, from allowing their salesmen to exhibit to purchasers samples of merchandise of a kind and quality different from that actually delivered, and representing that the merchandise offered for sale was limited in quantity or was offered at a special sales price which was a saving over prices charged by local retail stores, is affirmed. The fact that a number of the transactions of which evidence was given occurred in Michigan, the petitioners' state of residence, does not lessen the relevancy of the evidence as to the interstate practices shown to exist.

See Federal Trade Commission Act annotations, Vol. 2, ¶ 6325.50, 6610.30, 6620.065, 6620.482, 6660.22, 6660.75.

For Consumers Home Equipment Co.: Louis M. Hopping, Detroit, Mich.; Fitzgerald, Walker, Conley & Hopping; Hopping, Detroit, Mich., on brief.

For Harry H. Chereton: Sylvan Rapaport, Detroit, Mich.; Friedman, Myers & Keys, Detroit, Mich., on brief.

For Federal Trade Commission: James W. Cassedy, Washington, D. C., W. T. Kelley, Walter B. Wooden, James W. Cassedy and John W. Carter, Jr., Washington, D. C., on brief.

Before ALLEN, MCALLISTER and MILLER, Circuit Judges.

Affirming Federal Trade Commission cease and desist order in Dkt. 5174.

[*Nature of Action*]

Per Curiam: Petitioners were found by the Federal Trade Commission to have committed and used unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C., § 45. Petitioner Consumers Home Equipment Company is a Michigan corporation having branches in seven states of the United States, and individual petitioners were at the time of the hearing officers and directors of the corporation who formulate and control its policies and practices. The corporate business consists of the sale and distribution of silverware, blankets, mattresses, radios, and other articles of merchandise direct to the purchasing public through house to house canvassers, and usually upon an installment basis. It was found that in the conduct of their business and for the purpose of inducing purchases the petitioners, through their salesmen, had made use in interstate commerce of a sales plan employing false representations and fraudulent schemes. A cease and desist order was issued, commanding all of the petitioners to desist from the illegal practices specified. The findings and the cease and desist order were carefully limited by the Commission to those practices where the evidence showed were performed in interstate, as well as intrastate commerce.

[*Findings Sustained by Record*]

The findings of the Commission are amply sustained by the record, and hence are binding upon this court. *Keasbey & Mattison Co. v. Federal Trade Commission,* 159 Fed. (2d) 940 (C. C. A. 6). Petitioner corporation contracts with purchasers in different

states, delivers goods to different states, and receives payment for the articles sold. It clearly engages in interstate commerce. *Federal Trade Commission v. Bunte Bros., Inc.,* 312 U. S. 349, relied upon by petitioners, presents a totally different fact situation, and has no bearing here. Cf. *Brewer & Sons v. Federal Trade Commission,* 158 Fed. (2d) 74, 79 (C. C. A. 6). As typical of the deceptive practices engaged in, the salesmen were shown to have exhibited to purchasers samples of merchandise of a kind and quality different from that actually delivered. They represented that the merchandise offered for sale was limited in quantity or was offered at a special sale price which was a saving over prices charged by local retail stores. These representations were shown in a number of instances to be false. When an objection was made to the quality of the merchandise received, the petitioners attempted to force the purchaser to accept the merchandise delivered, by threatening suit or refusing to return the down-payments theretofore made. The numerous letters concerning these transactions received by better business bureaus in Detroit and Toledo, and the petitioners' answers thereto, are evidence that petitioners must have had knowledge of these unfair and deceptive practices.

[*Sufficiency of Evidence*]

The fact that a number of the transactions of which evidence was given occurred in Michigan, the corporation's state of residence, does not lessen the relevancy of the evidence as to the interstate practices shown to exist. The testimony as to the individual transactions was evidence of the merchandising plan and policy of petitioner Consumer Home Equipment Company, and shows the course of business engaged in by its agents and solicitors. *Hills Bros. v. Federal Trade Commission,* 9 Fed. (2d) 481 (C. C. A. 9), cert. denied, 270 U. S. 662. Since petitioner Harry H. Chereton, during all the period involved, was an officer and director of the corporation, responsible for its policies and practices, the order properly applies to him as well as to other officers and directors. *Sebrone Co. v. Federal Trade Commission,* 135 Fed. (2d) 676 (C. C. A. 7).

[*Order Affirmed*]

The order to cease and desist is affirmed, and the petitioners are ordered to comply therewith.

[¶ 62,203] Opinion of the Attorney General of Wisconsin.

Addressed to Joseph E. Tierney, First Deputy District Attorney, Milwaukee County, by John E. Martin, Attorney General, October 8, 1947.

Wisconsin Unfair Sales Act

Unfair Sales—Contingent Gift Prohibited—Effect of Amendment.—A gift of an item of merchandise by a wholesaler or retailer as defined in the Wisconsin Unfair Sales Act, as amended, when such gift is made contingent upon the purchase of any other item of merchandise, is prohibited.

See the Wisconsin Unfair Sales Act, Vol. 2, ¶ 8948.

[*Request for Interpretation*]

We have your request for an interpretation of sec. 100.30 (2), (3), Wisconsin statutes, as amended by ch. 323, L. 1947.

[*Statutory Provisions*]

Sec. 100.30 (2) (j), Stats. 1945, provided as follows:

"When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purposes of this section be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of paragraph (a) or (b) of subsection (2) hereof."

Sec. 100.30 (3), Stats. 1945, provided as follows:

"Any advertising, offer to sell, or sale of any merchandise either by retailers or wholesalers, at less than cost as defined in this section, with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this section."

Sec. 2, ch. 323, L. 1947, is worded as follows:

> "100.30 (2) (j) When one or more items are advertised, offered for sale * * * sold or * * * offered as a gift, or given *tied in or combined* with the sale of one or more other items * * * the price of each item * * * shall be * * * *subject to the requirements* of subsection (2) (*a*) or (b) hereof."

[*Amendment*]

Sec. 2, ch. 323, L. 1947, is worded as follows:

> "(3) Any advertising, offer to sell, or sale of any *item of* merchandise either by retailers or wholesalers, at less than cost as defined in this section * * * *and any advertising, offer to give, or gift of any item of merchandise contingent upon the sale of any other item of merchandise,* with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this section."

[*Question*]

Your question is whether the amendments set forth above now make it a violation for a merchant to give away merchandise in combination with other merchandise which is sold to the purchaser. In other words, we assume that the gift is contingent upon the sale.

[*Interpretation Prior to Amendment*]

On April 8, 1947, the Supreme Court in *State ex rel. Heath v. Tankar Gas, Inc.*, 250 Wis. 218, 26 N. W. 2d 647 considered sec. 100.30 as it stood before the amendment referred to above. The court concluded that sec. 100.30 (2) (j) did not require that each item of merchandise offered for sale had to be offered at a price which would conform to the formula set forth in subsec. (2) (a). The court held that the total price for which merchandise was sold at the combined price, or the sale of merchandise with a gift added, must measure up to the aggregate cost of the goods as determined by the statutory formula.

The court stressed the fact that in sec. 100.30 (3) the term "item" was not used and the reference in the 1945 statutes was to the sale of any merchandise. 250 Wis. 218, 222.

Ch. 323, L. 1947 amends sec. 100.30 (3) by adding the words "item of" in the first line and then adds the following language: "and any advertising, offer to give, or gift of any item of merchandise contingent upon the sale of any other item of merchandise." It is apparent that the words "item of" were deliberately inserted before the word "merchandise." It is also quite apparent that subsec. (3) now specifically refers to gifts of any item of merchandise contingent upon the sale of another item of merchandise. Sec. 100.30 (2) (j) as amended by ch. 323, L. 1947, now provides that each item "given tied in or combined with the sale" of one or more other items shall be subject to the price requirements of subsec. (2) (a) or (b).

[*Legislative History of Revision*]

On the face of it, it is apparent that the legislature was aiming at the result reached in the *Tankar* case. We have traced the legislative history of the revision and we will outline it herewith:

1. On March 25, 1947, Bill No. 407 S. was introduced.

This amended sec. 100.21 and 100.30 (4). The first section referred to has nothing to do with our problem and the amendment to subsec. (4) of sec. 100.30 was only for the purpose of increasing the penalties for violation.

2. On April 8, 1947, the Supreme Court handed down the opinion in the *Tankar* case.

3. On April 16, 1947, a request was received by the legislative reference library for an amendment of Bill 407, S. The draftsman's notes contain the following comment:

> "To take care of *State v. Tanker Gas Company* (April 8, 1947)"

His notes also contained the following comment:

> "Provide:
>
> 1. Violation to offer as gift contingent upon purchase.
>
> 2. Each item in combination when priced separately must sell 6 per cent over cost."

4. On April 17, a proposed draft of amendment 1, S. was delivered and on the same day offered by Senator Busby. The amendment made no changes whatever in the original Bill No. 407, S. but rather added amendments of subsec. (2) (j) and (3) of sec. 100.30.

5. On April 23, 1947, substitute amendment No. 1, S. to Bill 407, S. was offered by the Committee on Labor and Management. This substitute amendment made some changes in the revision of subsec. (4) of sec. 100.30, but only to the extent of reducing the amount of the fines to be levied for violation. The substitute amendment was identical with the first amendment insofar as subsec. (2) (j) is concerned. However, the substitute amendment added language to subsec. (3) of sec. 100.30—language which was not contained in amendment 1, S. This briefly is the history of the amendment of the statute.

[*Contingent Gifts Prohibited*]

There is no question what the legislature intended to do. The only question is whether they used apt language to accomplish the purpose. Considering the amendment of subsec. (2) (j) of 100.30 alone, one might conclude that the changes made were not sufficient to escape the interpretation made by the court in the *Tankar* case. However, when we consider the amendment to subsec. (3) of sec. 100.30 there can be little doubt that the legislature was aiming squarely at gifts of any items of merchandise contingent upon the sale of some other item of merchandise. Such contingent gifts are now defined as unfair competition and contrary to the policy of this statute.

The legislature certainly intended to do something or it would not have gone to the lengths it did in amending this statute. If the language actually used will permit of an interpretation that will effectuate the clearly apparent legislative intent, we are justified in adopting such construction. As we have pointed out above, the language of subsec. (2) (j) is not such as unmistakably prohibits gifts. We must consider, however, that the legislature perhaps did not intend to prohibit an outright gift of merchandise, but sought only to prohibit gifts that were tied in, combined with, or contingent upon sales of other merchandise. For example, the statute clearly does not prohibit a merchant from giving away a can of corn or a bar of soap if he desires to do so. We believe it does prohibit, however, the offer of a gift of a bar of soap contingent upon the customer purchasing 3 bars of the same kind or a different kind of soap.

[*Applies to Wholesalers and Retailers*]

The interpretation set forth above applies to wholesalers and retailers as defined in subsec. (2) of sec. 100.30. It is our conclusion, therefore, that a gift of merchandise contingent upon a purchase of other merchandise, is now prohibited.

[¶ 62,204] Cargill, Incorporated v. The Board of Trade of the City of Chicago, et al.

In the United States Circuit Court of Appeals for the Seventh Circuit, No. 9426. December 23, 1947.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Sherman Antitrust Act

Conspiracy—Order Stopping Trading—Valid Measure for Price Fixing.—A judgment dismissing a complaint alleging a conspiracy to restrain trade by entering an order stoping trading in grain futures is affirmed. The order was made pursuant to lawful authority to terminate trading and liquidate contracts, and did not constitute illegal price fixing or restraint of commerce.

See the Sherman Act annotations, Vol. 1, ¶ 1220.339 and the Clayton Act annotations, Vol. 1, ¶ 2024.19.

Affirming the judgment of the District Court, reported at '44-'47 Court Decisions Supp., ¶ 57,581.

Before EVANS and MINTON, Circuit Judges, and LINDLEY, District Judge.

[*Nature of Action*]

MINTON, Circuit Judge: The District Court sustained a motion to dismiss the plaintiff's amended and supplemental complaint, and the plaintiff has appealed. These material facts are alleged.

The plaintiff, a Delaware corporation, is a large dealer in grain. It is not a member of the Board of Trade of the City of Chicago, and its contracts herein referred to were handled through a member of the Board. The defendant Chicago Board of Trade, herein referred to as the Board, is a corporation organized and existing under the laws of Illinois. The defendant Board of Trade Clearing Corporation, herein referred to as Clearing, is a corporation organized and existing under the laws of Delaware and is an affiliate of the Board. The individual defendants are either officers or directors of the Board or of Clearing and as such officers and directors acted for and on behalf of the Board and Clearing in the actions hereinafter complained of.

The plaintiff in its business enters into futures contracts on the Board. It acquires such contracts in what are known as hedging operations and relies upon the defendants to maintain an orderly market in grain futures under conditions that will reflect the general value of grain. The Board and Clearing operate under certain rules, regulations, and by-laws by which Clearing becomes substituted as a seller to the buyer and a buyer to the seller upon all contracts for future delivery. All contracts of members for nonmembers are cleared through Clearing and are subject to the charter, by-laws, and regulations of Clearing. Unless otherwise provided, when a commodity is sold for delivery in any month, delivery may be made by the seller on any business day he elects in the month, and if not previously delivered, then delivery must be made on the last business day of the month. The Board has been designated by the Secretary of Agriculture as a contract market for grains, pursuant to the provisions of the Commodity Exchange Act.[1]

[*Board Rules*]

The Board had in existence at all times mentioned in the amended and supplemental complaint a Rule 251, which reads as follows:

"Rule 251. Emergencies.—The Board shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise by the Clearing House of the powers reserved to the Clearing House by its Charter, By-Laws, and Resolutions."

[*Notice of Price Increases*]

On and prior to May 8, 1946, the Office of Price Administration had maintained a ceiling on grains. On that date, the Government authorities notified the Board that effective May 13, 1946, the ceiling prices on grains would be substantially raised. The Government authorities at the time requested and recommended to the Board that all futures contracts open at the close of business on May 11 be settled at the then ceiling. On and prior to May 12, 1946, the plaintiff had entered into contracts of purchase for the delivery of corn in May, July, and September of 1946; oats in December, 1946; wheat in September and December, 1946; and rye in September, 1946.

[*Conspiracy Alleged*]

It is alleged that upon receipt of the notification from the Government authorities of the impending price increases, the defendants immediately entered into a conspiracy in restraint of interstate trade and commerce in grain and grain futures, in violation of the Sherman Act.[2] The plaintiff brings this civil action as provided in Sections 4 and 16 of the Clayton Act.[3]

The acts of the defendants, complained of as parts of the conspiracy and combination in violation of the Sherman Act and in furtherance thereof, are the enactments of certain regulations by the Board and the effectuation thereof by Clearing. On May 12, 1946, the Board, acting under Emergency Rule 251, promulgated Regulation 1894 which forbade trading in futures contracts outstanding at the close of the business day May 11, except for purposes of liquidation, and directed that such liquidation take place at or below the old ceiling prices, and without consideration of the increased ceiling

[1] 7 U. S. C., Sec. 1-17a.

[2] 15 U. S. C., Sec. 1.

[3] 15 U. S. C., Secs. 15, 26.

prices in determining penalties on defaults of such futures contracts. The plaintiff thereupon filed its first complaint in this action based upon the deprivation of benefits due it on its futures contracts of purchase.

On May 31, the Board, again acting under Rule 251, enacted its Regulations 1897 and 1898 which repealed Regulation 1894 by directing settlement of the now defaulted May futures contracts at the new ceilings and by reinstating the trading in futures contracts outstanding as of June 1 at or below the new ceiling prices. On June 4, the defendants caused Clearing to notify all its members that other parties were contesting the validity of Regulations 1897 and 1898, and to warn them that they would have to return monies paid thereunder if the Regulations were adjudged invalid. At this time, the plaintiff was entitled to receive from Clearing large sums of money under its May futures contracts, and also, by virtue of the rising prices, under its July, September, and December contracts. These sums, it is alleged, have not been fully paid.

On June 13, 1946, the Board enacted its Regulation 1899 which stopped as of that day all trading in futures contracts of the plaintiff and of others similarly situated and ordered Clearing to settle such contracts as of the closing exchange prices on that day. This regulation has been carried into effect, and the plaintiff allegedly has been deprived of the benefits of its contracts, the possible profits having been greatly increased by the lapse of the O. P. A. ceilings on grain on June 30, 1946.

After setting forth grounds for equity jurisdiction, the complaint seeks judgment against the defendants and each of them for treble damages in the sum of $10,624,867.50, plus costs and attorneys' fees, and injunctions against their price-fixing and interference with free and open trading.

The sole charge of this amended and supplemental complaint, then, is that the defendants' actions in promulgating and enforcing these regulations were a violation of Section 1 of the Sherman Act. The regulations of the Board are not challenged except as they are alleged to have violated the Sherman Act.

[*Regulations Held Binding*]

We have held in *Daniel et al. v. The Board of Trade of the City of Chicago et al.*, this day decided, that these regulations were valid and binding upon members of the contract market. They are likewise binding upon one who, like the plaintiff, is not a member but trades on the market through members. *W. A. Thomson v. Alexander W. Thomson et al.*, 315 Ill. 521, 530, 146 N. E. 451, 455.

As we understand the plaintiff, as far as its position is concerned it makes no difference whether the Board's regulations are valid or invalid. The plaintiff contends that they amount to price-fixing and are in restraint of trade in violation of the Sherman Act.

The defendant Board is the largest grain market in the world. When the Office of Price Administration announced the increases in ceiling prices on grains, a crisis and an emergency confronted the Board, and the Board acted under Rule 251, applicable to emergencies. The Board owed a duty to the public and to all parties trading upon the market to act in the utmost good faith in the general interest. As we held in *Daniel et al. v. The Board of Trade of the City of Chicago et al., supra,* if the defendants acted in good faith, they were authorized by the rules, regulations, and by-laws of the Board and Clearing, which were binding upon the plaintiff as a trader in the market, to act for both parties to the transactions in situations involving the termination of trade in certain futures contracts and the liquidation thereof. This was not price-fixing. It was the establishment of a measure of damages for the liquidation of the contracts terminated and in which there was to be no further trading. Thereafter, these contracts were not in the market for anything but settlement or liquidation upon the terms set forth in the regulations. There was no trading in these contracts at the liquidation figure, but a clearing of the way for trading. Here we have the settlement of liquidation of contracts which the parties by their duly authorized agents have terminated. The settlement is upon terms that the parties through their agents have agreed upon. Such termination and settlement is not price-fixing any more than any termination and settlement of contractual obligations by mutual agreement of the parties is price-fixing. No other trading on the market was affected by the settlement of these contracts.

[*No Restraint of Trade*]

Neither is the termination and settlement an illegal restraint of commerce. Almost every act of an agency such as the Board

and Clearing affects or restrains commerce in some respect, but such restraints as may be within the rule of reason are not unlawful. *Board of Trade of the City of Chicago et al. v. United States,* 246 U. S. 231, 38 S. Ct. 242, 62 L. Ed. 683. The acts of the defendants rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market. Only the bad faith of the defendants in the discharge of their duties under the emergency in which they purported to act can vitiate the defendants' action. No such claim of bad faith is made in this case.

[*No Price Fixing*]

We have been cited no case which holds that such action as is here charged to the defendants amounts to price-fixing. We have been cited cases such as *United States v. Socony-Vacuum Oil Co., In. et al.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, and *United States v. Trenton Potteries Company et al.,* 273 U. S. 392, 47 S. Ct. 377, 71 L. Ed. 700. These cases do not define and delineate what is price-fixing. They go only to the proposition that if there is price-fixing, it is *per se* an unreasonable restraint of trade. We, of course, would so hold here if we thought the defendants' acts were price-fixing. We are of the opinion that such acts do not constitute price-fixing. There was no trading in any grain commodity on the market maintained by the defendant Board as a result of the Board's action taken with respect to the plaintiff's futures contracts. Trading on these contracts was stopped and liquidation was provided for under the rules, regulations, and by-laws which, in the absence of bad faith amounting to fraud, bound all the parties.

[*Judgment Affirmed*]

The District Court properly sustained a motion to dismiss, and the judgment is affirmed.

[¶ 62,205] Raymond A. Belz v. The Board of Trade of the City of Chicago, et al.

In the United States Circuit Court of Appeals for the Seventh Circuit. No. 9439. December 23, 1947.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Sherman Antitrust Act

Conspiracy—Order Stopping Trading—Valid Measure for Price Fixing.—A judgment dismissing an amended complaint alleging a conspiracy to restrain trade by stopping trading in grain futures is affirmed on the authority of *Cargill, Incorporated v. The Board of Trade of the City of Chicago, et al.,* reported at ¶ 62,204, *supra.*

See the Sherman Act annotations, Vol. 1, ¶ 1220.339, and the Clayton Act annotations, Vol. 1, ¶ 2024.19.

Before EVANS and MINTON, Circuit Judges, and LINDLEY, District Judge.

MINTON, Circuit Judge: In this case an amended complaint was dismissed on motion. From judgment of dismissal the plaintiff has appealed.

The allegations of the amended complaint parallel the allegations in *Cargill, Incorporated, v. The Board of Trade of the City of Chicago et al.,* this day decided, although in a more concise form. The averments of the plaintiff's amended complaint charge a violation of the Sherman Act,[1] just as in the *Cargill* case. On the authority of that case, the judgment in this case is affirmed.

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[1] 15 U. S. C., Sec. 1.

[¶ 62,206] Louisiana Wholesale Distributors Association Inc. v. I. Rosenzweig, Doing Business as Pic-Kwickly Grocery.

In the Supreme Court of the State of Louisiana. No. 38660. December 15, 1947.

Appeal from the Sixth Judicial District Court, Parish of Madison.

Louisiana Unfair Sales Act

Sales Below Cost—Constitutionality of Statute—Jurisdiction of Court.—In a suit for an injunction to restrain violations of the Louisiana Unfair Sales Act, the defense of unconstitutionality of the Act was raised. On appeal by defendant from a judgment for plaintiff, it is held that the Supreme Court does not have appellate jurisdiction, inasmuch as (1) this is not a case wherein a law of the state has been declared unconstitutional, and (2) the jurisdictional amount is not shown to be involved, the loss claimed being based on conjecture as to future events.

See the Louisiana Unfair Sales Act, Vol. 2, ¶ 8328.

[*Nature of Action*]

HAWTHORNE, J.: Plaintiff, Louisiana Wholesale Distributors Association, Inc., a non-profit corporation organized and existing under the laws of this state, instituted this injunction suit against I. Rosenzweig as the sole owner and operator of a large retail store known as the Pic-Kwickly Grocery, located in the City of Tallulah, Louisiana.

[*Violations Alleged*]

In this petition plaintiff alleged that on April 12, 1947, and subsequent thereto defendant caused numerous pamphlets to be circulated in Tallulah to the effect that at certain times he would sell certain popular brands of cigarettes at $1.75 per carton, tax included, and 18¢ per package, tax included; that on April 12, 1947, he did actually sell for said prices cigarettes to six persons named in the petition; that the advertisement and sales consummated by defendant were in direct contravention of law and particularly in violation of the express provisions of the Louisiana Unfair Sales Act, Act 338 of 1940, as amended by Act 79 of 1942 and subsequently by Act 256 of 1946; that under the terms and conditions of said act, it is unlawful for any person, outside the City of New Orleans, to sell these cigarettes at less than $2.00 per carton or 20¢ per package. The petition further alleged that, under the terms and conditions of the act, petitioner is entitled to an injunction permanently restraining, prohibiting, and enjoining the defendant from continuing to advertise or sell said commodities in violation of the act.

Petitioner then prayed for the usual citation, and, after regular proceedings had, for a permanent writ of injunction forever restraining, prohibiting, and enjoining the defendant from advertising and selling the aforesaid commodities in violation of the law.

[*Defense of Unconstitutionality*]

Answering this petition, defendant admitted all the material allegations of fact, but denied that the plaintiff was entitled to injunctive relief for the reason that the said act is wholly unconstitutional in that it violates the due process and the equal protection of the laws provisions of the Constitutions of the United States and this state, and, further, that the act is a price-fixing statute and class legislation and precludes defendant from freely contracting with regard to the property and things which he owns.

[*Judgment Appealed*]

After trial in the lower court, judgment was rendered in favor of plaintiff and against defendant, decreeing the act in question to be constitutional and granting unto plaintiff the injunctive relief prayed for. From this judgment defendant has appealed to this court.

[*No Appellate Jurisdiction*]

We shall not discuss the merits of this case, since we take cognizance *ex proprio motu* of the fact that we do not have appellate jurisdiction of this case. *Dupey v. Greffin's Executor et al.*, 1 Mart. (N. S.) 198; *Lafon's Executors v. Lafon,* 1 Mart. (N. S.) 703; *Kerr v. Kerr et al.*, 14 La. 177; *Foundation Finance Co., Inc., v. Robbins et al.*, 144 So. 293 (La. App.).

[*Louisiana Constitution*]

Article VII, Section 10, of the Louisiana Constitution of 1921 defines the appellate jurisdiction of this court in cases involving constitutional questions thus:

"It shall have appellate jurisdiction in all cases wherein the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the State, or by any parish, municipality, board, or subdivision of the State is contested, or where the legality, or constitutionality of any fine, forfeiture, or penalty imposed by a parish, municipal corporation, board, or subdivision of the State shall be in contest whatever may be the amount thereof, and in all cases wherein an ordinance of a parish, municipal corporation, board, or subdivision of the State, or a law of this State *has been declared unconstitutional.* * * *" (Italics ours.)

This case is not a contest over the constitutionality or legality of any tax, local improvement assessment, etc., imposed by the state or any subdivision thereof, nor is it a contest over the legality or constitutionality of any fine, forfeiture, or penalty imposed by the state or any subdivision thereof, nor is it a case wherein a law of this state has been declared *unconstitutional.* On the contrary, it is a suit in which plaintiff seeks an injunction prohibiting the defendant from violating the terms and provisions of Act 338 of 1940, as amended. The only defense, that is, that the statute is unconstitutional, the lower court concluded was without merit in holding that the statute was constitutional.

An examination in its entirety of Article VII, Section 10, of the Louisiana Constitution discloses that this is not a case in which this court is given appellate jurisdiction, and for this reason this court is without such jurisdiction.

[*Jurisdictional Amount Lacking*]

After this case was argued before this court and submitted for decision, the court took cognizance of the fact that there was a serious doubt that it has appellate jurisdiction. Accordingly we requested counsel to file briefs on the question, and counsel for both sides have complied, urging that we have jurisdiction of the case under Article VII, Section 10, of the Louisiana Constitution of 1921, because it is a civil suit where the amount in dispute exceeds $2000.00. An affidavit also was filed on behalf of the appellee to the effect that the amount involved in the case exceeds $2000.00. It is alleged in the affidavit:

"In the event that this injunction had not been obtained from the District Court, it would have become necessary for retail outlets to cut their price in order to meet this 'loss-leader' practice, which would, in a period of less than twenty-four hours, cause the members of plaintiff corporation to lose a sum in excess of $2000.00. * * *

"That the Louisiana Wholesale Distributors Assn., Inc., collects an excess of $10,000.00 per year from its members as dues and this membership could not afford to continue paying said dues to said organization where the use of 'loss-leader' practices as engaged in by the defendant herein are continuous, * * * that said corporation under such circumstances would suffer a decided loss in dues in excess of the jurisdictional minimum of $2000.00."

[*Claim Based on Conjecture*]

We do not in any way question the good faith of the affiant in this affidavit, but it is obvious that the loss claimed is based on conjecture as to future events, and conclusions of the affiant from such conjecture. Undoubtedly such presumptions cannot inject an "amount in dispute or * * * fund to be distributed" in excess of $2000.00 into this injunction proceeding.

[*Case Ordered Transferred*]

For the reasons assigned, this case is ordered transferred to the Court of Appeal, Second Circuit, provided that the record be filed in that court within 30 days from the date on which this decree shall become final; otherwise the appeal shall be dismissed. The appellant is to pay the costs of appeal to the Supreme Court; all other costs shall abide final disposition of the case.

[¶ 62,207] United States v. Vehicular Parking, Ltd., et al.

In the United States District Court for the District of Delaware. Civil Action No. 259. October 29, 1947.

Sherman Antitrust Act

Patent License—Reasonable Royalties—Motion to Furnish Bond.—An action charging misuse of patents in violation of the Sherman Act resulted in a judgment requiring defendants to grant licenses at reasonable royalties, in which jurisdiction was retained to

enforce compliance. The motion of defendants to require a competitor, which has intervened for determination of the terms and conditions on which it should be granted a license, to furnish bond to insure payment of royalties, is denied. Defendant cannot require intervener to take a license which covers all of defendant's patents. Intervener is given the right to take a license under the four patents which it seeks. The court will then fix a reasonable royalty.

See the Sherman Act annotations, Vol. 1, ¶ 1270.151, 1270.201, 1270.251, 1610.411, 1610.501.

Francis A. Reardon, U. S. Assistant District Attorney, of Wilmington, Del., for the plaintiff.

E. Ennalls Berl (of Sutherland, Berl & Potter), of Wilmington, Del., Samuel E. Darby, Jr., of New York, N. Y., Donald K. Merwin and Joseph Frease, of Ohio, for the defendants.

C. Edward Duffy (of Logan, Duffy & Boggs), of Wilmington, Del., Charles M. McKnight, of Tulsa, Oklahoma, Robert F. Davis and Richard K. Stevens (of Stevens, Davis & Miller), of Washington, D. C., for Magee-Hale Park-O-Meter Company, intervener.

[*Syllabus*]

The present matter arises on motion of the Vehicular defendants to require Magee-Hale Park-O-Meter Company to furnish a bond of $250,000 to insure the payment to Vehicular of royalties when this court determines what a reasonable royalty will be. See 7 F. R. D. 336. Magee-Hale has retaliated with seven of its own motions. They are (1) to dismiss Vehicular's counterclaim in answer to Magee-Hale's petition of intervention; (2) a motion for summary judgment declaring Vehicular's patents invalid; (3) to dismiss Vehicular's "alternative counterclaim"; (4) to require Vehicular to designate what claims of its patents are alleged to be infringed; (5) to dismiss Vehicular's counterclaims because of "unclean hands"; (6) leave to charge Vehicular with "unfair and damaging actions" because it has started a patent infringement suit against Magee-Hale; and (7) for an order requiring Vehicular to file a $100,000 bond to protect Magee-Hale for damages it is suffering because Vehicular has brought suit for infringement.

[*Nature of Action*]

Leahy, District Judge: Out of the several varieties of motions there appear basic issues. Vehicular is willing to give Magee-Hale a license but it must be on the same terms as govern its other licensees; *i. e.*, Magee-Hale must take a license involving over 25 patents and covering about 5 pending applications for parking meters and parts thereof, at a fixed percentage of royalty common to all licensees. Magee-Hale first took the position that out of Vehicular's group of patents it was merely interested in Nos. 2,118,318; 2,168,302; 2,198,422; and 2,284,221; and it petitioned the court to fix a reasonable royalty for these patents and not the remainder. After the parties would adduce evidence on this question and the court would decide what a reasonable royalty would be, Magee-Hale stated it wished to reserve to itself the right to refuse to take any license on the basis fixed by the court; but it would thereafter take its chances on defending an infringement suit by Vehicular. After oral argument and by way of briefs, Magee-Hale now states it wants to take a license under the four patents mentioned, have the court determine a reasonable royalty which Magee-Hale will be bound to accept, but under three conditions (1) the acceptance of the license will not serve as an admission of the validity of Vehicular's patents and the license will not preclude Magee-Hale from urging as a defense that the patents are invalid in any action brought under the license or in any action involving the patents; (2) that the acceptance by Magee-Hale of a license at the royalty fixed by the court will not constitute an admission by Magee-Hale that any of its past or future operations are within the scope of the claims of the patents; and (3) the acceptance of the license will not serve as a waiver to urge any other defense in any action under the license.

[*Right to Intervene*]

This court is not the proper place for litigious business men to stress and strain as they try to make a deal. Magee-Hale has the right to intervene here. Vehicular does not have the right to insist that if Magee-Hale is to take a license it must include all

parking-meter patents owned by it. Magee-Hale does not have the right to take up this court's time in a determination of what is a reasonable royalty and then regard its decision as an advisory opinion and walk away without taking any license at all. More than that, Magee-Hale will not be heard to say that it will abide by the royalty rate fixed by the court but only with specific conditions.

[*Intervener May Take License under Four Patents*]

As I am not to be a party to any negotiations, I shall leave the parties free to negotiate elsewhere. The matter will be resolved in this fashion: Magee-Hale will not be required to take a license covering all Vehicular's patents but only the four Magee-Hale wants; Magee-Hale has thirty days to consider but there are to be no reservations or conditions. It simply takes a license under the four patents. This court proceeds to fix what it considers a fair and reasonable royalty. Any and all risks as to future legal quarrels between the parties, over the patents or the license, if one is granted, are to be assumed by the parties. Otherwise, the petition of intervention and its prayers will be dismissed.

[*Motions for Bonds Denied*]

One other matter should be determined at this time. The Vehicular defendants have filed a motion to require Magee-Hale to furnish a bond in the amount of $250,000 to insure the payment to defendant Vehicular Parking, Ltd. of royalties on a reasonable basis. In turn, Magee-Hale seeks a bond from Vehicular of $100,000 because of damage to Magee-Hale by reason of loss of customers arising from the threat of the patent infringement counterclaim. Vehicular defendants say the Magee-Hale claim "is so absurd and so utterly devoid of the many supporting elements, universally recognized as necessary for serious consideration of a motion of this sort, as to require no further comment." This description of Vehicular aptly describes both motions for a bond. Accordingly, the motion of each party for the kind of bond sought by each will be denied.

[*Other Motions Not Decided*]

I have considered the other motions of Magee-Hale but I do not think it necessary to pass on them at this time. Depending upon further events, Magee-Hale may renew its application at some future time.

[¶ 62,208] Opinion of the Attorney General of Minnesota.

Addressed to Mr. James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General, November 24, 1947.

Minnesota Unfair Trade Practices Act

Published Price List—Current Delivered Invoice or Replacement Cost—Prima Facie Evidence.—A price list which is prepared by a manufacturer and circulated among wholesalers, jobbers and sales representatives, but which is not available to the retailer except when displayed to him by a sales representative, is not "published" within the meaning of the Act. In the absence of a published list price, the retail sale of goods at a price less than the current delivered invoice or replacement cost, whichever is lower, plus eight per cent thereof, for the purpose or with the effect of destroying competition, is prima facie proof of violation of the Act. "Current delivered invoice" refers to the invoice delivered at or about the time of the sale.

See the Minnesota Unfair Trade Practices Act, Vol. 2, ¶ 8428.

[*Statutory Provision*]

Your letter of November 20 is directed to M. S., Sec. 325.52. That section consists of three paragraphs and reads:

"Any sale made by the retail vendor at less than eight per cent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price; or, in the absence of such a list price, at less than eight per cent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors or destroying competition, shall be prima facie evidence of the violation of sections 325.02 to 325.07.

"No prosecution shall be had nor any action at law for damages or injunctive relief shall lie where the vendor sells at a price not less than 15 per cent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price; or, in the absence of such a list price, at not less than 15 per cent above the current delivered invoice or replacement cost.

"Any sale made by a wholesale vendor at less than two per cent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price; or, in the absence of such a list price, at less than two per cent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors or destroying competition, shall be prima facie evidence of the violation of sections 325.02 to 325.07."

You comment that the section indicates that any sale made by a retail vendor at less than eight per cent above the manufacturer's published list price, less his published discounts, for the purpose or with the effect of injuring or destroying competition, shall be prima facie evidence of a violation of Secs. 325.02 to 325.07.

You comment that many manufacturers prepare and circulate price lists among wholesalers, jobbers and sales representatives, but not among retailers. Often sales representatives display such a price list, and at such times it is available to the retailer. In that connection you submit the question:

Question

As applied to the retailer, would such manufacturer's published price list in the hands of another be considered a manufacturer's published price list?

You comment further that this section, 325.52, states that in the absence of such a price list, retail sales at less than eight per cent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring or destroying competition, shall be prima facie evidence of the violation of Secs. 325.02 to 325.07. In that connection, you submit the second question:

Does the retail vendor have a choice between using the actual current delivered invoice and replacement cost; or must he be guided by Sec. 325.01, Subd. 5, (1), which limits him to the actual current delivered invoice or replacement cost, whichever is lower?

You also comment that Sec. 325.52 refers to the manufacturer's published list price, less his published discounts, but Sec. 325.01, Subd. 5 (2), refers to the manufacturer's published list price and discounts then currently in effect. In that connection you ask the third question:

Does Sec. 325.52 imply that the manufacturer's published list price, which the retail vendor must use, is the list price currently in effect?

Opinion

1. At the outset, we will bear in mind that Sec. 325.52 does not lay down a rule of conduct. It does not forbid a retailer from selling goods at less than a minimum specified price. It merely establishes a rule of evidence. The rule established is that when the retailer sells for less than the manufacturer's published list price, plus eight per cent, less the published discounts if the manufacturer publishes a list price, or if the manufacturer does not publish a list price, then, if the retailer sells at a price less than the current delivered invoice or replacement cost, plus eight per cent thereof, and if, in either case, basing the cost on either formula, this is done for the purpose of injuring his competitor, or with the effect of injuring his competitor, or with the effect of destroying competition, or for the purpose of destroying competition, then this is prima facie proof of violation of Secs. 325.02 to 325.07. The manufacturer's price to which reference is made is not a secret price. It is his published list price. The discounts are not secret discounts, but published discounts. The statute recognizes the possibility or probability that not all manufacturers publish a list price and it provides an alternative where such list price is not published. The first question involves a list price made available to a limited number of persons, but apparently not available to the retailer.

Published means to make public; to make known to people in general. 35 W. & P. 445.

Accordingly, when the list price is not availiable to the retailer so that he may consult it when he needs to and when he has use for it, I would not consider it published within the meaning of this statute.

2. In the absence of such a published list price, the rule depends upon the current delivered invoice or replacement cost. In the application of the law to any particular case,

the first thing to be determined is whether as applied to this particular retailer there is a manufacturer's published list price. If it is determined that there is not, then the case is governed by the current delivered invoice or replacement cost. I fail to see that the retailer has any choice in the matter when the list is not published and is not available to him. In such case, the manufacturer's list price is simply eliminated.

3. Sec. 325.01, Subd. 5, relates to cost as the term is used in this act. Should a person be accused of selling below cost which is forbidden in Sec. 325.04, we look to Sec. 325.01, Subd. 5, to learn the meaning of the term cost. We read that it means (1) the actual current delivered invoice or replacement cost, whichever is lower, not including customary cash discounts, plus the cost of doing business at that location by the vendor. (2) Where a manufacturer publishes a list price and discounts, we will consider the cost as shown by the manufacturer's published list price and discounts in effect at the time that the sale is made, plus his cost of doing business. That is made prima facie evidence of the cost. Sec. 325.01, Subd. 5 (2) refers to these items of the manufacturer's published list price and manufacturer's discounts then currently in effect, that is, in effect at the time of the sale. Sec. 325.52 does not mention whether the list price is the one which was in effect when the retailer purchased his goods and does not state whether the published discounts are the discounts in effect at the time that the retailer purchased his goods, but both these sections refer to the same subjects and they are a part of the same act. Consequently, it is my opinion that they must be read together. Sec. 325.52 refers to current delivered invoice and it is my opinion that that refers to the invoice delivered at or about the time of the sale.

We will bear in mind that both of these statutes are statutes relating to evidence or proof. The proof is not conclusive. It is only prima facie. If a retailer is accused of selling below cost and he proves that his actual cost is less than the cost that would be established by the formula in these prima facie evidence rules, and if there is no evidence to dispute his actual cost which is lower, then he has not offended the statute.

[¶ 62,209] William Goldman Theatres, Inc. v. Loew's Inc., Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, Stanley Company of America, Universal Film Exchanges, Inc., and United Artists Corporation.

In the United States Circuit Court of Appeals for the Third Circuit. No. 9324. January 6, 1948.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Sherman Antitrust Act

Review of Previous Ruling—Conspiracy—Concerted Refusal to Lease Films.—Upon a re-examination of its previous ruling, the Court affirms its decision that uniform participation in a system of doing business which results in restraint of commerce is sufficient to establish an unlawful conspiracy. The concerted refusal by owners of all other available theatres and distributors of 80% of the feature motion pictures, to lease films to plaintiff, violates the Act. The evidence was competent and sufficient to prove damages, and the injunction was not too wide in scope.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Affirming 150 Fed. (2d) 738, reported at '44-'47 Court Decisions Supp. ¶ 57,401.

Before Biggs, Maris and McLaughlin, Circuit Judges.

[*Reversal Sought*]

Per Curiam: The appellants insist that this court should review its previous decision, 150 F. 2d 738 and in effect reverse itself because, it is said, the court below on remand modified certain essential findings of fact. This, the appellants contend, necessitates a judgment in the appellants' favor under *Schad v. Twentieth Century-Fox Film Corporation,* 3 Cir., 136 F. 2d 991. Out of

an abundance of caution we have reexamined our previous ruling in the light of the entire record and find it to be correct. We are of the opinion now, as we were of the opinion then, that the principles ot *Interstate Circuit v. U. S.*, 306 U. S. 208, 225, 227, rule the case at bar.

[*No Abuse of Discretion*]

The appellants assert also that the injunction entered by the court below was too wide in scope. The sweep of the injunction is broad but in view of all the circumstances we cannot say that the learned trial judge abused his legal discretion in entering the decree.

We find also, contrary to the assertions of the appellants, that the evidence offered was competent and sufficient to prove the appellee's damages under *Bigelow v. RKO Radio Pictures,* 327 U. S. 251. Cf. the earlier decisions in *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359, 379, and *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555, 563. This phase of the case at bar is most competently analyzed, as are its other aspects, in the opinion of the court below. See 69 F. Supp. 103.

[*Judgment Affirmed*]

The judgment appealed from will be affirmed.

[¶ 62,210] Ray Carlton v. Paul Manuel, doing business under the firm name and style of "I-X-L Laundry Company".

In the Supreme Court of the State of Nevada. No. 3494. December 10, 1947.

Nevada—Common Law—Monopoly

Combination in Restraint of Trade—Personal Services Not a Commodity at Common Law.—A laundry route owner who had his customers' laundry processed by the operator of a large laundry may not maintain an action against the laundry operator for conspiring with other laundry operators to reduce the rate of discount given to route owners. Nevada has no antitrust law, and personal services, such as the laundry work done by defendant for plaintiff, cannot be the subject of a monopoly at common law. Evidence of conspiracy was properly excluded.

See Vol. 2, ¶ 8535.

Concurring Opinion—Legislation Recommended.—The concerted action of the laundry operators in organizing to reduce the discount allowed to route owners was unduly oppressive and arbitrary. The subject of the prohibition or regulation of monopolies and trusts should be considered and acted upon by the Nevada legislature.

See Vol. 2, ¶ 8535.

For appellant: Morgan, Brown & Wells, and Oscar Zapf.

For respondent: Sidney W. Robinson.

[*Nature of Action*]

By the Court, EATHER, C. J.: The evidence in this case establishes the fact that on or about the 5th day of February, 1945, appellant purchased a business in Reno, Washoe County, Nevada, consisting of a laundry route, from one Ken Darrah. The evidence further establishes the fact that at the time of purchase of said business, the laundry work and dry cleaning work of the customers of said laundry route was processed and finished by respondent doing business under the firm name and style of "I-X-L Laundry." At the time of the purchase of said business by said appellant, he and his immediate predecessor in interest were allowed a trade discount of thirty-two per cent on the published public list price of laundry and dry cleaning for all such work brought to the plant of respondent. The evidence further establishes the fact that at no time was there in existence any written agreement as between respondent and appellant covering the matter of the aforesaid discount rate or any other matters pertaining to said business relationship, and further, that respondent was under no obligation to perform services for appellant, and that appellant was under no obligation to bring laundry or dry cleaning to the plant of respondent for processing. In other

words, the evidence establishes the fact that each item of work done and performed by respondent for appellant constituted a separate transaction and that neither of the parties had any continuing contractual relationship of any kind with the other.

This situation prevailed until on or about the 19th day of November, 1945, at which time appellant was notified by respondent that the discount rate of thirty-two per cent previously allowed to appellant for appellant's work would be reduced to twenty-five per cent. The evidence does not indicate that after said notification any other discount rate was allowed by respondent to appellant in connection with laundry or dry cleaning work performed by respondent for appellant. The parties continued to do business with each other at said new reduced discount rate until on or about the 14th day of March, 1946, at which time appellant ceased transacting business with respondent. The evidence further establishes the fact that for the period from February 5, 1945, until November 26, 1945, appellant paid to respondent the cost of all laundry and dry cleaning performed by respondent for appellant at the established list price less a discount of thirty-two per cent, and that from November 26, 1945, until on or about the 4th day of March 1946, appellant paid to respondent the cost of all laundry and dry cleaning performed by respondent for appellant at the list price thereof, less a discount of twenty-five per cent, and that no payments were made by appellant to respondent for work done between the period from March 4, 1946, to and including March 14, 1946.

This action was commenced in the trial court by respondent for the purpose of recovering for the value of said laundry and dry cleaning performed by respondent for appellant for said period from March 4, 1946 until March 14, 1946, said value of said work, labor and services being computed upon the established list price for said laundry and dry cleaning less a discount of twenty-five per cent, said discount being the same allowed to and paid to appellant for such work done since on or about the 26th day of November, 1945. Appellant denied owing any money to respondent, and set up various affirmative defenses which give rise to this appeal.

[Portions of the opinion dealing with the questions of discount rate and violation of War Labor Board regulations are omitted as not pertinent to the scope of these reports.]

[*Conspiracy Alleged*]

We will now consider appellant's first and third assignments of error relating to the exclusion of testimony pertaining to the alleged conspiracy and the finding of the trial court that the contractual relationship between appellant and respondent subsequent to November 26, 1945 was based upon a twenty-five per cent discount rate.

[*Common Law Applies*]

At the outset we wish to observe that the Legislature of the State of Nevada has never deemed it advisable to enact any statute governing matters pertaining to monopolies, combinations, or restraints of trade, and consequently, in arriving at a determination of this matter, we are obliged of necessity to rely solely upon the principles of the common law pertaining thereto. At common law, personal services cannot be the subject of a technical monopoly, a monopoly being predicable only on rights or interest in property. See 41 C. J., p. 172, sec. 170, wherein the following language is used, amply supported by substantial authority.

"An agreement fixing the price of labor is not forbidden by the common law. Nor is labor a 'commodity', 'article of merchandise', 'product,' or 'convenience,' 'repair', 'any article or thing whatsoever,' or 'trade,' or 'commerce,' within the meaning of federal or state anti-trust acts, and an agreement to fix the price of labor is not forbidden by any of these statutes; and this is so whether the labor is physical or intellectual or a combination of the two. Nor is an agreement fixing and regulating the price of labor a 'trust'. The foregoing principles have been applied to agreements fixing the price of laundry work, or fixing the price for dyeing and dressing of furs. They also have been applied to agreements between physicians fixing charges for professional services, and to agreements fixing and maintaining the rates of commission and brokerage to be charged by the members of an association of dealers."

See also the case of *Lohse Patent Door Co. v. Fuelle,* 114 S. W. 997, at 1002:

"* * * and at common law personal service—an occupation—could not be the subject of a monopoly. In discussing that question, in the case of *State ex rel.*

v. Associated Press, 159 Mo., loc. cit. 456, 60 S. W. 91, 104, 51 L. R. A. 151, 81 Am. St. Rep. 368, this court used this language: 'But there is nothing here on which a monopoly can attach. The business is one of mere personal service—an occupation. Unless there is 'property' to be 'affected with a public interest there is no basis laid for the fact or the charge of a monopoly.' "

The only type of combinations or monopolies or restraints of trade which fell within the ban of common law principles were those monopolies, combinations or restraints of trade which tended in any way to limit, fix, control, maintain or regulate the price or production of any article of trade or manufacture or the use of the same. Labor was never deemed to be a commodity at common law, and combinations affecting personal services were not unlawful or the subject of actions for damages. These common law principles have been adhered to in connection with judicial construction of statutes regulating monopolies, combinations and restraints of trade, and even under such statutes, labor or personal services have never been construed to constitute a commodity or article of trade. See the case of *Rohlf v. Kasemeier,* 118 N. W. 276, 23 L. R. A. (N. S.) 1284, wherein the following language is used by the Iowa Court:

> "If we were to adopt the view so strongly presented by appellant's counsel, it would be on the assumption that the associated words 'merchandise' and 'commodity' include the wages to be paid for labor, because labor is a sort of merchandise, subject to barter and sale as other goods. * * * We are constrained to hold that labor is not a commodity within the meaning of the act now in question. As supporting this conclusion, see *Hunt v. Riverside Club,* 140 Mich. 538, 104 N. W. 40, 13 Detroit Leg. N. 264; *Queen v. State,* 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483. It seems to be the almost universal holding that it is no crime for any number of persons without an unlawful object in view to associate themselves together, and agree that they will not work for or deal with certain classes of men, or work under a certain price or without certain conditions. *Carew v. Rutherford,* 105 Mass. 14, 8 Am. Rep. 287; *Commonwealth v. Hunt,* 4 Metc. (Mass.) 134, 38 Am. Dec. 346; *Rogers v. Evarts* (Sup.) 17 N. Y. Supp. 268; *United States v. Moore* (C. C.) 129 Fed. 630. * * * it follows that the word 'commodity', when used with reference to prices, should not be held to include labor. No case has been cited which supports appellant's contention, and we have not been able to find any."

[*No Commodity Involved*]

It is our opinion that in the instant case no commodity as such is involved and that consequently the conspiracy alleged in appellant's second affirmative defense does not constitute a cause of action under common law principles within the State of Nevada. The purpose of the alleged conspiracy was to maintain a reduced discount rate as between appellant and respondent in connection with personal services furnished by respondent for appellant. Such personal services are not a commodity at common law, and consequently any conspiracy with reference thereto would not violate any common law principle or give rise to a cause of action for damages in connection therewith. Laundry services have in several cases been held to constitute a matter of personal services rather than the production of a commodity, and in this connection, we expressly refer to the case of *State of Arkansas ex rel. Moose v. Aaron Frank,* 169 S. W. 333, 52 L. R. A. (N. S.) 1149:

> "If the business of laundering is not a commodity, then an agreement fixing prices for the performance of that service is not within the inhibition of the antitrust act. No other word or term in that act could include that business. The act does use the word 'repair', but it cannot be seriously contended that this word is sufficient to embrace the business of laundering. It may be true that to some extent launderies do repair the clothes which they wash, but it does this as a mere incident to that business; and by such service they merely 'repair' the damage which they have done in performing their service of making the clothes clean. The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the legislature of this state has not made such an agreement unlawful."

We also refer in this connection to the case of *State of Louisiana v. McClellan,* 94 So. 748, 31 A. L. R. 527:

> "When we come, therefore, to consider the section referred to in connection with the business of laundry as shown by the statement of facts, there is

left no possibility of doubt that such business is utterly and totally foreign to the 'trade and commerce' which the lawmakers had in view, and the restraint of which it was the object and purpose of the statute to prevent.

"The business of the laundry is not to lease or to sell, nor does a laundry deal in goods, wares, and merchandise, or other commodities. Nor has it anything to do with the fixing of the prices of commodities. In other words, there is absolutely nothing in connection with the business carried on by the laundry, or the method pursued in operating the laundry business, that would bring the laundry within any definition of 'trade' or 'commerce', in the sense in which those words are used in the statute, or that would even suggest to the ordinary mind that such laundry was a concern engaged in trade and commerce. We are unable to conceive of any rule of interpretation by which the terms of the statute can be so broadened or enlarged as to bring the laundry business thereunder."

* * *

"Our conclusion is that the laundry business operated in the City of New Orleans, as disclosed by the evidence, is not 'trade or commerce', in the sense that said words are used in sections 2 and 4 of Act 11 of the extra session of 1915; and that said laundry business was not included within the prohibition of said sections of said act."

While it is true that both of the foregoing cases arose under antitrust statutes, nevertheless, said statutes were but declaratory of common law principles, and common law principles were used in connection with interpreting the statutes involved. By an application of said common law principles, it has been determined that a laundry business is a business involving personal services rather than commodities, and consequently that no action involving monopolies, combinations, or restraints in trade, can be maintained in connection with agreements fixing the price, or tending to fix the price of such personal services. Various other cases supporting this view are to be found in an extensive annotation to the aforesaid case of *State v. McClellan, supra,* in 31 A. L. R. at page 533.

In connection with this phase of the matter, counsel for appellant has cited at length, and placed considerable reliance upon the case of *Endicott v. Rosenthal,* 16 P. (2nd) 673. However, we do not believe that the ruling in said case should find any application in a state governed solely by common law principles, since said case is predicated solely upon a California statute section, said section being section 1673 of the California Civil Code. It is admitted by the Supreme Court of the State of California that said section is much broader in its terms than was the statute under consideration in the foregoing case of *State v. McClellan,* in that the California statute referred not only to trade, but also to businesses of any kind. Under said California statute, the Supreme Court of California held that:

"It could not logically be maintained that persons engaged in the industry of cleaners and dyers of wearing apparel were not engaged in some kind of business."

It will be seen that said California statute referring to "businesses of any kind" enacted a measure much broader than any interpretation of what constitutes "trade" or "commodity" at common law. We do not believe that said California case, under the circumstances, should be construed to over-ride the generally prevailing common law principles applicable to this case as hereinabove enunciated.

Upon the trial of this matter, the lower court specifically referred to and relied upon the case of *Goldfield Consolidated Mines Company v. Goldfield Miners' Union No. 220,* decided by the late Judge Farrington, in 159 Fed., p. 500. Said case involved an agreement and combination among various mine operators within the State of Nevada, which had for its purpose the following five objectives, namely:

"First, to reduce the wages of the men employed by the various members of the association; second, to resume operations, giving preference to old employes; third, to reduce the cost of living in Goldfield District 20 percent; fourth, to have no further dealings with the Goldfield Miners' Union, or any organization affiliating with the Western Federation of Miners; fifth, to require each person presenting himself to any member of the association for employment, to sign, as a condition of such employment, an agreement that he is not, and during the period of his employment will not become, a member of respondent union. The fifth item may be regarded as the means agreed upon to accomplish the first and fourth."

It will be observed that the purposes of the aforesaid combination were much

broader in their scope than were the purposes of the conspiracy alleged in appellant's second cross-complaint and counterclaim. In referring to such combination, Judge Farrington stated as follows:

"An unlawful conspiracy is a combination between two or more persons to do a lawful act by criminal or unlawful means." 8 CYC. 620,"

and further held with reference to the foregoing quoted purposes of said combination, that:

"None of the proposed acts are either unlawful or criminal. For these reasons I must hold that complainant, in entering into an agreement with the other members of the Goldfield Mine Operators' Association, which is embodied in the resolutions of December 7, 1907, was not guilty of any unlawful conspiracy against the respondents."

In said decision the following language is also used:

"It is a constitutional right of an employer to refuse to have any business relations with any person or with any labor organization, and it is immaterial what his reasons are, whether good or bad, well or ill formed, or entirely trivial and whimsical."

"The right of an employer to refuse to employ any particular individual, or any class of individuals, is neither greater nor less than the right of a man to refuse to work for any particular individual, or class of individuals. The reason for the refusal can in no wise control, enlarge or diminish the legal right of refusal, the right to employ, or the right to refuse to be employed.

"It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts. 2 Cooley on Torts, p. 587." (Cooley on Torts, second edition, sec. 278, p. 328.)

The foregoing case was not decided by this court but rather by the Federal Circuit Court for the District of Nevada. However, since said decision arose within the state, the rule set forth therein is persuasive of what the common law is within this state. Furthermore, this court has quoted said decision with approval in the case of *Branson v. I. W. W.*, 30 Nev. 270, at page 295.

It is our conclusion, therefore, that in view of the testimony of appellant himself to the effect that he had no continuing contract with respondent, and that his contractual relationship with respondent was of a very nebulous character, and could be terminated at the whim of either appellant or respondent, respondent committed no wrong in entering into the combination alleged to have been entered into by him in appellant's second cross-complaint and counterclaim. If the testimony had indicated that a contractual relationship existed between appellant and respondent which continued for a specified term, and if said testimony had indicated that a combination or conspiracy was entered into for the purpose of destroying said contractual right, appellant's offered testimony with reference to the existence of a conspiracy might have been material. However, at the time the testimony relating to the conspiracy was offered in evidence by appellant, appellant's own testimony negatived the existence of any such contract, and to the contrary established the fact that no such contract existed. We conclude, therefore, that the trial court did not err in excluding such testimony, in view of the fact that respondent, in reducing the established discount rate to appellant from thirty-two per cent to twenty-five per cent, did nothing more than he had an absolute right to do. Since respondent had the absolute right to reduce said discount rate and since the services performed by respondent for appellant were, at common law, not the subject of monopolies, combinations, or restraints of trade, as hereinabove found to be the case, the combination or conspiracy complained of by appellant was not a combination or conspiracy to do a wrongful act or an act in contravention of common law principles. Since respondent had the right to reduce said discount rate, the fact that he may have conspired to reduce the same with various other laundry operators was an immaterial matter when judged by the principles of common law applicable to this case, and consequently, any testimony in support of such conspiracy would have been immaterial to a determination of the rights of the parties. See, in this connection, the case of *Bohn Manufacturing Company v. Hollis*, 55 N. W. 1119:

"What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private

action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failure to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. *Bowen v. Matheson,* 14 Allen, 499; *Steamship Co. v. McGregor,* 23 Q. B. Div. 598, (1892) App. Cas. 25; *Parker v. Huntington,* 2 Gray, 124; *Wellington v. Small,* 3 Cush. 145; *Payne v. Railway Co.,* 13 Lea, 507."

See also the case of *Werth v. Fire Companies' Adjustment Bureau,* 171 S. E. 255, at page 258:

"A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or actionable conspiracy, are, in my opinion, the same, though to sustain an action special damages must be proved."

"The above was said by Lord Brampton in the case of *Quinn v. Leatham,* (1901) A. C. 495, 70 L. J. P. C. 76, 65 J. P. 708, 50 W. R. 139, 85 L. T. N. S. 289, 17 Times L. Rep. 749, 1 British Ru. Cas. 197. See also, 5 R. C. L. 1091, sec. 41; Amer. & Eng. Ency. of Law (2nd ed.) 832; *Harris v. Com.,* 113 Va. 746, 73 S. E. 561, 38 L. R. A. (N. S.) 458, Ann. Cas. 1913 E, 697.

"The mere operation of a lawful business by lawful means, as a combination between corporations or individuals to draw to themselves business from other competitors, however hurtful to the latter, is not a conspiracy which is actionable." 5 R. C. L. 1095, sec. 44.

"In the case of *West Virginia, etc. Co. v. Standard Oil Co.,* 50 W. Va. 611, 40 S. E. 591, 594, 56 L. R. A., 804, 88 Am. St. Rep., 895, it was said: 'Counsel for plaintiff put emphasis on the charge of conspiracy and malice; but there can be no conspiracy to do a legitimate act,—an act which the law allows,—nor malice therein. To give action there must not only be conspiracy, but conspiracy to do a wrongful act. If the act is lawful, no matter how many unite to do it [sic]. *Bohn Mfg. Co. v. Northwestern Lumbermen's Ass'n,* (Minn.) 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, * * *

"It is no crime for any number of persons, without any unlawful object in view, to associate and agree that they will not work for or deal with certain men, or classes of men, or work under a certain price, or without certain conditions. *Carew v. Rutherford,* 106 Mass. 1, 14, 8 Am. Rep. 287.'

"'The definition or description which seems to be more generally adopted is that a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.' *Harris v. Com.,* 113 Va. 746, 73 S. E. 561, 562, 38 L. R. A. (N. S.) 458, Ann. Cas. 1913 E, 597 and cases there cited.'"

This principle of law finds approval in numerous authorities, and it is sufficient of our purpose to cite but one further in support thereof, namely, the case of *Lindsey v. Montana Federation of Labor,* 96 P. 127, at 130:

"But there can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act."

We conclude, therefore, that appellant's first assignment of error is not well taken and that the trial court properly excluded

testimony relative to the matter of conspiracy in view of the fact that we are dealing solely with the common law principles hereinabove propounded.

With reference to the question of whether or not the parties to this action were dealing with each other on a twenty-five per cent or thirty-two per cent discount rate subsequent to November 26, 1945, it is sufficient to state that there is ample evidence in the record to justify the trial court in finding that the twenty-five per cent discount rate prevailed between the parties after November 26, 1945. All of the dealings between the parties subsequent to said date were had upon said basis and all bills for services performed by respondent for appellant were settled upon said basis. None of the testimony offered by appellant and excluded by the trial court upon the objection of respondent would in any way have altered the testimony with reference to said matter and consequently, we are of the opinion that the trial court properly found that the relationship of the parties subsequent to November 26, 1945, was governed by the twenty-five per cent discount rate.

[*Judgment Affirmed*]

The judgment and decision of the trial court is therefore affirmed.

[*Concurring Opinion*]

HORSEY, J.: I concur in the opinion of Mr. Chief Justice Eather, but not without reluctance.

[*Defendants' Action Oppressive*]

I am opposed to, and detest, monopoly, and, in my view, the concerted action of the laundry owners of the City of Reno in organizing the Washoe County Laundry Association, evidently for the purpose of reducing the discount allowed the laundry drivers, from 32 per cent to 25 per cent upon the gross business turned in by them from the operation of their laundry routes, thereby reducing the compensation of such drivers more than 20 per cent, and without prior collective bargaining, was unduly oppressive and arbitrary. The collective action of the members of the association, in the letter they dispatched to the laundry drivers, including the appellant, on November 19, 1945, notifying them of such reduction to become effective November 26, 1945, appears to me to have been a bold and brazen manifestation of the power and spirit of the monopolistic combination which had been formed, and which destroyed, as to the business theretofore transacted upon an individual basis with the laundry drivers, all competition. The association evidently included practically all of the laundry businesses in the City of Reno. The letter amounted to an ultimatum. The effect of it was that the drivers, who had their established laundry routes and their savings invested therein, were told, in effect, to pay the increased charge for the laundry, or go out of business in Reno, as there was no laundry, or laundries, of any consequence in the city which were nonmembers of the association, with whom the drivers could deal on a competitive basis.

[*No Nevada Statute*]

We are completely powerless, however, to make these views effective, for the reason that there is no statute in the State of Nevada prohibiting monopolies or agreements in restraint of trade.

In the absence of statute, our only recourse is to the common law, and the common law exempts from the prohibition of monopolistic combinations or agreements in restraint of trade, those relating to personal services. And all the authorities classify the laundry business, or those operating same, as being engaged in merely the rendition of personal service. In addition to the cases cited by Chief Justice Eather, I cite: *Morris v. Colman,* 18 Vesey Jr.'s Reports, p. 436, and *State ex rel. Star Publishing Co. v. Associated Press,* 159 Mo. 456, 60 S. W. 91,104, 51 L. R. A. 151.

[*Legislation Recommended*]

The opinion and decision of the California Supreme Court in the case of *Endicott v. Rosenthal,* 16 P. (2d) 673, related to a dyers' and cleaners' association, not different in principle, as to whether or not it related exclusively to personal services, from the laundry business. The court was able, upon the basis of Section 1673 of the California Civil Code, which by its terms applied to "business" of any kind, to hold such association unlawful. Nevada not having any statute prohibiting monopolies or agreements in unreasonable restraint of trade, we are powerless, because of the absence of any legal basis, to so hold in the instant case.

It would seem that the subject of the prohibition or regulation of monopolies and trusts is one which should commend itself to the legislative branch of our state government, for appropriate consideration and action.

[¶ 62,211] Interstate Circuit, Inc., and Texas Consolidated Theaters Company v. Tivoli Realty Company.

In the United States District Court for the Northern District of Texas, Dallas Division. Civil No. 2797. December 22, 1947.

Clayton Antitrust Act

Preliminary Injunction—Forum Non Conveniens.—A preliminiary injunction will issue to prohibit maintenance of an action brought under Section 12 of the Clayton Act in the District Court in Delaware, when it is shown that since all of the business of those parties is transacted in Texas and New Mexico, although some of the parties are incorporated in Delaware, the convenience of the parties in meeting the issues and presenting evidence may best be furthered by the trial of an action in the District Court in Texas.

See the Clayton Act annotations, Vol. 1, ¶ 2032.10.

Joe A. Worsham and Joe Irion Worsham, Dallas, Texas, for plaintiffs.

Thompson, Meek & Goldberg, Dallas, Texas, Thurman Arnold, Washington, D. C., for defendant. George S. Wright, Dallas, Texas, for interveners.

ATWELL, D. J.: In a suit in a federal court of Delaware, No. 1077, styled *Tivoli Realty, Inc. v. Paramount Pictures, Inc., and thirteen other moving picture concerns,* which, for brevity, will hereafter be referred to as No. 1077, the plaintiff sought $750,000 in damages and certain equitable restraints, on the ground that it had built on Hackberry Street in or near Dallas, Texas, a theater which was completed and begun to exhibit on September 26th, 1947. On November 7th, 1947, No. 1077 had been filed in Delaware under Sec. 12 of the Clayton Act for the alleged damages mentioned. The principal stockholder in Tivoli Realty, Inc., the plaintiff in No. 1077, is I. B. Adelman. His wife owns one share of the stock, and Harry Sachs owns a few of the shares.

Mr. Adelman and Mr. Sachs were employees of the Interstate Circuit, and the Texas Consolidated Theaters, Inc., the plaintiffs in this suit, for approximately ten years. They claim in No. 1077 that all of the defendants in that suit conspired to prevent them from securing pictures for this new suburban theater. They also contend that Dallas is a large city and that a large part of the moving picture shows are downtown and that traffic conditions are such that there was a justification for an attempt to have a theater outside of the accustomed theater district.

Plaintiffs in this suit own and operate one hundred seventy-one motion picture theaters in Texas, and eight in New Mexico. Neither of the plaintiffs in this suit transacts any business in the state of Delaware, nor outside of the states of Texas and New Mexico.

In No. 1077 there is pleaded, in addition to the alleged conspiracy, an injunction issued in this court ten years ago, and the claim is made that that injunction is being violated by the defendants in No. 1077.

Upon the presentment of the verified complaint on December 8th, 1947, a rule was issued requiring the Tivoli Realty, Inc. to show cause why a temporary injunction should not issue. On December 22nd, 1947, the defendant filed a motion to dismiss, and an affidavit of I. B. Adelman in support of his allegations in No. 1077, and for the purpose of defeating the claim of the plaintiffs, that this is the most convenient forum for the determination of the issues shown to exist in No. 1077, as well as in this case.

The defendant, through earnest counsel, invokes the various reasons against an application of the doctrine of *forum non conveniens,* to-wit:

(a) That the suits under scrutiny must be substantially the same. The question may be ruled against the defendant on the facts shown.

(b) That the doctrine of the most convenient forum will not rule where jurisdiction is granted under a special statute. Cases holding that, in substance, are largely federal employees' actions for damages. The wholesome reason for not requiring a working man to seek some distant forum for the securing of his rights growing out of an injury while he is at work, can hardly be found in cases like these under discussion.

(c) A citation of stockholder suits against the management of a corporation is hardly in point, because such suits are really suits by the corporation and are provided for in long recognized equity powers.

(d) That the domicile of the defendants in No. 1077 must be recognized as the state

of incorporation, which, for nearly all of the defendants in that suit, is in the state of Delaware. That rule of venue is of little or no interest if and when a corporation born in that state has its main office and place of business elsewhere and merely makes use of the state of its incorporation for the purpose of furnishing an agent upon whom service may be had.

The dawning of the day of practicability instead of continuation of the night of technicality, has been welcomed by both bench and bar in a simplification of the rules of both civil and criminal procedure. That satisfactory direction of the hunt for justice has been recently recognized by the Supreme Court with reference to this very doctrine of convenience in a statement which means, in substance, that it is high time that the facts of each case be considered rather than cumbersome and wholly unnecessary technicalities.

There is no substantial nor satisfactory answer on the merits to the complaint and statements of the plaintiffs with the convenience of the parties in the meetings of the issues and the presentment of a vast amount of testimony may be furthered and recognized by listening to and granting the plaintiffs' plea for a solution of the differences between these litigants in a court situated near the scene of the happenings. The charge that the plaintiff in No. 1077 is acting in a vexatious and inequitable manner, is serious.

Cases presented by counsel on both sides may be placed together rather than reviewed by the court. Among them are: *B. & O. v. Kepner,* 314 U. S. 44; *Steelman v. All Continent,* 301 U. S. 278; *B. & O. v. Clem,* 36 F. (S) 703; *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501; *Koster v. Lumbermen's Mutual,* 330 U. S. 518; *Rogers v. Guaranty,* 288 U. S. 123; *International Mill v. Columbia,* 292 U. S. 511; *N. P. Ry. Co. v. Richey & Gilbert,* 232 F. 355; *Crosley Corp. v. Westinghouse,* 130 F. (2) 474; *Hoffman v. Foraker,* 274 U. S. 21; *Cole v. Cunningham,* 113 U. S. 107; *Stonite Products Co. v. Melvin Lloyd Co.,* 315 U. S. 564; *Miles v. Illinois Central,* 315 U. S. 698; *Sacco v. B. & O.,* 56 F. (s) 959; *Momand v. Paramount,* 19 F. (s) 102; *U. S. v. National City Lines,* 7 F. R. S. 456, 1947.

I have said nothing about No. 1077 having parties who are not parties in No. 2797, this suit, because there is no force in that argument since all of the parties who are in No. 1077 have voluntarily intervened, and are now parties in this suit.

Preliminary injunction must issue.

[¶ 62,212] Waverly Products, Inc. v. Gordon.

In the New York Supreme Court, Special Term, Part III. 119 N. Y. L. J. 258. January 21, 1948.

New York Fair Trade Act

Injunction Pendente Lite—Sale at Less than Fair Trade Price.—A motion to restrain defendants from selling a trade-marked product pending the trial of an action for violation of the New York Fair Trade Act is denied inasmuch as the complaint fails to allege that defendants advertise or offer for sale at retail the product in question. The facts stated do not compel an inference to that effect, but support equally well the conclusion that the price quoted is the wholesale price.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.75; Resale Price Maintenance Commentary, Vol. 2, ¶ 7354.

CHURCH, J.: Motion by the plaintiff for an injunction pendente lite is denied. This is an application by the plaintiff to restrain the defendants pending the trial from selling or offering for sale the "Steam-O-Matic" iron, a trade marked product, for less than fair-trade retail price of $18.95. As stated in its memorandum, "plaintiff seeks an injunction forbidding the offer to sell at any price lower than $18.95 retail." The defendants deny that they offer or have offered the article in question for sale at retail at a price lower than the price stated. The defendants do not deny that they are offering the iron for sale at the wholesale price of $14.95. The complaint contains no allegation that the defendants advertise or offer for sale at retail the iron in question. Before it can obtain the drastic relief demanded by this motion, the plaintiff must satisfy the court that the defendants are selling or offering to sell at retail. This the plaintiff fails to do. The facts stated in support of the motion do not compel the inference that

the defendants are selling or offering to sell the iron at retail for the price quoted and the facts stated support equally well the conclusion that the price quoted by the defendants is the wholesale price (see *Lucien Le Long, Inc., v. H. Mohr & Co.,* 169 Misc., 560; aff'd 257 App. Div., 820). Order signed.

[¶ 62,213] Opinion of the Attorney General of Minnesota.

Addressed to James W. Clark, Commissioner, Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. December 2, 1947.

Minnesota Unfair Trade Practices Act

Sales Below Cost—Furnishing of Services.—The serving of meals by the operators of public eating places at less than the cost to the vendor does not violate the Minnesota Unfair Trade Practices Act. The Act does not prohibit the sale below cost of prepared food, which cost includes not merely the cost of materials used, but the cost of services rendered as well.

See the Minnesota Unfair Trade Practices Act, Vol. 2, ¶ 8428.

[*Question*]

Your letter of December 1 relates that a number of establishments in the business of serving food to the public are reported to furnish this service at less than the cost to the vendors. You submit the question:

Is this a violation of Minnesota Statutes, Section 325.04, if the vendor does so for the purpose or with the effect of injuring or destroying competition?

Opinion

M. S., Sec. 325.01, Subd. 2, defines retailer to mean any person selling any commodity, article, goods, wares or merchandise to the consumer and not for the purpose of resale in any form. The same section in Subd. 11 defines retailer to mean any person selling a commodity to consumers for use.

The same section in Subd. 8 defines commodity to mean any subject of commerce.

Sec. 325.04 defines unfair discrimination to consist of selling, offering for sale or advertising for sale any commodity, article, goods, wares or merchandise at less than the cost thereof to the vendor, or the giving, offering to give, or advertising the intent to give away any commodity, article, goods, wares, or merchandise for the purpose or with the effect of injuring competitors and destroying competition.

[*Legislative Intent*]

It appears to me that the underlying thought in Sec. 325.04 is to prohibit certain sales. The serving of prepared food is something more than the mere sale of the merchandise or the commodity. The ordinary meal served at a public eating place involves a variety of viands. The service furnished is an important part in the serving of a meal. The services are furnished by the cook and the waiters in combination. It would appear to me that when the legislature used the language that it did in the sections above mentioned, it did not intend to describe the service of a meal for a consideration. If it did so intend, the language which it selected to express its thought appears to be inadequate for the purpose.

[*Cost Includes Services*]

In computing the cost of a prepared meal from a variety of ingredients and a combination of services of different persons, we cannot merely consider the cost of the materials used.

[*Statute Does Not Apply*]

It appears to me that Sec. 325.04 is not intended to apply to the sale of prepared meals and the service furnished in connection therewith.

[¶ 62,214] Opinion of the Attorney General of Minnesota.

Addressed to James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. December 27, 1947.

Minnesota Fair Trade Act

Trading Stamps—Contract Provisions.—The giving of trading stamps with the sale of merchandise under resale price maintenance contracts is not prohibited by the Minnesota Fair Trade Act unless an express prohibition is found in the contract. The law does not concern itself with trifles. If the value of the stamps were substantial rather than trifling, a different problem would be presented.

See the Minnesota Fair Trade Act, Vol. 2, ¶ 8424; Resale Price Maintenance Commentary, Vol. 2, ¶ 7314.

[*Facts*]

Your letter of November 10 relates these facts:

> "A common practice of retail business establishments is to give coupons, commonly called 'trading stamps,' to retail purchasers of merchandise produced by manufacturers who have complied with all applicable provisions of The Fair Trade Act, Minnesota Statutes 1945, Section 325.08 to 325.14 inclusive.
>
> "In so doing, the foregoing retail business establishments do not limit the giving of coupons to purchasers of fair traded merchandise but offer and give coupons to purchasers of any item of merchandise sold, whether such item is fair traded or not. In addition, no special offer such as the giving of extra coupons for the purchase of fair traded merchandise is made.
>
> "However, when fair traded merchandise is sold at retail for the minimum price established by contract, the exchange value of the coupon or coupons forces the net cost of the fair traded merchandise to the retail purchaser below the established minimum contract price. * * * "

In connection with these facts, you submit this question:

[*Question*]

Does the giving of such coupons constitute a violation of the Fair Trade Act?

Opinion

M. S., Sec. 325.08, permits the making of certain contracts establishing a minimum price at which certain goods may be sold by merchants. When such contracts are made, they are enforceable. It appears that the policy of the law is to approve the making of such contracts. Sec. 325.09 specifies certain conduct there mentioned to be a violation of the resale price restriction. Among the things specified as a violation is the offering or the making of any concession of any kind, whether by the giving of coupons or otherwise, in connection with such sale.

It is my opinion that the giving of trading stamps does not violate a contract made under the Fair Trade Act unless the contract itself expressly prohibits the giving of such stamps. I am inclined to the opinion that the well-known principle applies that the law does not concern itself with trifles. Anyone interested in the study of the question will find the following cases well considered: *Weco Products Co. v. Mill City Cut Rate Drug Stores,* 55 Cal. App. (2d) 684, 131 P. (2d) 856 (1943); *Bristol-Myers Co. v. L. Bamberger & Co.* (1937) 122 N. J. Eq. 559, 195 A. 625 (affirmed on opinion of court below in (1938) 124 N. J. Eq. 235, 1 A. (2d) 332); *Bristol-Myers Co. v. Lit Bros.* (1939) (Pa.) 6 A. (2d) 843; *Sperry & Hutchinson Co. v. McBridge* (Mass.) 30 N. E. (2d) 269, 131 A. L. R. 1234.

If the value of the trading stamps is substantial rather than trifling, a different problem would be presented.

[¶ 62,215] United States v. Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Screen Gems, Inc.; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation.

In the United States District Court for the Southern District of New York. Equity No. 87-273. January 20, 1948.

Sherman Antitrust Act

Alleged Civil Contempt—Power to Enforce Decree Limited to Parties.—A petition by a motion picture exhibitor for an order adjudging certain motion picture distributors and exhibitors to be in contempt of a final decree entered in an action brought by the United States under the antitrust laws is denied where petitioner was not a party to the action. Rule 71 of the federal Rules of Civil Procedure does not apply, inasmuch as the decree was not "made in favor" of petitioner. Petitioner has not made application to intervene, and the power of the Court to enforce the decree is, by its terms, limited to the parties to the action.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273, 1240.141, 1610.371.

For petitioner: Morris & Lovejoy, Winslow M. Lovejoy, Houston H. Wasson.

For defendants: Dwight, Harris, Koegel & Caskey, John F. Caskey, Frederick W. R. Pride, Robert E. Nickerson.

For plaintiff: Tom C. Clark, Attorney General.

[*Nature of Action*]

BRIGHT, D. J.: New Salinas Theatres, Inc., not a party to the above entitled action, petitions for an order adjudging the defendant's Twentieth Centry-Fox Film Corporation and National Theatres Corporation to be in contempt of the final decree entered herein on December 31, 1946, and for damages and counsel fees, alleging that said defendants have violated section III subdivision (6), which restrains said defendants "from expanding its present theatre holdings in any manner whatsoever exempt as permitted in the preceding paragraph". (An exception which at present has no materiality.)

It appears without dispute that petitioner is and since 1939 has been engaged in the business of exhibiting motion pictures in the Vogue Theatre in Salinas, California. On April 7, 1946, it purchased a lot in Watsonville, California, for the purpose of constructing a new motion picture theatre thereon and is proceeding with the construction thereof. No theatre had been constructed at the date of this application.

The defendant National Theatres Corporation is the owner through subsidiaries of two-thirds of the stock of Fox Salinas Theatres, Ltd., which has since 1931 been the lessee and operator of the Fox California Theatre in Salinas, and in association with Borg and Peters, has been the operator of the El Rey Theatre there. Fox Salinas is also the lessee of the Strand Theatre in that city, which has been subleased to Borg and Peters, at a fixed rental. These were the only motion picture theatres in Salinas until petitioner erected the Vogue in 1939.

In that year, Borg and Peters acquired title to a piece of property in Salinas for the purpose of erecting a theatre thereon, and entered into negotiations with Fox Salinas for the purpose of having the latter acquire a one-half interest in the site and pay one-half of the construction cost of the new theatre. Nothing was done, largely because of the impact of the war, until August 21, 1945, when Fox Salinas did acquire the one-half interest. Shortly thereafter a contract for the construction of the theatre on the site was executed and construction commenced. The opinion upon which the decree in question was entered was filed in this action on June 11, 1946. When the decree was filed on December 31, 1946 (which provided for a ninety day stay in the event of an appeal which was there-

after taken) the construction of the theatre was substantially completed, the only work remaining to be done was some decorating and painting, the alteration of some doors and hardware and the installation of sets and projection equipment. On March 31, 1947, when the stay mentioned expired, the theatre was ready for operation but its actual opening did not take place until April 10, 1947, and since then it has been continuously operating.

West Coast Theatres, substantially all of whose stock is owned through a subsidiary by the defendant National Theatres Corporation, is the lessee of the only three theatres in Watsonville—the Fox, the State and the Pajaro, which latter was closed shortly after it was leased in 1936. During the war, it was determined to open the Pajaro but it was found that extensive renovation and remodeling would have to be done to comply with building ordinances. The lease expires in 1949 and West Coast has been unable to make satisfactory arrangements for the purchase of the property. In February 1946, it secured an option to purchase other property for the purpose of erecting a theatre thereon. The purchase was completed on February 27, 1946, and title taken on May 1, 1946. On May 5, 1947, it commenced excavation for the theatre. West Coast claims that the erection of the theatre on the new site would be for the purpose of replacing its Pajora theatre when the lease is terminated or expires.

[*Defendant's Contention*]

Defendant National Theatre claims that its action in Salinas and Watsonville with reference to new theatres would not in any way violate the provision of the decree quoted, for the reason that in Salinas the property had been acquired and the theatre practically completed at the time the decree was signed, and in Watsonville, that the construction of the new theatre would not be an expansion of its theatre holdings but merely a replacement of the Pajaro, which is closed and which it cannot reasonably be expected to renovate and remodel unless it can obtain title, which it has been unable to do.

[*Terms of Decree*]

The decree entered in this action on December 31, 1946, also provided in section VIII:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

Counsel for the plaintiff in this action were present in court at the time of the argument of the motion but did not join in or oppose the motion.

[*Civil Contempt*]

Both parties agree that the petitioner's application is to punish for a civil contempt. The defendants oppose the motion on the grounds (1) that petitioner, not being a party, has no standing to institute this proceeding (a) because the decree expressly prohibits, and (b) because it is not an aggrieved party; (2) that the proceeding is premature because of a pending appeal from the final judgment mentioned to the United States Supreme Court; (3) because petitioner's moving papers are defective under rule 16 of the local rules of this court, in that they fail to set out with particularity the claim for damages and the evidence upon which the amount of damages may be determined; (4) that no civil contempt may be found unless a plain violation of the decree is proved; and (5) the two defendants have not violated the provision of the decree first above quoted under the facts as previously outlined in this memorandum.

In my opinion, it will not be necessary to decide any of the objections above stated except the first.

It is to be observed that the clause in the decree of December 31, 1946, reserving jurisdiction in the court, was only for the benefit of the parties to the action "and no others". Plaintiff claims that it is authorized to pursue the present remedy by rule 71 of the federal Rules of Civil Procedure, which provides:

"*Rule 71. Process in Behalf of and Against Persons Not Parties.* When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

[*Decree Not "Made in Favor" of Petitioner*]

The decree was not "made in favor" of the petitioner and it is not a successor in interest of any party. It was made in favor only of the parties to the litigation and by its terms expressly reserved the right to enforce only to the parties "and no others".

Petitioner argues that it is a proper party under the anti-trust statutes, which do not confine their enforcement to the United States or any of its agencies alone, and specifically calls attention to sections 15 and 26 of Title 15 U. S. C. of the Sherman and Clayton Acts.

Section 15 provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in any district court of the United States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 26 provides that "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * * and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue."

These sections obviously provide for the bringing by the petitioner of a plenary suit in its own name, if grounds sufficient to justify one exist. Neither of them, in my opinion, authorizes petitioner, neither a party to nor an intervenor in this suit, to take affirmative action therein. That action, in my judgment, and under the express terms of the decree, can only be taken by one of the parties to it.

[*Case Cited*]

Petitioner cites the case of *United States v. Vehicular Parking, Limited, et al.*, 7 F. R. D. 336. That case, in my opinion, is not at all parallel. Rule 71 was not involved, only an application to intervene. There the defendants had been found guilty under the antitrust laws, and a judgment had been entered requiring the defendants, among other things, to grant reasonable royalties. The Magee-Hale Park-O-Meter Company requested permission to intervene under rule 24 (a) of the Federal Rules and the application was granted. The court in that judgment had retained jurisdiction "for the purpose of enabling any of the parties to this judgment to apply to the court at any time for * * * the enforcement or compliance therewith and for the punishment of violations thereof." Petitioner was in the business of manufacturing and selling parking meters, and the defendants in the action had accused it of infringing certain claims of four of the patents referred to in the judgment and had offered a license under all of the patents but at a royalty which petitioner believed to be unreasonable. Judge Leahy, granting the application to intervene, wrote:

> "The real difficulty in the case is that the judgment does not specifically permit any party requesting a license to apply to the court for determination of the reasonableness of the royalty. * * * Petitioner is affected by the judgment equally with the parties to it, as is any other competitor in the same field. It would obviously be most unreasonable to limit the judgment's application to the parties to the suit. Without pausing to consider whether, from a point of view of semantics, petitioner might not qualify as a party through the Department of Justice, which represents the public, I hold that the petitioner may intervene in this proceeding by permission of the court under Rule 24 (b)."

[*No Application to Intervene*]

Petitioner has not made application to intervene here, and the power of the court to enforce the decree is, by its very terms, limited to the parties of the action.

In view of this holding, it is not necessary for me to decide any of the other questions presented.

[¶ 62,216] United States v. Cotton Valley Operators' Committee, The Ohio Oil Co., et al.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action No. 2209. January 21, 1948.

Sherman Antitrust Act

Application to Take Depositions—Subpoenas Ducem Tecum—Motions to Strike and Quash Granted.—A motion by plaintiff to strike or limit defendant's application to take depositions, and a motion to quash *subpoenas ducem tecum* are granted in an action brought by the United States charging producers of hydrocarbons with conspiring to monopolize trade, in violation of the antitrust laws, upon findings that (1) defendant failed to comply with the requirement of Rule 26 (a) of the Rules of Civil Procedure that permission to take depositions be granted by the court; (2) the Attorney General, whose official duties are performed in Washington, D. C., can not be required to appear at Marshall, Texas; (3) testimony sought from the Attorney General and from the United States Attorney is shown to be irrelevant; and (4) the charge that the plaintiff comes into court with "unclean hands" is groundless, since it is not contended that plaintiff has committed acts involving the merits of the case.

See the Sherman Act annotations, Vol. 1, ¶ 1220.211, 1230, 1240.141, 1260, 1610.345; see also comment on complaint, '44-'47 Court Decisions Supp. ¶ 54,134.

For Plaintiff: Tom C. Clark, Attorney General, John F. Sonnett, George B. Haddock, W. B. Watson Snyder, and Jas. R. Browning, Special and Assistants Attorney General, Washington, D. C.; Malcolm E. Lafargue, United States Attorney.

For Defendants: John M. Madison; W. S. Wilkinson; Wilkinson, Lewis & Wilkinson; Jno. T. Gayton, J. R. Goff, Sidney G. Meyers, all of Shreveport, La.; Vernon Roberts, Ada, Okla.

[*Nature of Action*]

DAWKINS, J.: The Government brought this suit under the provisions of Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Anti-Trust Law, charging some fifteen corporations and eighteen individuals with conspiring to "restrain unreasonably and to monopolize trade and commerce in the liquid and gaseous carbohydrates" taken from the Cotton Valley Field of Webster Parish, as follows:

"Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants the substantial terms of which have been and are the defendants.

"(a) Agree to jointly engage in and exclude others from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from said Field and not reinjected therein, which said business of extracting, processing and refining was in addition to that required to separate said hydrocarbons from said natural flow or to reinject the residue thereof into the Field;

"(b) Agree to jointly engage in and exclude others from the business of distributing and selling all of the hydrocarbons and hydrocarbon products jointly extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

"(c) Agree to jointly sell through channels of distribution jointly selected by the defendants all of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein.

"(d) Agree upon fixed and uniform prices and terms and conditions of sale for each of the hydrocarbons and hydrocarbon products extracted, processed or refined by the defendants from over 85% of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein, and agree to sell each of said hydrocarbons and hydrocarbon products at the said fixed and uniform prices and upon said terms and conditions of sale."

The bill itself, under the heading "Background" enumerates the conditions prevailing in the field, which brought about the original joint action of the defendants as follows:

"The Cotton Valley Oil Field is located in Webster Parish in the State of Louisiana. Whenever the term 'Field' is hereinafter used, it is intended to mean the said Cotton Valley Oil Field including the natural underground reservoirs in said Field in which hydrocarbons are present.

"The Field contains hydrocarbons in both liquid and gaseous forms. These hydrocarbons are under high pressure within the reservoirs, and in the exploitation of the Field this pressure is utilized to bring both the liquid and gaseous hydrocarbons to the surface of the ground. This flow of liquid and gaseous hydrocarbons as it reached the surface is sometimes hereinafter referred to as the 'natural flow' from the Field. The greater part of the hydrocarbons in the Field are found at depths in excess of 8,000 feet. The ratio of gaseous to liquid hydrocarbons in the Field is in excess of 10,000 cubic feet of gas to one barrel of liquid. The cost of producing liquid hydrocarbons from individual wells is high. Rights to produce hydrocarbons from the Field are owned by more than thirty individuals and corporations. The production of gaseous and liquid hydrocarbons from the Field without reinjecting a part thereof into the Field would result in the rapid reduction of the underground gas pressure necessary to the ultimate recovery of both liquid and gaseous hydrocarbons from the Field. It is economically impracticable for individual owners to reinject a part of the gaseous and liquid hydrocarbons into the Field.

"In an effort to find a solution to these problems the producers in the Field erected an experimental injection station in 1939. From this experiment it was determined that certain of the liquid and gaseous hydrocarbons could be separated from the natural flow from the reservoirs and the residue could be returned to the reservoirs under pressure, permitting the exploitation of the Field without serious reduction of the pressure within the natural reservoirs. To accomplish this objective the producers of over half of all gaseous and liquid hydrocarbons from the Field entered into an agreement in the spring of 1940 which is known as the Cotton Valley Unitization and Pressure Maintenance Agreement, hereinafter referred to as 'the Agreement'. Thereafter other producers of hydrocarbons from the Field joined and became parties to the Agreement, and at the time of the filing of this complaint the parties thereto produced in excess of 90 per cent of all hydrocarbons taken from the Field. All of the defendants herein are parties to the Agreement or participated in activities related thereto. The purpose of the Agreement as set out in the preamble thereof is that 'of more properly conserving the resources of said common oil, gas and other hydrocarbon field, pool or reservoir, and for the prevention of underground and surface waste.' The Agreement provides for the unitization of liquid and gaseous hydrocarbons within a substantial part of the underground reservoirs of the Field and the pooling of lands containing these substances, for the production of these substances by a joint agency to be known as the Operators' Committee, and the apportionment of the substance so produced to the owners of individual rights in the area covered by the Agreement on an agreed upon basis. The Operators' Committee is authorized by the Agreement to exercise the sole right to drill in the area covered by the Agreement with certain limited exceptions, to enter into contracts for the extension of that area and to plan, co-ordinate and execute the development and operations within that area for unitized substances. As a part of this development the Operators' Committee is specifically authorized to construct and maintain a modern recycling, pressure maintenance and liquid hydrocarbon extraction and processing plant. The Agreement stipulates that all unitized substances produced from the area covered by the Agreement, except such as may be used for production or development purposes or for repressuring or recycling, shall be apportioned among the owners and allocated on an acreage basis to the several tracts of land comprising such area except that the Operators' Committee shall be empowered to dispose of the gas produced for all owners.

"Pursuant to power delegated by Act Number 225 of the Legislature of the State of Louisiana of 1936, and by Act Number 157 of the Legislature of the State of Louisiana, of 1940, the Commissioner of Conservation of the State of Louisiana issued Order Number 10-B, dated July 1, 1940, and Order Number 10-C, dated January 28, 1941, approving the Agreement only in so far as it provided for the unit operation and development of the area covered by the Agreement and the reinjection into the reservoir under pressure of a part of the liquid and gaseous hydrocarbons produced from said Field."

The results of the alleged acts in restraint of trade and commerce are listed under the heading "Effects".

"The aforesaid combination and conspiracy and the acts and things done by defendants in forming and effectuating said combination and conspiracy, were intended by the defendants to and have had the following effects:

"(a) Excluded other persons and companies from the business of extracting, processing and refining various separate hydrocarbons and hydrocarbon products, from over 85 per cent of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein;

"(b) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of selling and distributing liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom;

"(c) Excluded persons and companies other than the defendants and those jointly selected by the defendants from an opportunity to engage in the business of transporting liquid and gaseous hydrocarbons jointly produced by the defendants from said Field and the hydrocarbon products jointly processed, extracted or refined by the defendants therefrom; and

"(d) Eliminated competition among the defendants, and between the defendants and others, in the extraction, processing and refining, in the transportation, in the distribution, and in the sale of hydrocarbon products extracted from over 85 per cent of the natural flow of liquid and gaseous hydrocarbons produced from the Field and not reinjected therein."

[*Motion to Strike Application*]

The bill was filed on June 17, 1947. Numerous motions were presented by various defendants, and on October 22, 1947, the Government filed a motion to "strike or limit" defendant, Magnolia Petroleum Company's application to take oral depositions. Up to that time there was no record in this court of said Company's effort to take such depositions for the process had been gotten out in the Eastern and Southern Districts of Texas. Attached to the motion to strike were copies of notices, addressed to the Attorney General and some four of his assistants, to the United States Attorney of this district, and to the numerous attorneys representing the corporations and individuals, that the depositions would be taken as follows: On October 27, 1947, Tom Clark, Attorney General, Malcolm E. Lafargue, United States Attorney for this district, Myron Blalock and Jack Blalock of Marshall, Texas, and L. G. Dufilho of Shreveport, in the State Court House at Marshall, Texas; on October 28th, depositions of Sylvester Dayson (or Dyson), president of Premier Oil Refining Co. of Longview, Texas, and J. Zeppa of Tyler in the state courthouse of Tyler, Texas; and on October 29th, J. R. Parten, president Woodley Petroleum Co., Marlin Sandlin, Myron Blalock and Jack Blalock of Houston, Texas, in the state courthouse in that city.

[*Subpoenas Ducem Tecum*]

There was also attached to said motions to strike, of the plaintiff, *subpoenas ducem tecum,* or to produce, addressed to the Attorney General and to the said U. S. Attorney of this district, as follows: to Tom Clark, Attorney General, demanding that he produce at Marshall, Texas, at the time of giving his deposition on October 27, 1947, documents and records as set forth in the footnote below[1]; to Malcolm E. Lafargue, United States Attorney, documents and records as shown in footnote.[2]

[*Grounds of Motion*]

The grounds of the motion to strike or limit as follows:

"1. Said Notice was filed by defendant Magnolia Petroleum Company before answer without first obtaining leave of this Court.

[1] "All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

[2] "All letters, telegrams, and other communications of every kind thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by defendant, Magnolia Petroleum Company, or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish."

"2. Said Notice seeks to require the attendance of nonresidents of the district in which the depositions are to be taken in a county other than that in which served and at a place more than 40 miles from the place of service without an order of the Court.

"3. The depositions to be taken pursuant to said Notice could not serve either the purpose of discovery or as evidence in the above entitled action.

"4. The examination contemplated by the Notice would relate to matters which are privileged and which are not relevant to the subject matter involved in the above entitled action.

"5. The examination contemplated by said Notice would relate to information obtained by the attorneys and agents of the Plaintiff in anticipation of litigation and in preparation for trial, and the mental impressions, conclusions, opinions and legal theories of said attorneys, and no showing has been made that denial of disclosure concerning said matters will unfairly prejudice the defendant Magnolia Petroleum Company or cause said defendant undue hardship or injustice.

"6. The taking of depositions contemplated by said Notice would cause unreasonable annoyance, embarrassment and oppression to the Plaintiff and to the witnesses.

"7. Said notice seeks to require the attendance of Tom C. Clark, Attorney General of the United States, at a place remote from his duties at the seat of Federal Government in Washington, D. C., to submit to examination in a preliminary hearing relating to matters of State and of a confidential nature and not relevant to the subject matter involved in the above entitled case, without any showing as to the possible materiality of the testimony of said Tom C. Clark. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public order.

"8. Said notice seeks to require the attendance of Malcolm E. Lafargue, United States Attorney, Western District of Louisiana, at a place remote from his office and duties at Shreveport, Louisiana, to submit to examination in a preliminary hearing relating to matters concerning which he has no personal knowledge, without any showing as to the possible materiality of his testimony. That said Notice is therefore unduly oppressive and harassing, is contrary to the public interest, and is against public policy.

"9. That the examination contemplated by said Notice would relate to matters the disclosure of which is prohibited by Department of Justice Order Number 3229, issued pursuant to the authority of Revised Statute 161, 5 U. S. C. 22."

[*Disposition of Motion*]

(1) The motion to strike might be disposed of by a simple reference to Rule 26 (a) of the Rules of Civil Procedure, which allows the taking of depositions before issue joined, before the filing of an answer "by leave of the court" in which the suit is pending. No application was made to or granted by this court for the taking of said depositions. See *Application of Wisconsin Alumni Research Foundation* (D. C. N. Y. 1945) 4 F. R. D. 264; *Deskin v. Zinker,* 6 F. R. D. 615. (Amendment to this rule has been made authorizing taking of depositions without permission of the court before issue joined but the Attorney General has given an opinion that it will not become effective until March 1948.) However, since the taking of the depositions was stayed by this court and the dates therefor have long since passed, it is thought proper for the guidance of the parties in the future, that the Court should rule upon the issues raised by the motion to strike.

[*Notice to Attorney General*]

(2) As to the notice to the Attorney General and his assistants, the court may take cognizance of the fact that his official duties are performed in Washington, D. C. many times the distance of 40 miles, within which a witness may be required to appear, and these witnesses can not be made to respond. Rule 45 (d) (2).

As to the United States Attorney, Shreveport is some 37 miles from Marshall, Texas. The rule just cited provides that "a resident of the district in which a deposition is to be taken may be required to attend, etc. A nonresident of the district (in which the deposition is to be taken) may be required to attend * * * within 40 miles of the place of service, or at such other place as may be fixed by the court." In this instance there was no place fixed by the court, for the reason no order for the taking of the deposition of the District Attorney was obtained, but if the right to take it had existed at the time, without this order, then he was within the range which permitted him to be summoned to Marshall, Texas, since he was "a non resident of the district" in which the deposition was to be taken.

[*Purpose of Depositions*]

(3) The third point of the motion to strike, that the "depositions could not serve the purpose of discovery or as evidence" involves much of what is raised in Nos. 4 and 5.

In response to the motion to strike, Magnolia Petroleum Co., at whose instance the notice to take the depositions was issued, has answered, stating in substance what it expected to prove thereby (a) that the suit of the Government was not filed in good faith, (b) that the United States is only a nominal party and the real plaintiff, not named in the case, is the Premier Oil Refining Company of Texas, "its president, officers, directors and stockholders", (c) that it was filed to pay a political debt of the present national administration, (d) its purpose is to further the final [*sic*] interest of the said corporation, its officers and stockholders, (e) for which reasons the Plaintiff and the Attorney General come into court with "unclean hands", (f) that the purpose is to permit or foster a monopoly on behalf of said corporation in the Cotton Valley field, (g) that plaintiffs are using Woodley Petroleum Co., a subsidiary of the Premier Oil Refining Co., whose officers and stockholders are largely common to those of the former, as a nominal defendant to have it enter "a sort of plea of guilty and thereby 'run interference' for the plaintiff and the said Premier Oil Refining Co., to help it achieve a monopoly over distillate from the Cotton Valley Oil field or to insure a future treble damage suit for" it and plaintiff. The three succeeding paragraphs (h) (i) and (j) are largely elaborations of the preceding ones; (k) denies that the communications between the Attorney General and the persons named are confidential, (l) that the information sought would enable the Court to understand the "background" of the suit to enable it to balance equities, (m) unless it, Magnolia Petroleum Company is permitted access to the information thus sought, it would be "deprived of its day in court" and be denied due process of law. Paragraphs (n) and (o) are also elaborations of matters covered by preceding numbers.

Rule 26 provides (a) for the taking of oral depositions "for the purpose of discovery or for use as evidence in the action or for both purposes * * * in accordance with these rules * * *;" (b) * * * regarding any matter, not privileged, which is relevant to the subject matter involved * * * in the pending action * * *.

Defendant, Magnolia Petroleum Company (called Magnolia) charges that the suit was not filed in good faith, not because it does not state a cause of action under the Sherman Anti-Trust Act, but because, as this defendant alleges, action was induced by political considerations and to pay a political debt to the Premier Refining Co. (called Premier), not made a party. It would seem sufficient to say that, if the complaint alleges facts, which, under the law, would entitle the plaintiff to relief, and this were substantially proven, the Court could not decline to award judgment even though it might have been inspired in the manner charged. Suppose, on final hearing it should be shown that defendants had violated the anti-trust statute to the extent and in the manner charged and Magnolia was able to show that the Attorney General, his assistants and the United States Attorney had acted at the instance of Premier for the reasons which Magnolia alleges, then this could not thwart a lawful result.

[*Testimony Sought is Irrelevant*]

It is the conclusion that the matters charged in paragraphs (a) to (f) inclusive, show that the testimony sought from the Attorney General and the United States Attorney is irrelevant.

As to the charge (h) that Woodley Petroleum Company (called Woodley) was made party defendant for the purposes stated, when in reality its interest was the same as Premier, if it should be found at the trial that the former is not a bona fide defendant, the bill as to it should be dismissed, and otherwise what has been said as to the preceding paragraphs applies in this instance.

With respect to the charge (i) that for the reasons alleged in the preceding paragraphs the plaintiff (United States) comes into court with "unclean hands", it is believed that this principle should be confined to matters wherein the party so charged was guilty of some act or acts which were similar to those complained of or attributed to the defendants, or that complainant had committed others of a nature such that good conscience with respect to the subject matter would not permit the complainant to be heard. The answer in no sense charges that these Government officers have participated in acts involving the merits of the matter, which would deprive

the Government of its right to insist that the defendants be held to account for their alleged wrongdoing. A simple illustration, it is thought, will serve to show the irrelevancy of these charges. Should the National Administration change between now and the trial of this case on the merits, and the new Attorney General should determine to go forward with it, no one could seriously contend that the alleged conduct of the present officers could serve to prevent that course. Then, too, fundamentally, officers of the United States can not bind it either adversely or favorably by action intended to serve their personal ends. Its right to proceed and to have relief according to the facts proven under the complaint can not be diminished by the conduct of its agents. These observations apply equally to paragraphs (j) to (o) inclusive.

[*Subpoenas Quashed*]

From what has been said it follows that the *subpoenas ducem tecum* should be recalled and quashed.

Motions for More Definite Statement of Facts

Motions for more definite statement of facts have been filed by a number of defendants. Counsel for one or more of these have asked and will be granted further hearing thereon, and until this has been done, said motions will not be disposed of.

This course will also be pursued as to the exceptions that the complaint fails to state facts upon which relief can be granted. After the motions for more definite statements are out of the way, it will be time to determine whether the bill alleges a cause of action.

Proper decree should be presented.

[¶ 62,217] Hartford-Empire Company v. Obear-Nester Glass Company.

In the United States District Court for the Eastern District of Missouri, Eastern Division. Equity No. 12546. Filed October 10, 1947.

Clayton Antitrust Act

Effect of Prior Judgment or Decree—Motion to Strike Overruled.—Plaintiff sued defendant in Missouri for infringement of certain glass-making machinery patents. A decree entered in Ohio in a government antitrust action against plaintiff enjoined plaintiff from proceeding in its suit against defendant. Defendant counterclaimed for damages; plaintiff replied, setting up a judgment for plaintiff in the infringement suit. Defendant's amended counterclaim contends that plaintiff's judgment was obtained by fraud, and that its use as a defense violates the decree in the government suit. A motion by plaintiff to strike all reference to the decree is overruled. The decree is admissible as prima facie evidence on the issue whether the judgment in the infringement case should be set aside. The counterclaim satisfies the requirement of Section 5 of the Clayton Act that it plead an action brought "under" the antitrust laws.

See the Clayton Act annotations, Vol. 1, ¶ 2025.12.

For plaintiff: John H. Sutherland of St. Louis, Missouri; Hubert Hickam and Alan W. Boyd, both of Indianapolis, Indiana.

For defendant: Kingsland, Rogers & Ezell and Jacob M. Lashly, all of St. Louis, Missouri.

Memorandum and Order on Plaintiff's Motion to Strike Out Parts of Defendant's Second Amended and Supplemental Counterclaim

[*Nature of Action*]

HULEN, J.: Plaintiff has filed a motion to strike from Count V of the second amended and supplemental counterclaim all reference to the judgment, findings and record in the case of *United States v. Hartford-Empire Co., et al.*, referred to in this cause as the "Toledo case", on the ground that such allegations are "immaterial, impertinent and prejudicial". Counts I to IV of the counterclaim seek to recover damages for injuries alleged to have been suffered in consequence of antitrust law violations by plaintiff. Count V of the counterclaim asks to have the order and judgment in case number 7453 set aside because obtained by plaintiff by fraud. Count V not containing any jury issues, the

allegations complained of by plaintiff do not present a serious question. This is conceded by plaintiff. The purpose of the motion now before the Court is that the parties may "know in advance of any trial of those issues (under Count V of the counterclaim) whether the Toledo decree is or is not admissible as prima facie evidence".

[*Preliminary Observations*]

The pleadings have not been made up in this case. We do not consider the present procedure and motion the proper time and means to make a final ruling on admissibility of evidence. Aside from the record in the trial such matters could properly be disposed of at a pre-trial conference when the issues in the case have been made up. We propose to hold such a conference at the proper time. However, it may serve some purpose if we make some preliminary observations on the question presented.

[*Plaintiff's Contentions*]

We have read the briefs submitted. As we understand plaintiff's position it is that proceedings in the Toledo case are inadmissible in any cause unless made admissible in evidence under the antitrust statute (15 U. S. C. 16), and that the Toledo judgment is not admissible in trial of the issues in Count V of the counterclaim because it does not plead an action brought "under said laws" as provided in Section 16 (15 U. S. C. 16). The statute provides that a final judgment or decree in any criminal prosecution or suit brought on behalf of the United States under the antitrust laws that a defendant has violated the antitrust laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against the defendant "under" the antitrust laws as to which the decree in the Government action would be an estoppel as between the parties thereto.

[*Amended Counterclaim*]

As we view Count V of the amended counterclaim it presents two issues—at most. First, and principally—that any effort by plaintiff to avail itself of the decree of this Court in cause No. 7453 as a defense to Counts I, II, III and IV of the counterclaim would constitute a violation by plaintiff of the decree in the Toledo case.

Second, that the decree in cause No. 7453 was obtained by the plaintiff by fraud, and for that reason should be annulled.

I.

[*Prior Judgment as Defense*]

We do not think Section 16 is decisive on the first question. Plaintiff instituted this litigation in 1938 by complaint charging defendant with infringement of certain patents alleged to be vested in the plaintiff. Plaintiff prayed for an injunction and an accounting. The decree in the Toledo case, entered October 31, 1945, stopped the plaintiff from proceeding under its complaint as the case then stood. Defendant then filed a counterclaim in two counts seeking damages under the provisions of Section 15 of tthe antitrust act (15 U. S. C. 15). To the counterclaim plaintiff filed a reply and as its "fifth" and "sixth" defenses set up the judgment in case No. 7453 in favor of plaintiff and against the defendant, "that plaintiff was the owner of valid patent rights therein described; that defendant was infringing same; that plaintiff was entitled to the relief given and that defendant had no valid defense to such action" and that the defendant was bound by that judgment. Defendant then filed its second amended and supplemental counterclaim, adding Count V alleging (paragraph 13) that the fifth and sixth defense set up in the plaintiff's reply was an attempt on plaintiff's part "to make further use of * * * patents and of the decree adjudging said patents valid and infringed by this defendant" which action on the part of plaintiff was in violation of the injunctive order in the Toledo case. What would have been defendant's position under the pleadings as they stood prior to the filing of its second amended and supplemental counterclaim we are not called upon to decide. Rule 7, Federal Rules of Civil Procedure, is plainly to the effect that an answer to a counterclaim is the last permitted pleading. When the plaintiff filed its reply to defendant's original counterclaim defendant found itself in a quandary as to how to meet the fifth and sixth defense set up in the counterclaim in view of Rule 7. We do not think defendant is subject to criticism for filing an amended counterclaim, informing the court and the plaintiff of its position on the "fifth" and "sixth" defense rather than hazard the chance that the court would permit introduction of evidence to meet the issue without a pleading. "The new rules * * * restrict the pleadings to the task of general notice-giving * * *. The way is now clear, consistent with recognized privileges, for

the parties to obtain the fullest possible knowledge of the issues and facts before trial." (See *Hickman v. Taylor,* 329 U. S. 495.) We will construe the pleadings "with the liberal atmosphere surrounding" the new rules, under the mandate of the Supreme Court. It is our opinion that the decree in the Toledo case, and so much of the record as is necessary to present the issue raised in Count V, resulting from plaintiff's attempt to avail itself of the judgment in case No. 7453, as a defense in this cause, should be admitted in this cause if offered. With that evidence and such other relevant facts as the parties care to offer, the Court will then be in a position to pass on that question if and when it is presented.

II.

[*Judgment Admissible to Prove Fraud*]

Plaintiff would construe Count V of the amended counterclaim as a suit in equity to set aside a judgment alleged to have been procured by fraud. Assuming, but not deciding, that this Court now has jurisdiction to entertain such a proceeding, would the record in the Toledo case be admissible in support of the defendant's position? At the outset we observe that under Section 16 (15 U. S. C. 16) only a "final judgment or decree" rendered in a Government proceeding "shall be prima facie evidence" in certain proceedings brought by a third party against the defendant in the Government action. Much more is contained in the pleading complained of by the plaintiff. However, it is plaintiff's position that no part of the Toledo proceeding is admissible in evidence under Count V of the counterclaim because the counterclaim does present an action "under" the antitrust laws.

[*Case Arising "Under" Antitrust Laws*]

The authorities are not uniform in their holding, on the facts of the particular case, as to when a case may be said to arise under the Constitution or laws of the United States, and particularly under the antitrust laws, although they are all based on the well recognized principle of law that whenever it appears that the correct decision of the case depends on the construction of the law of the United States, or that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the law or sustained by the opposite construction, then a case arises under the Constitution and laws of the United States. Let us examine the facts of this case and see where plaintiff's contention would lead. Plaintiff urges that the Toledo judgment is inadmissible in evidence in the trial of Count V. Therefore it must be plaintiff's position that this Court must try *de novo* the issue of violation of the antitrust laws by the plaintiff which were, among others, tried and finally adjudicated in the Toledo case. If we should try that issue anew under Count V of the counterclaim and perchance reach the conclusion that the defendant has failed to sustain its position, the paradoxical situation would then be presented of plaintiff having been convicted of violating the antitrust laws in the district court in the State of Ohio, but on part of the same issues as were found against plaintiff in that case the plaintiff would be found innocent in the district court in Missouri and a judgment which the plaintiff was enjoined from taking any action on other than the dismissal by the Toledo, Ohio, district court would be found a valid judgment by the Missouri district court. Only the most persuasive authority of a superior court would lead this Court to a ruling on evidence contemplative of the possibility of such a result.

[*Toledo Decree Admissible*]

For all practical purposes defendant's action is for damages and Count V of defendant's counterclaim is a part of the defendant's pleading in its cause of action for damages. It is the defendant's position that under the decree in the Toledo case the judgment of this Court in case No. 7453 no longer has any force or effect. Based on the decree in the Toledo case, and Section 15 of the antitrust Act (15 U. S. C. 15) defendant seeks damages against the plaintiff under Counts I, II, III and IV of the amended counterclaim. There is no dispute between the parties that these counts of the amended counterclaim constitute an action brought "under" the antitrust Act (15 U. S. C. 16). Plaintiff has injected the judgment of this Court in case No. 7453 into these proceedings as a defense to an action "under" laws of the United States. The defendant replies to this move by the plaintiff with the charge that the judgment in case No. 7453 should be set aside because obtained by the plaintiff by fraud. It follows, we conclude, that the judgment in case No. 7453 is so inextricably connected with

the issues under Counts I, II, III and IV, as raised by plaintiff, it cannot be disassociated from them solely for the purpose of Count V of the amended counterclaim. If defendant has filed a separate action setting up solely the matters contained in Count V of the counterclaim, and if defendant's position is correct as to the effect of the Toledo Judgment, such a case would be terminated as moot because under the decree in the Toledo case the plaintiff could take no action other than a dismissal in case No. 7453. The effect of Count V of the counterclaim serves only to form the pleadings on the first four counts of the amended counterclaim and if offered, and the Court entertains jurisdiction, the decree in the Toledo cases would be admissible in this case on the issue whether this Court should set aside the judgment in case No. 7453.

ORDER

Motion of plaintiff to strike from the second amended and supplemental counterclaim the allegations referred to in the motion, is overruled.

[¶ 62,218] James B. Turner, et al. v. Walter R. Zanes, Sr., et al.

In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. No. 13,832. October 17, 1947.

Texas Antitrust Act

Secondary Boycott—Conspiracy in Restraint of Trade—Injunction Affirmed.—An attempt by a teamsters union to obtain a union shop contract from an employer by inducing other transportation companies to cease doing business with him until he should accede to the union's demands constitutes a conspiracy in restraint of trade under the Texas antitrust laws. A concerted attempt to restrain the pursuit of a business or to boycott a business establishment or to induce others to do so is a conspiracy in restraint of trade under the Texas law, whether the attempt is made by a union or by others. An injunction restraining such conduct is affirmed, with a direction to disregard a paragraph of the decree which is held to be an improper restraint of appellants' right to disseminate information.

See the Texas Antitrust Act, Vol. 2, ¶ 8835.

For appellant: L. N. D. Wells, Jr., W. F. Bane, Dallas, Texas; Padway, Goldberg & Previant, Milwaukee, Wisconsin.

For appellee: Bowyer, Gray, Thomas, Crozier & Jaffe, Dallas, Texas.

[*Parties*]

YOUNG, J.: The appeal was from an order of injunction granted upon final hearing and following a labor dispute.

Plaintiffs below were Zanes Freight Agency, a copartnership composed of W. R. Zanes, Sr., W. R. Zanes, Jr., and Grover Funderburk; Merchants Delivery, Inc., and Zanes-Ewalt Warehouse, a corporation. Zanes Freight Agency is engaged in the pickup and delivery of goods, wares and merchandise in the City of Dallas, having contracts with four railroads and written or verbal contracts with some twenty-four truck lines, whereby freight is picked up in their trucks and delivered to depots of truck lines and railroads for customers of all concerned; likewise picking up freight at railroad and truck line depots for delivery to various consignees, all of which service is performed wholly within the City of Dallas. The business of Merchants Delivery, Inc., is the delivery of packages from local wholesale and retail merchants to their city customers, also handling pool car shipments for Acme Freight Company. Zanes-Ewalt Warehouse maintains and operates a city warehouse where commodities are stored and receipts issued therefor. Plaintiff concerns operate separately in the matter of business establishments, offices, books and employees, but are owned by above individuals.

Adverse parties herein are Local Union No. 745 and C. B. Kepke, successor to James B. Turner, individually, and as business agent of Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, all hereinafter styled labor defendants; the twenty-four companies already mentioned being styled truck line defendants, operat-

ing freight lines into the City of Dallas, with common carrier permits issued by the Railroad Commission of Texas and the Interstate Commerce Commission.

[*Labor Dispute*]

A temporary injunction had heretofore issued, June 4, 1946, in [a] suit filed the previous May 11th, in connection with the following antecedent facts: On February 21, 1946 an election had been held among employees of Zanes Freight Agency under National Labor Relations Board supervision to determine whether Local No. 745 should be designated as bargaining agent for certain of the company employees, to-wit: Drivers, their helpers, station men and mechanics; office and supervisory employees having been excluded from such election. Out of approximately sixty employees eligible to vote, thirty-nine cast valid votes, twenty-seven for the union and twelve against; and, as a result, on March 13, the union was designated by NLRB to represent such employees for purpose of collective bargaining. Shortly thereafter business agent Turner of Local 745 presented to Zanes Freight Agency a contract which the union desired to consummate between the Agency and employees of such company represented by it; Mr. Zanes, Sr., not accepting the contract but submitting a counter proposal, rejected by Turner who insisted that his form of contract and no other be signed. Principal difference between the parties was a proviso for the "union shop," and no further negotiations were carried on. Turner then went to see some of Zanes freight employees, talking to between five and seven at Southern Pacific docks, Dallas, inquring if they were still ready to strike; and on April 22, 1946 the union put a picket line (no Zanes employees) at both the place of business of Zanes Freight Agency, 1500 South Preston, and in vicinity of the MKT Railway Freight Office, carrying placards worded "Zanes Freight Agency employees on strike. Truck Drivers Local No. 745 A. F. of L."

[*Requests for Boycott*]

Zanes Freight Agency also had pickup and delivery agreements with the following railroads: MK&T Railway Company of Texas, St. Louis & Southwestern Railway Company of Texas, T. & N. O. Railway Company, C. R. I. & G. Railway, F. W. & D. C. Railway and T. & P. Railway Company. Coincident with picketing, the following notices were sent generally to truck line defendants, railroads and others by Local 745, such notices being posted on company bulletin boards by Union stewards of the companies employing Local 745 members:

"Office of the Secretary-Treasurer * * * JAS. B. TURNER, Secretary-Treasurer DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745, 1727 Young St., Dallas, Texas. AFFILIATIONS: LOCAL Texas State Federation of Labor, Dallas Central Labor Council, NATIONAL American Federation of Labor, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers. April 22, 1946.

"Dear Sir: Effective Monday, April 22, Zanes Freight Agency of Dallas, Texas will be on strike by the Dallas General Drivers, Warehousemen and Helpers Local Union No. 745. Please refrain from doing business with said Cartage Company until this dispute is settled."

"4-27-46 SPECIAL BULLETIN TO WHOM IT MAY CONCERN: DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745 HAS THE FOLLOWING FIRMS ON STRIKE, OR ON THE UNFAIR LIST, AND WE DO NOT WANT YOU TO DO BUSINESS IN ANY MANNER WITH THE FIRMS LISTED BELOW. JOHNSON MOTOR FREIGHT LINES, BRASWELL FREIGHT LINES, ZANES FREIGHT AGENCY, MERCHANTS DELIVERY SERVICE, BINYON-O'KEEFE STORAGE COMPANY, ZANES-EWALT CORP. BONDED WAREHOUSE. THIS UNION WILL APPRECIATE ALL YOUR COOPERATION IN THIS MATTER AND WE EXPECT THE SAME. GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745, DALLAS, TEXAS."

"TRUCK DRIVERS LOCAL UNION NO. 745 A. F. OF L. ON STRIKE AGAINST THE ZANES FREIGHT AGENCY. PLEASE DO NOT BE MISLED—TRUCK DRIVERS LOCAL NO. 745 ARE ON STRIKE AND WE HAVE THIS FIRM ON OUR WE DON'T PATRONIZE LIST. REMEMBER WE ARE STILL ON STRIKE. DALLAS GENERAL DRIVERS—LOCAL UNION NO. 745, A. F. OF L."

Labor defendants also sent out telegrams, *viz.:*

"April 22, 1946. Mr. Forest T. Bice, Cotton Belt Railroad, 910 Young Street, Dallas, Texas. Zanes Freight Agency on strike by the Dallas General Drivers, Warehousemen and Helpers Local Union No. 745. Please cooperate to the fullest extent of your ability on this matter. T. T. Neal, General Organizer. Charge to Local Union No. 745."——

"Mr. T. W. Waldrop, Southern Pacific Transportation Company, Houston, Texas. April 25, 1946. Southern Pacific Lines using Zanes Freight Agency which we have on strike at Dallas. Continued use of this company after Monday, April 29 will necessitate Over-the-Road Division of the Southern Conference of Teamsters instituting Action against Southern Pacific Motor Transport Company. Advise you contact me immediately. Will be at Whitmore Hotel until early Saturday morning and at Hotel New Orleans, La. all day Saturday. Dexter L. Lewis, International Representative."——

"May 1, 1946. Mr. T. W. Waldrop, Vice President and Gen. Manager, Southern Pacific Bldg., Southern Pacific Transportation Co., Houston, Texas. Mr. B. C. James, Ass't Vice Pres., Texas & Pacific Bldg., Texas & Pacific Transports Co., Dallas, Texas. Mr. H. R. Moore, Jr., Southwestern Transportation Co., Texarkana, Texas. The company doing business with Zanes Freight Agency, Dallas, Texas which our Union Local No. 745 has on strike—we are maintaining the picket line on this company—your contract provides no crossing of picket line. We will not permit technicalities to be used for the purpose of giving succor to our enemies. I am at this time calling upon you people to discontinue business with Zanes or suffer the consequences that we will initiate, Dexter L. Lewis, International Representative."——

"MKT A. J. Pickett, Ry. Exchange Building, St. Louis, Missouri. H. W. Horton, 508 National Building, Pine Bluff, Arkansas. W. M. Crawford, Grand Lodge Representative, 108 East Ninth, Fort Worth, Texas. April 24, 1946. Dallas General Drivers, Warehousemen and Helpers Local Union No. 745 has won an NLRB election with Zanes Freight Agency, a cartage company that handles railway freight in the City of Dallas. They refuse to sign our uniform City Pickup and Delivery contract. Have Company on strike and picket on. Please have your local Chairman refuse to handle merchandise for said cartage company. T. T. Neal International Representative. Charged to Local Union No. 745."

Union representatives further called upon the customers of Zanes Freight Agency named in their petition, among others, stating that the two principals were in dispute and demanding support of said concerns by their withdrawal of patronage from plaintiff agency. Immediately all truck line defendants except two[1] ceased doing business with plaintiffs; as did John Sexton Company, a customer under contract with Merchants Delivery, Inc.[2]

[*Picketing*]

Then ensued a period covered by the temporary injunction of June 4, 1946, when in January 1947 a new and independent controversy arose between defendant Union and Zanes-Ewalt Warehouse. On January 1, this appellee had acquired quarters at Hawkins Street and Pacific Avenue in the City of Dallas, under a lease from the building owner, Eagle Ford Land and Development Company, which premises, up to December 31, 1946, had been occupied by Texas & Pacific Terminal Warehouse Company. No contractual relations existed between the two lessees, Zanes-Ewalt assumed no obligation of such former tenant, nor did there exist any connection between lessor and successive lessees in matter of stockholders, officers or directors. Defendant union had secured an employment contract covering employees of Texas & Pacific Terminal Warehouse Company and, in taking over the building, a continuation of employment to some eighteen of these workers was offered by Zanes-Ewalt; it being contended that the latter should recognize the prior union contract. Recognition was refused; M. R. Dixon, assistant business manager of the

[1] Texas & Pacific Transport Company and Southern Pacific Transportation Company; and, as to these, Dexter L. Lewis, International Representative of the Teamsters Union, on May 1, 1946, sent letters to NLRB, National Wage Adjustment Board and Department of Labor, giving notice of intention to strike because of existence of a labor dispute, the issue being that such companies "are doing business with Zanes Freight Agency, which Local Union No. 745 of the International Brotherhood of Teamsters has on strike."

[2] Contracts between the Union and all truck line defendants contained the proviso: "The employer shall not request, instruct or require any employee to go through a picket line of a striking union * * *" (to which was added in "Over-the-Road" or intercity contracts "nor to handle 'unfair goods,' declared so by the Unions signed to this agreement.")

union, filing complaint with the NLRB and, on January 6, placing a picket at the premises, telling Zanes-Ewalt employees of the union that they could then go on strike. When the picket line was established, and as a result of conference between Dixon and representatives of the Brotherhood of Railway Trainmen, Union employees of the Texas & Pacific Railway Company, whose tracks ran into the warehouse, would not deliver freight to Zanes-Ewalt or their customers in the warehouse because of the picket line. In the same connection there was testimony that trucks belonging to three different companies attempted to enter the warehouse premises at Pacific and Hawkins Streets and, when approached by the picket, backed out of the gate and would not enter.

[*Injunctive Relief*]

Without further detail from a rather lengthy statement of facts, the court on March 5, 1947 entered judgment of permanent injunction of which the following summary is material: (1) Paragraphs one and two, in general, restrained appellant union and non-appealing truck line defendants from a secondary boycott against plaintiff "notwithstanding the provisions of any contract existing between the said Local No. 745 and any of such defendants relating to the crossing of picket lines and the handling of so-called 'unfair goods' or so designated as 'unfair' by the labor union defendants"; paragraph three prohibited secondary picketing of railroads, truck lines and named customers of plaintiffs in consequence of any dispute between the plaintiffs and union, also providing against ambulatory pickets "to follow or accompany plaintiffs' trucks or vehicles while operating in the usual course of business"; (2) labor defendants were authorized to establish a picket line at the place of business of Zanes Freight Agency and Zanes-Ewalt Warehouse with following provisos: (a) Picketing shall be peaceful and not to interfere with ingress or egress to either of said such places of business; and (b) shall not extend beyond the Freight Agency premises at 1500 South Preston Street "either actually or constructively"; (c) said picket line at plaintiffs' warehouse shall be on the Pacific and Hawkins Street side and not extend to within one hundred feet of the railroad track entering said warehouse and in nowise to interfere with movement of freight, in and out, over each track; (d) or interfere with delivery of freight or movement thereof in and out of the two places of business by common carriers, either truck line defendants or railroads; (e) picket line shall be for the limited purpose of persuading employees of plaintiff to leave their employment or dissuading third parties from becoming employees, and not to consist of more than two pickets at any one time at either place; (f) pickets shall be limited to hours from 6:00 A. M. to 7:00 P. M. daily unless employees (other than officers, supervisors, clerical help, etc.) are present and performing usual functions at other times; (g) that should any of the named railroads or truck lines, while operating under common carrier permits, their servants or employees, refuse to deliver freight to plaintiffs or accept freight at their premises because of presence of pickets, then upon notice the picket line shall be removed and not be reestablished until after acceptance or delivery of the freight involved or movement of trains and trucks has been completed.

[*Coercion Prohibited*]

Under paragraphs five, six and seven of the judgment, labor defendants were restrained from doing any acts with respect to contractual relationships between plaintiffs and railroads, also T. & P. and Southern Transportation Companies, by way of intimidation or coercion to terminate contracts; the letter transportation companies being in turn restrained from terminating contracts with plaintiffs on account of activities of labor defendants under the foregoing circumstances; and the same restraint, in effect, was made applicable to named customers.

Upon cross action of certain truck line defendants, appellants were enjoined from authorizing any strike of employees or picketing on or about the premises of such defendants on account of any labor dispute between Local 745 and plaintiffs or any provision of contract existing between said Local and the particular defendants. Under paragraph eight labor defendants were accorded the right of "publicizing the controversy with plaintiffs in an accurate, peaceful and truthful manner, without threats, coercion or intimidation, actual or implied, against any of the parties herein mentioned, except as herein limited."

[*Issues*]

The appeal was by labor defendants only, the points presented being in substance that (1) a labor dispute existed between appellants and appellees (plaintiffs below) and

their non-striking employees; (2) picketing as invoked by appellants is privileged under the free speech guaranties of both Constitutions of Texas and the United States; (3) picketing under the instant circumstances is privileged and authorized by Arts. 5152 and 5153, Texas Revised Statutes; (4) refusal of defendants to cross a picket line or handle "unfair freight" is not illegal; (5) the trial court had no jurisdiction to restrain defendant truck lines from interchanging freight with plaintiffs, such matters being within the exclusive jurisdiction either of the Interstate Commerce Commission or the Texas Railroad Commission; (6) the judgment of injunction and any laws of Texas upon which it might be purportedly based are unconstitutional and void because in violation of Art. 1, sec. 8, Art. 6, and Thirteenth and Fourteenth Amendments, United States Constitution; also too vague and indefinite for enforcement.

From above points and opening statement of appellants' brief, plaintiffs' cause of action is assumed to be one merely to restrain the picketing of their places of business, but the union's right to peacefully picket as contemplated by Arts. 5152, 5154, V. A. S., is nowhere brought in question. On the other hand, material allegations of plaintiffs' trial petition raise issues challenging the right of the union in concert with others to engage in activities resulting in a secondary boycott, interference with plaintiffs' contracts, violation of the Texas antitrust laws, creation and carrying on of restrictions in the free pursuit of a lawful business, and prevention or lessening of competition in aid of commerce. In the same connection, a labor dispute may be assumed as the basis of controversy, the litigation following a refusal on part of Zanes Freight Agency to sign a closed shop agreement with defendant union.[3]

[*Requests for Boycott*]

The activities of appellants pursuant to strike were twofold in nature: First, consisting of letters, telegrams, personal calls, etc., giving notice of strike and invoking the proviso in contracts of truck line defendants against crossing of picket lines; second, the actual picketing of plaintiffs' places of business, consisting of the usual marching to-and-fro before the establishments involved in the dispute, accompanied by the display and carrying of signs, placards or banners bearing statements of grievance touching the particular controversy. Teller, *Labor Disputes,* Vol. 1, Sec. 109.

By stipulation of the parties and otherwise, the material facts herein are not controverted. Obviously, under the first phase of these strike activities (notices, messages and communications), a cessation of business relations with plaintiffs was demanded of the persons addressed, a refusal inviting similar consequences to themselves. Turner, union agent, frankly stated that the purpose of his calls upon both carriers and customers was to advertise the strike and to get them not to do business with Zanes; testifying:

> "Q. But, your object was that you wanted these people not to do business with him? A. Until this grievance was settled.
>
> "Q. That's right by way of punishment against him because he wouldn't sign your contract, isn't that true? A. That's right, sir. * * *
>
> "Q. You said a moment ago that where you do all these things that have been done in this case, and the party you are dealing with, your adversary, suffers some damages, so far as you are concerned that is only incidental? Is that your testimony? A. That's right, sir.
>
> "Q. And, if a man's business, by your activities, is completely destroyed, that is still incidental so far as you are concerned; is that correct? A. That's right, sir."

Vincent, an employee of H. J. Heinz Company, testified:

> "A. During our negotiations with the union, in which they negotiated a contract with us, Mr. Neal Hodges (Union agent) made the statement that they were going to put Mr. Zanes out of business if he didn't get in line with the union."

As a result, all except the railroads and two truck line defendants ceased doing business with Zanes Freight and other plaintiffs, to the Agency's immediate damage, it being stipulated that "Zanes Freight Agency sustained pecuniary loss and damage as a result of the activities engaged in by the defendant labor union, the exact amount of which is impossible of estimation and calculation at this time."

[3] Placard displayed by pickets at the Agency premises stated that Zanes Employees were on strike, although only three or four actually quit as a result of strike.

[*Conspiracy in Restraint of Trade*]

The foregoing facts conclusively establish a conspiracy in restraint of trade or secondary boycott; such activities on part of a labor organization being violative of Texas statutes defining trusts, conspiracies against trade, pools and monoplies, as our courts have consistently held from an early date. Arts. 7426, 7428, V. A. S.; *Webb v. Cooks', Waiters' and Waitresses' Union,* 205 S. W. 465; *Borden Company v. Teamsters Local No. 133,* 152 S. W. (2d) 828 [4 LABOR CASES ¶ 60,446]; *Carpenters Union v. Ritter's Cafe,* 138 S. W. (2d) 223, 149 S. W. (2d) 694; 86 L. Ed. 1143; 315 U. S. 722.

[*Unlawful Activities*]

Aside from the above aspect of boycott, these labor activities seeking to breach subsisting contracts between plaintiffs, truck line drivers and railroads, to which the local was neither a party nor in privity, are uniformly deemed tortious and enjoinable. *Evans v. McKay,* 212 S. W. 680; *Texas Operators v. Galveston Operators,* 132 S. W. (2d) 299; *Carpenters Union v. Ritter, supra; Borden Company v. Local No. 133, supra.* Likewise, as to the restraint against all nonappealing truck lines. The record discloses that these common carriers, upon insistence and demand of labor defendants, were refusing to accept freight from plaintiffs tendered in due course of business. This was clearly in violation of their duty as common carriers under Arts. 882, 884, 6360, V. A. S., to transport all tendered freight, constituting an unlawful act. *Burlington Transportation Co. v. Hathaway,* Iowa, 149 A. L. R. 1238.

[*Lawfulness of Means*]

But appellants strenuously argue (1) that all related dealings with truck lines, railroads and customers of plaintiff were simply incidents of "peaceful picketing" as authorized by Arts. 5152, 5153, 5154, V. A. S., and the Fourteenth Amendment, United States Constitution, guaranteeing the right of free speech; (2) that neither the common law nor Texas antitrust laws prohibit a labor combination from acts promotive of its own legitimate aims and purposes, even though others may be injured thereby; defendants in the instant case merely seeking public support in the obtaining of better wages, hours and conditions of employment; citing *Harris v. Thomas,* 217 S. W. 1068; *Cline v. Insurance Exchange,* 154 S. W. (2d) 491, affirmed 166 S. W. (2d) 677; *Thornhill v. Alabama,* 310 U. S. 88; *Milk Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287; *A. F. of L. v. Swing,* 312 U. S. 321; *Carlson v. California,* 310 U. S. 106; *Pastry Drivers, etc. v. Wohl,* 315 U. S. 769; *Senn v. Tile Layers Protective Union,* 301 U. S. 468.

However proper may have been appellants' labor objective, the "peaceful picketing" contemplated under Art. 5153, V. A. S., must be conducted by "lawful means"; Justice Brandeis in the *Senn* case, *supra,* pointing out that the term implies "not only absence of violence, but absence of any unlawful act." In *Borden Co. v. Local No. 133, supra,* the court, after a review of the *Swing* and *Meadowmoor* cases, decided that the state court was not thereby precluded from affording protective relief where picketing involved "such conduct as the State is authorized to declare unlawful, or the breach of such laws as are necessary for the protection and welfare of its residents"; concluding that

> "The anti-trust laws of this state, R. S. Articles 7426 and 7428 and Articles 1632, 1634, and 1635 of the Penal Code, which prohibit any attempt to create restrictions in the full pursuit of any lawful business, or any agreement or threat to boycott a person or association by a refusal to buy from or sell to him or it, or to induce others to do so, are in full force and effect. Their constitutionality has recently been sustained by the Supreme Court of the United States in the case of *Tigner v. State of Texas,* 310 U. S. 141, 60 S. Ct. 879, 84 L. Ed. 1124, 130 A. L. R. 1321, and they have not been repealed or modified by the statutes which provide for the creation of labor organizations and for peaceful picketing (R. S. Articles 5152, 5153, 5154), in so far as they apply to the state of facts in the instant case."

[*Permissible Regulation of Picketing*]

The second phase of strike activity—peaceful picketing—was permitted along with such regulations as the trial court considered reasonable in view of the attendant facts. Though the judgment provided that individual picketing should be for the limited purpose of persuading employees to leave said employment or the dissuading of third parties from the employment,[4] labor defend-

[4] In Texas, picketing is so limited by Art. 5153, but recent U. S. Supreme Court pronouncements in the *Carlson, Thornhill* and *Swing* cases, accord a union, under the Fourteenth Amendment, the right to publicize all grievances involved in the dispute.

ants were permitted to fully publicize their dispute by way of distribution of handbills, posting of notices on bulletin boards of various customers, truck line defendants and railroads. As viewed by the trial court, it was only the threats, intimidation, acts of coercion, unlawful interference with contractual relations and acts violative of the antitrust laws that became items of restraint.

Appellants complain, however, that their right to peacefully picket is subject to none of the limitations imposed by judgment perforce of the identification of that activity with freedom of speech under the Fourteenth Amendment, United States Constitution. Places of allowed picketing were at 1500 South Preston and at Pacific and Hawkins Streets, Dallas, limitations thereon generally being: Pickets shall not interfere with ingress and egress to premises; extent of picket line specified and prohibited during certain hours; prohibiting interference with movement of freight into and out of the premises and that the picketing should be peaceful.

Identification of picketing with the freedom of speech clause (U. S. Constitution) was first announced in *Senn v. Tile Layers Protective Union, supra,* 1937, *viz:*

> "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

There is no doubt, since above pronouncement and under succeeding decisions of the United States Supreme Court, that picketing in a labor dispute is a form of communication and, as such, has the cited constitutional protection. But implicit in these same decisions is the conclusion that "peaceful picketing" may involve something more than the exercise of freedom of speech, *i. e.,* "dissemination of information concerning the facts of a labor dispute" *(Thornhill v. Ala.);* and it is this "something more" (words or acts having the effect of force) that may be the subject of reasonable regulation. The concurrence by Justice Douglas in *Pastry Drivers, etc. v. Wohl, supra,* goes on to say:

> "Picketing by an organized group is more than free speech since it involves patrol of a particular locality, and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. *Hence those aspects of picketing make it the subject of restrictive regulation.*" (Emphasis ours.)

The main opinion *(Wohl)* likewise points out that

> "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

And a conclusive answer to the insistence that picketing is constitutionally immune from all regulations may be found in *Carpenters Union v. Ritter's Cafe, supra* (affirmed by U. S. Supreme Court), where, in the dissenting opinion of Justice Reed, one of the most liberal members of that court, it is stated:

> "We are not here forced, as the Court assumes, to support a constitutional interpretation that peaceful picketing 'must be wholly immune from regulation by the community in order to protect the general interest.' We do not doubt the right of the state to impose not only *some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required.*" (Italics ours.)

The restrictions complained of herein, not being inconsistent with the right of free speech, but adjusted to it, we are not prepared to say that same were in anywise unwarranted or unreasonable.

[*Jurisdiction*]

Appellants further contend that the refusal of truck line defendants to accept appellees' freight was a matter solely within the jurisdiction of either the Interstate Commerce Commission or the Texas Railroad Commission. Neither of the plaintiffs was a common carrier of freight and, owing to the nature of their several businesses, a certificate as such from the named Commissions was not required. Even conceding a right of the union to complain in such particular, we think that it was these administrative bodies that had no jurisdiction. Plaintiffs' suit was for prevention of boycott, against interference by labor defendants with third party contracts and to restrain the union in concert with others from violating the Texas antitrust laws, involving common law and statutory rights that the courts alone were competent to determine. 49 U. S. Code, sec 22; *L. & N. Ry. Co. v. Cook Brewing Co.,* 223 U. S. 70; 56 L. Ed. 355; 11 Am. Jur. 129.

[*Indefiniteness*]

The entire judgment is attacked as vague and indefinite in various paragraphs and recitals. To the contrary, all parts thereof appear sufficiently definite and certain, labor defendants being clearly advised of what they can and cannot do. Reach of the injunction to "Disputes hereinafter arising" might ordinarily be censurable as prejudging future activities conceivably lawful. But the language in context relates to secondary picketing—always an illegal labor activity in Texas—according to the *Borden* case, *supra,* and now made expressly so by statutory enactment; see Senate Bill 167, 50th Leg. 1947, Art. 5154f, Vernon's Annotated Statutes.

[*Improper Restraint on Communication*]

However, in view of recent Supreme Court decisions identifying right of free speech with peaceful picketing, the wording of sec. E, paragraph three, of the judgment would appear as unduly limiting appellants' right to disseminate information relevant to its interest concerning the facts of a labor dispute. See *Thornhill* and *Carlson* cases, *supra.* The subdivision in question, expressly limiting instant picketing to persuasion and dissuasion of employees, may thus be disregarded and the general provision of paragraph eight substituted therefor, reading: "Nothing herein shall be construed to limit the right of C. B. Kepke and the Labor Union Defendants from publicizing the controversy with plaintiffs in an accurate, peaceful and truthful manner, without threats, coercion or intimidation, actual or implied, against any of the parties herein mentioned," except as limited by other paragraphs and portions of the injunction.

Otherwise, all points of appeal are overruled and judgment of the trial court affirmed.

[¶ 62,219] Fifth and Walnut, Incorporated and Albert J. Hoffman v. Loew's Incorporated, Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, RKO Radio Pictures, Inc., Warner Bros. Pictures Distributing Corp., Universal Pictures Company, Inc., Columbia Pictures Corporation, United Artists Corporation, Republic Pictures Corporation, Marcus Loew Booking Agency, Inc., and United Artists Theatre Circuit, Inc.

In the United States District Court for the Southern District of New York. Civil No. 36-736. January 23, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Motion to Dismiss—*Forum Non Conveniens*—Doctrine Inapplicable.—A motion to dismiss a complaint charging a conspiracy to deprive an independent exhibitor of the right to negotiate for the exhibition of "first run" motion pictures on the ground of *forum non conveniens* is denied when it is found that defendants, by their failure to object promptly to the forum, have deprived plaintiffs of the opportunity to plead statutory exemptions to a statute of limitations raised by defendants. Defendants cannot answer, take depositions of plaintiffs, have plaintiffs incur pre-trial expenses, and then, after many months have passed, seek dismissal on the ground of *forum non conveniens.* If the complaint were dismissed, the action would have to be recommenced in another district after the expiration of the statutory exemption.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291, 1640.435, and the Clayton Act annotations, Vol. 1, ¶ 2032.

[*Motion to Dismiss*]

RYAN, J.: All eleven defendants move to dismiss the complaint without prejudice.

The stated grounds of the motion are that "a fairer determination of the issues would be had, at greater convenience to this Court, to the parties and to the witnesses and personnel most directly concerned with this action, if the action were brought in Louisville, Kentucky in the District Court for the Western District of Kentucky."

[*Nature of Action*]

This action is brought by plaintiffs under the "Sherman Act," 15 U. S. C. A. Sections 1 to 7 inclusive, and the "Clayton Act," 15 U. S. C. A. Sections 12 to 17 inclusive.

Plaintiff, Fifth and Walnut, Inc., a corporation of the Commonwealth of Kentucky, has its principal office in Louisville, Kentucky. Since December 10, 1943, it has leased and operated the National Theatre located at Fifth and Walnut Streets in Louisville. Plaintiff, Albert J. Hoffman, a resident of Indianapolis, Indiana, has owned the National Theatre since January 20, 1943 from which date to December 10, 1943 he operated the theatre at which time, while continuing in title to the fee, he leased the theatre to Fifth and Walnut, Inc.

All eleven defendants are engaged in the motion picture industry, as producers, distributors or exhibitors. Nine of the eleven defendants are described in the complaint as distributors. Five of these nine are incorporated under the laws of the State of Delaware—Loew's Incorporated, RKO Radio Pictures, Inc., Universal Pictures Company, Inc., United Artists Corporation and Republic Pictures Corporation; the remaining four—Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation and Columbia Pictures Corporation are incorporated under the laws of the State of New York. All nine distribute motion picture films throughout the United States and have their principal offices in New York City.

Of the two remaining defendants, one—United Artists Theatre Circuit, Inc., is a Maryland Corporation and the other—Marcus Loew Booking Agency is a New York corporation. The former owns Loew's United Artists Theatre and operates it in conjunction with Marcus Loew Booking Agency, a subsidiary of the defendant, Loew's Incorporated. It is not disputed that all eleven defendants irrespective of the state of their origin transact business and maintain offices in New York City within this district.

The facts recited herein are alleged in the complaint and for the purposes of this motion only are deemed established by affidavits submitted.

The complaint alleges that defendants have conspired and agreed together to deprive and have deprived plaintiffs of the right to negotiate for the exhibition and showing of "first run" pictures at the National Theatre in Louisville.

The defendants in their answers deny this charge. They allege that their refusal to license pictures for first run at this theatre was prompted solely by economic reasons and sound legitimate business considerations. They say, in explaining any apparent uniformity and similarity in conduct, that they individually and separately arrived at the same conclusion—that each of them would make more money and realize higher rental if his respective pictures were licensed first run to theatres other than the National.

[*Statute of Limitations*]

As an affirmative defense defendants plead a one-year statute of limitations effective in Kentucky. Their moving affidavit concerning this defense makes the following comments (pp. 14-15):

> "It is very well established that there is no federal statute of limitations applicable to anti-trust actions brought under the Federal Laws. Therefore, the local statute of limitations should govern this question."
>
> * * *
>
> "However, a very important subsidiary question has been raised by the answers of these defendants and will be raised at the trial, namely, the question of the Statute of Limitations that is applicable here."

And, defendants seek to invoke the doctrine of *forum non conveniens.*

Entering upon a determination of the merits of the motion the court is mindful of the admonition, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508.

At the very outset the court is led to a consideration of the historical facts of this litigation. The complaint herein was filed on July 11, 1946 and defendants were served

in this district within a day or two thereafter. By stipulations, defendants' time to answer was extended and issue was joined by the service of their answers on September 26, 1946. Notice of this motion was first given plaintiffs on May 17, 1947; it was returnable on May 23, 1947 at which time it was marked "off" the calendar by consent of both sides. It was not returned to the motion calendar and submitted for consideration until the December, 1947 Term.

The notice of motion was served ten months after the commencement of the action and eight months after issue was joined. It was not brought on for submission to the court until seven months later, or almost fifteen months after service of answer. This long delay does not impress one as being the course usually taken by defendants who feel that they have been vexed, harassed or oppressed by plaintiffs' choice of an inconvenient forum. It is not the spontaneous hue and outcry of persons who have been outraged.

The court does not adopt plaintiffs' interpretation of Rule 12 (b) of the Rules of Civil Procedure, that this motion should be denied because not made before answer. The objection of *forum non conveniens* is not a defense to improper venue, which must be asserted by preliminary motion or answer. It is simply a motion which may be addressed to the discretion of the court *at any time*. *Weiss et al. v. Routh et al.*, 149 Fed. (2d) 193; *Burdick v. Freeman,* 120 N. Y. 420; *Collard v. Beach,* 81 App. Div. 58. It may be raised after as well as before answer, but the objection should be taken with reasonable and appropriate promptness. (An examination of the *Gulf Oil* case, *supra,* and *Koster v. Lumbermens Mutual Co.*, 330 U. S. 518, shows that the defendants in those actions objected to the forum before answer.)

Defendants cannot answer, take depositions of plaintiffs, permit plaintiffs to examine witnesses on deposition, have plaintiffs incur pre-trial expenses in excess of $7500 (out of which $690 costs were paid to each of defendants' counsel to reimburse them for expenses on the taking of depositions in Kentucky), and prepare for trial and, finally after many months have passed, raise an objection to the forum for the first time. Such inaction does not prompt the court to exercise discretion in their favor.

The court is not impressed by defendants' complaint of the added inconvenience and cost of securing the attendance of expert witnesses in New York over what it would incur in having the same witnesses testify in Kentucky. "Furthermore, the plea of inconvenience loses some of its persuasiveness in the mouth of a highly solvent defendant, particularly one charged with personal wrongdoing." Harvard Law Review, Vol. 60, p. 933; *Cf.* dissent of Mr. Justice Cardozo in *Rogers v. Guaranty Trust Co.,* 288 U. S. 123, 151, and Mr. Justice Jackson concurring in *Miles v. Illinois Central R. R.*, 315 U. S. 698, 706-08. The court cannot find that the forum selected by plaintiffs is inconvenient to the point of oppression.

The defense of the Kentucky statute of limitations pleaded in the answer of defendants is as they describe it "a very important subsidiary question," and particularly so on this application.

By the law of the State of Kentucky, a one-year statute of limitations governs this action. The plaintiffs rely in large measure, to meet this pleaded defense, on the Act of Congress passed October 10, 1942 (c. 589, 56 Stat. 781) as amended June 30, 1945 (c. 213, 59 Stat. 306), which plaintiffs contend (and it seems rightly so) suspended the running of the statute of limitations on any violation of the anti-trust laws until June 30, 1946.

Plaintiffs contend that if this action has to be recommenced in Kentucky after June 30, 1947 (as it will have to be if at all in the event the motion is granted), plaintiffs will lose the benefit of these statutes. The defendants to counter this objection now suggest in a supplemental memorandum submitted in support of the motion that,

> "If this court should fear that the granting of this motion would result in plaintiffs' being barred by the applicable statute of limitations in the forum where the action is reinstituted, it could condition dismissal of the complaint upon an agreement by the defendants that, for the purpose of applying the appropriate statute of limitations, the action, if reinstituted promptly in the appropriate forum, would be deemed to have been commenced on July 11, 1946." (pp. 1-2.)

The ultimate value of the defense of the Kentucky statute of limitations is not determined on this motion. It is sufficient to find that it does raise an important and substantial question, and the only apparent answer to it which plaintiffs can make would have to be predicated upon the Act of Congress of October 10, 1942 and June 30, 1945,

supra, and these acts do not extend the time in which suit may be commenced beyond June 30, 1947.

Mr. Justice Jackson in the *Gulf Oil* case, *supra,* at p. 506, observes: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." The choice of forums indicated by Mr. Justice Jackson must be a fair and real one with equal opportunity for successful conduct of the action by plaintiff in both. Defendants, by their failure to object promptly to the forum have deprived plaintiffs of the opportunity to plead in Kentucky the exemptions to the statute of limitations granted by Act of Congress.

Defendants' offer to limit the plea of the defense of the statute of limitations does not appeal to the court.

The very grave and present possibility that by the granting of this motion to dismiss, the plaintiffs will be deprived of the right to plead these statutes in answer to the defense of the statute of limitations is sufficient to impel the court to deny the motion. Jurisdiction has been retained frequently because a statute of limitations has barred suit elsewhere. *Williamson v. Palmer,* 181 Misc. 610; *Randle v. Inecto,* 131 Misc. 261; The Yale Law Journal, Vol. 56, p. 1237, footnote 22.

To justify the exercise of discretion in the granting of this motion the basis for it should exist and be found in the facts of the litigation itself. The court should not, by imposing conditions or by accepting stipulations from the defendants, bring about a change in the factual situation to warrant a favorable determination, where without such conditions and stipulations such action would not be equitable.

But, above all, the plaintiffs assert that under the special venue provisions of the Clayton Act, they have an absolute right to bring this action in this district and that their choice of a forum cannot be defeated on any ground if jurisdiction over the defendants is obtained.

Section 12 of the Clayton Act (15 U. S. C. A. Sec. 22) provides:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

All of the defendants are corporations, inhabitants of and are found and transact business within this district.

Section 12 of the Clayton Act, *supra,* is unmistakably a special venue provision and as such falls squarely within the boundaries set by Mr. Justice Jackson in the *Gulf Oil* case, *supra,* wherein he wrote:

> "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.* But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & Ohio R. R. v. Kepner,* 314 U. S. 44; *Miles v. Illinois Central R. R.,* 315 U. S. 698." (p. 505.)

In passing upon the application of Section 12 of the Clayton Act, it was held in *Momand v. Paramount Pictures Distributing Co., Inc. et al.,* 19 Fed. Supp. 102, at 103, by the District Court of Massachusetts, that:

> "In the case at bar, a citizen of the United States is invoking the jurisdiction of the federal courts to enforce in her own right a remedy given to her by acts of Congress. These statutes expressly confer upon the court jurisdiction to entertain such a suit and give to the plaintiff a choice of districts in which to sue. *Eastman Kodak Co. of New York v. Southern Photo Materials Co.,* 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684; *Haskell v. Aluminum Co. of America* (D. C.), 14 F. 2d 864."
>
> * * *
>
> "I do not find anything in the federal statutes, or in the adjudication, which suggests that the court has any such discretionary power, or any such control over the plaintiff's remedy."

Of the special venue provision in Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56), Mr. Justice Reed in *Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44, at p. 52, stated:

> "Section 6 establishes venue for an action in the federal courts. * * * It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 72."

And, the court went on to say at page 54:

> "When the section was enacted, it filled the entire field of venue in federal courts.

A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense."

That portion of Section 6 of the Federal Employers' Liability Act, which was held to be dispositive of the *Kepner* case, *supra,* reads as follows:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

The wide choice of venue granted to plaintiffs under this provision is strikingly similar to Section 12 of the Clayton Act hereinabove quoted.

The opinion in *United States v. National City Lines, Inc., et al.,* 7 F. R. D. 456, cited by defendants cannot be accepted or applied. It appears to be an attempted judicial limitation of a clear and definite special venue act affording plaintiffs a privilege of venue, which should not be denied them.

[*Motion Denied*]

For all the foregoing reasons the motion is denied.

[¶ 62,220] Opinion of the Attorney General of Montana.

Addressed to the State Board of Food Distributors, Ex Officio Montana Trade Commission, Helena, Montana, by R. V. Bottomly, Attorney General. Official Opinion Vol. 22, No. 102. February 9, 1948.

Montana Unfair Practices Act

Implied Powers of Commission—Authority to Call Conference.—If, in the judgment of the State Board of Food Distributors, Ex Officio Montana Trade Commission, a conference will aid the Commission in carrying out the purposes of the Act, it is within the implied powers of the Commission to provide by rule for the calling and holding of such a conference.

See the Montana Unfair Practices Act, Vol. 2, ¶ 8488.

[*Question*]

You have requested my opinion as to the authority of your board to call a conference with reference to wholesale prices within the State of Montana, under the Unfair Practices Act, and to expend funds of the commission in defraying the expenses of such conference. You have advised me as follows:

"This application, although informal, was made under the provisions of Rule XXVII of the established rules of the Montana Trade Commission. This rule provides that the Commission may call such a conference after reasonable public notice of the time and place, and that a transcript of the conference proceedings shall be made and filed in the office of the Commission.

"This procedure, set up by Rule XXVII will require the expenditure of public funds for the compilation of the transcript and the public notices . . .".

[*Rule XXVII*]

Rule XXVII promulgated by your commission, insofar as pertinent here, provides:

"(s) Purpose. The Unfair Practices Act Conference procedure has for its purpose the establishment, by the Commission, of rules in the interest of more efficiently administering the Unfair Practices Act. This procedure affords opportunity for voluntary participation by interested parties in the formulation of rules to provide for adjusting trade practices in conformity to the Unfair Practices Act. These rules may also contain provisions to foster and promote fair competitive conditions and to establish standards of ethical business practices in harmony with public policy under the provisions of the Unfair Practices Act of Montana."

[*Unfair Practices Act*]

Section 14 of Chapter 80, Laws of 1937, known as the "Unfair Practices Act," provides:

"The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair

and honest competition is destroyed or prevented. *This Act shall be literally construed that its beneficial purposes may be subserved.*" (Emphasis supplied.)

[*Construction of Act*]

Giving to the Act a literal construction as provided in Section 14, it is clear the legislature intended that the commission have broad powers and discretion in the administration of the Act to the end that the purpose thereof be fulfilled. Thus it follows that any action deemed necessary or advisable by the commission to obtain the ends intended by the legislature in the administration of the Act, as expressed in Section 14, *supra,* is within its power and authority, express or implied.

[*Implied Powers*]

The Supreme Court of Montana in the case of *Guillot v. State Highway Com., et al.,* 102 Mont. 149, 153, 154, 56 Pac. (2d) 1062, in speaking of the implied powers of a board or commission, said:

"But the powers which an officer, commission or department may exercise are not confined to those expressly granted by the Constitution or statutes of the state."

And quoting from 46 Corpus Juris, 1032, with approval, the Court continued:

"'In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no power will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred.'"

And further, in the *Guillot* case, *supra,* the Court said:

"Where the legislature sees fit to confer upon a board or commission such broad general powers, the repository of the power is vested with discretion in choosing the means and methods of accomplishing the result expected, and, in the absence of fraud or manifest abuse of that discretion, its determination is conclusive."

[*Appropriation for Expenses*]

The legislature has made an appropriation to the commission "for salaries and expenses." The term "salaries and expenses" is defined in the appropriation bill to include "operation," which in turn is defined as "all other expenditures which are necessary for the operation of the department, board, bureau, commission or institution to which the appropriation applies, including wages of employees paid to temporary employees for work not considered of a continuous nature." See House Bill No. 437, Laws of 1947, page 749.

[*Authority to Conduct Hearings*]

It is my opinion that the provisions of Section 12B, which was added by the amendment to Chapter 80, Laws of 1937, by Section 3 of Chapter 50, Laws of 1939, under which the Commission is given certain specific authority in conducting hearings and investigations "which, in the opinion of the Commission, are necessary and proper for the exercise of the powers vested in it . . ." clearly show the legislature contemplated hearings and investigations by the Commission, other than those specifically provided with regard to the retail trade. This but strengthens my answer to your question.

[*Implied Power to Call Conference*]

It is, therefore, my opinion that if in the judgment of your Commission a conference such as is proposed will aid the Commission in carrying out the purposes of the Act, it is within the implied powers of the Commission to provide by rule for the calling and holding of such a conference. Expenses necessary for such a conference would come within the term "operation" as used in the appropriation bill and therefore may be paid from the appropriation made to the Commission.

[¶ 62,221] United States v. Chrysler Corporation, et al.

In the United States District Court for the Northern District of Indiana. Civil Action No. 9. November 15, 1938, modified December 21, 1940, February 16, 1942, December 26, 1942, December 30, 1943, December 20, 1944, December 31, 1945, June 29, 1946, August 1, 1946, September 12, 1946, January 7, 1947, February 14, 1947, May 17, 1947, August 27, 1947, December 1, 1947, and January 28, 1948.

Sherman Antitrust Act

Consent Decree—Automobile Finance Companies—Effective Date of Provision Extended.—Upon consent of all parties a final decree was entered in proceedings under the Sherman Act, pending determination of similar actions against other defendants, prohibiting an automobile manufacturer from discriminating among automobile finance companies, and from requiring dealers to patronize particular finance organizations, but permitting the manufacturer to adopt plans of financing and to recommend and advertise such plans, and imposing restrictions upon certain collection methods. The decree was modified on the dates indicated above, and is further modified by an order which provides that if a final order requiring another manufacturer to divest itself of all interest in its finance company shall not have been entered on or before May 1, 1948, nothing in the decree shall preclude the defendant from acquiring and retaining ownership of, or interest in, any finance company or from dealing with such company and with the dealers in the manner provided in the decree.

See the Sherman Act annotations, Vol. 1, ¶ 1550.10.

E. J. Ford, Special Assistant to the Attorney General; Luther M. Swygert, Assistant United States Attorney, for complainant.

Nicholas Kelley, of Larkin, Rathbone & Perry, New York City, N. Y., S. J. Crumpacker, of Parker, Crabill, Crumpacker, May, Carlisle & Beamer, South Bend, Ind., for defendant Chrysler Corporation.

W. Russel Mules, associated with Duane R. Dills, Esq., Boston, Mass., Israel B. Oseas, New York City, N. Y., for defendant Commercial Credit Company.

On modification of January 28, 1948:

For plaintiff: Alexander M. Campbell, United States Attorney, Fort Wayne, Indiana; Holmes Baldridge, Special Assistant to the Attorney General, Washington, D. C.

For defendant: William D. Donnelly, Washington, D. C.

Final Decree

SLICK, D. J.: 1. The United States of America filed its petition herein on November 7, 1938; each of the respondents appeared and filed its answer to such petition, and asserted the truth of its answer and its innocence of any violation of law; the petitioner and the said respondents desire to avoid the expenses of a trial of the issues therein and the loss of time occasioned thereby; no testimony having been taken, each of the respondents consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be considered an admission or adjudication that it has violated any statute; and the United States of America by its counsel having consented to the entry of this decree and to each and every provision thereof, and having moved the court for this injunction.

[Order]

Therefore, it is ordered, adjudged and decreed as follows:

2. That the court has jurisdiction of all persons and parties hereto; and for the purposes of this decree and proceedings for the enforcement thereof, and for no other purpose, that the court has jurisdiction of the subject matter hereof and the petition states a cause of action against the respondents under the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

[Parties]

3. "Respondent Finance Company" as used in this decree shall include Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Delaware, Com-

mercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Pennsylvania, Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Iowa, Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Michigan, Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Minnesota, Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Missouri, Commercial Credit Company, a corporation organized and duly authorized to do business under the laws of the State of Illinois, Commercial Credit Company, Inc., a corporation organized and duly authorized to do business under the laws of the State of Wisconsin, Commercial Credit Corporation, a corporation organized and duly authorized to do business under the laws of the State of New Jersey, Commercial Credit Company, Inc., a corporation organized and duly authorized to do business under the laws of the State of Indiana and their officers, directors, agents and employees. "Manufacturer" as used in this decree shall include Chrysler Corporation, DeSoto Motor Corporation, Plymouth Motor Corporation, all of which are organized and duly authorized to do business under the laws of the State of Delaware, Chrysler Sales Corporation and Dodge Brothers Corporation, both of which are organized and duly authorized to do business under the laws of the State of Michigan and their officers, directors, agents and employees.

4. The respondents, their officers, directors, agents and employees, be and they are hereby enjoined from doing the acts hereby prohibited and to do the acts hereby directed.

[*Definitions of Terms of Decree*]

5. The following terms, as used in this decree shall have the following meanings:

(a) "Person" shall mean a person, firm, corporation or association.

(b) "Dealer" shall mean a person who holds a franchise from, or approved by, the Manufacturer that provides for the purchase at wholesale of new automobiles made by the Manufacturer, and who resells the automobiles at retail.

(c) "Wholesale financing" shall mean the advancing by a finance company, as hereinafter defined, of money or credit to or for the account of a dealer to cover, in whole or in part, the cost of new automobiles ordered by the dealer at wholesale.

(d) "Retail financing" shall mean the purchase or other acquisition of retail time sales paper from dealers by finance companies, as hereinafter defined.

(e) "Finance charge" shall mean the difference between the cash delivered price of an automobile and the price of that automobile when sold on an installment payment plan, including or not including (as the plan may provide) insurance for the retail purchaser.

(f) "Finance company" shall mean a person engaged chiefly in wholesale financing or retail financing, or both.

(g) "Retail time sales paper" shall mean any conditional sale contract, chattel mortgage, lease, note or other instrument given to evidence or secure the obligation to pay the whole or any part of the price of automobiles sold by a dealer at retail.

(h) "A finance company" or "any finance company" shall include Respondent Finance Company.

(i) "Registered finance company" shall mean a finance company which shall be registered as provided in sub-paragraph (j) of paragraph 6 of this decree including Respondent Finance Company if it be a registered finance company.

(j) "Ford Motor Company" means Ford Motor Company, a corporation of the State of Delaware and its subsidiaries and successors. "General Motors Corporation" means General Motors Corporation, a corporation of the State of Delaware and its subsidiaries and successors, and "General Motors Acceptance Corporation" means General Motors Acceptance Corporation, a corporation of the State of New York and General Motors Acceptance Corporation of Indiana, Incorporated, a corporation of the State of Indiana, and their subsidiaries and successors.

[*Duties of Manufacturer*]

6. The Manufacturer:

(a) Shall permit any finance company or other person to pay for any automobile shipped or otherwise delivered by the Manufacturer to any dealer, upon written specific or continuing authority of the dealer;

[*Nondiscriminatory Assignments*]

(b) So long as the Manufacturer shall continue to give or assign to Respondent Finance Company or any other finance company, any document of title or lien in respect of such automobiles, it shall not refuse, upon written request of any other finance company, to make available or assign to it similar documents of title or lien in respect of automobiles similarly shipped or delivered to the dealer and paid for by the finance company upon substantially similar terms and conditions;

[*Nondiscriminatory Use of Space*]

(c) So long as the Manufacturer shall continue to furnish Respondent Finance Company or any other finance company space for maintaining an office in any place of business of the Manufacturer, it shall not refuse, upon substantially equivalent terms and conditions and upon written request of any other finance company that extends wholesale financing facilities to dealers operating under franchise of the Manufacturer, to furnish it space for maintaining an office in such place of business; provided that it shall not be a violation of this decree for the Manufacturer to furnish the same only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6;

[*Nondiscriminatory Informational Service*]

(d) So long as the Manufacturer shall knowingly continue to furnish to Respondent Finance Company or any other finance company the identity of or other information concerning dealers or prospective dealers, it shall not knowingly refuse to furnish corresponding information, upon substantially similar terms and conditions and upon specific or continuing request as to identity and specific but non-continuing request as to other information, to any other finance company whose territory includes the location of such dealer's or prospective dealer's place of business; provided that it shall not be a violation of this decree for the Manufacturer to furnish the same only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6, or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer;

[*Discriminatory Financing*]

(e) Except as provided by sub-paragraphs (j) and (k) of this paragraph 6,

(i) the Manufacturer shall not establish any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility or privilege extended by the manufacturer pursuant to such practice, procedure or plan if such service, facility or privilege or a service facility or privilege corresponding thereto, is not made available upon its written request to any other finance company upon substantially similar terms and conditions; and

(ii) so long as the Manufacturer shall continue to afford any service, facility or privilege not otherwise specifically referred to in this decree to Respondent Finance Company or any other finance company or companies, it shall not refuse to afford similar or corresponding services, facilities or privileges upon substantially similar terms and conditions and upon written request to any other finance company for the purpose of giving Respondent Finance Company or any other finance company or companies a competitive advantage in obtaining the patronage of dealers: provided that it shall not be a violation of this decree for the Manufacturer to afford such service, facility or privilege only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6, or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer;

the written request shall specify in each instance the particular service, facility or privilege desired;

(f) The Manufacturer shall not give or make available or deny or threaten to deny to any dealer any service or facility, or discriminate among its dealers in any other manner, for the purpose of influencing a dealer to patronize Respondent Finance Company or any other finance company, or registered finance companies;

[*Exclusive Financing Contracts*]

(g) The Manufacturer shall not enter into or further continue any contract or agreement with any dealer (1) which provides that the dealer shall patronize only Respondent Finance Company or any other finance company selected by the Manufacturer or registered finance companies; or (2) which requires the dealer to observe any plan for or rate of financing the pur-

chase and sale of automobiles designated by the Manufacturer;

(h) The Manufacturer shall not cancel or terminate any contract, franchise or agreement with any dealer, or threaten to do so, because of failure of such dealer to patronize Respondent Finance Company, or any other finance company, or because of the failure of the dealer to patronize registered finance companies;

(i) The Manufacturer shall not, except in each instance upon written request of the dealer or prospective dealer, arrange or agree with Respondent Finance Company or any other finance company that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize Respondent Finance Company or such other finance company; provided, however, that it shall not be a violation of this decree for the Manufacturer to assist any dealer or prospective dealer, because of said dealer's or prospective dealer's financial situation or requirements, by joint conference with him and a representative of a particular finance company, to obtain special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) from the particular finance company, and in part consideration of such special facilities or services, for such dealer or prospective dealer to arrange to do business with such finance company on an exclusive basis for a reasonable period of time as may be agreed between them:

[*"Registered" Finance Companies*]

(j) As used in this decree the word "registered" as applied to a finance company means a finance company that shall have done the following things and shall have filed a statement that meets the following requirements:

[*Statement of Registered Finance Company*]

1. The statement shall be signed and acknowledged by the finance company and sworn to by an officer thereof, and shall have been filed in this proceeding and a copy thereof certified by the clerk shall have been served on the Manufacturer.

2. The finance company shall not in any manner have withdrawn the statement or rendered it ineffective.

3. The court shall not have made an order to the effect that the finance company shall cease to be a registered finance company; or, if so, the finance company shall have obtained an order reinstating it as a registered finance company, or otherwise shall have become again a registered finance company.

4. The statement shall be in the following form:

"To Chrysler Corporation (hereinafter called the 'Manufacturer'):

"(A) This statement is made pursuant to sub-paragraph (j) of paragraph 6 of a decree of the United States District Court for the Northern District of Indiana, in a cause entitled *'United States of America v. Chrysler Corporation et al.,'* dated November 15, 1938.

"(B) The undersigned finance company, in acquiring retail time sales paper, arising from sales of automobiles, from dealers of the Manufacturer, wherever located, will conform to the following rules:

(1) If the finance company acquires retail time sales paper from a dealer of the Manufacturer on a finance plan which includes insurance to be arranged for by the finance company, the finance company shall (unless the insurance company to which the risk is submitted declines to write the risk) arrange for such insurance as the dealer represents to the finance company is to be arranged for by it and shall mail or cause to be mailed to the buyer a policy or certificate of insurance so arranged for within twenty-five days after the finance company acquires such retail time sales paper. Such policy or certificate shall recite the character of the coverage and the amount of the insurance premium;

(2) The finance company will not require or accept assignments of wages or salaries, or garnish wages or salaries to collect deficiency judgments in respect of automobiles sold for less than $1,000 and for private and non-commercial use unless, prior to repossession, it has requested the buyer to return the automobile to it and he has not done so;

(3) The finance company will not take any deficiency judgment where the retail purchaser of an automobile, sold for private and noncommercial use, has paid at least 50% of his note or other obligation, and will not collect from any retail

purchaser of an automobile, through deficiency or other judgments, any amount in excess of its actual losses and expenses upon the failure of such purchaser to pay his note or other obligation, and will pay to or credit to the account of such purchaser any surplus over the amount owing by him on his note or other obligation which the finance company or its nominee or its affiliated or subsidiary company may realize on the purchaser's note or other obligation and the automobile or any other security therefor;

(4) The finance company will not assign or transfer any retail times sales paper owned or held by it to any other person, except a dealer from whom the finance company acquired the paper on a full recourse basis rather than upon a non-recourse basis or upon the dealer's agreement to repurchase the automobile if repossessed, without limiting the rights, and creating an obligation in its assignee and his successors in interest, to proceed against the retail buyer only in the manner and to the extent that the finance company is authorized to proceed hereunder;

(5) The finance company will not make a higher charge, for granting an extension or rewriting a transaction than the approximate pro-rata equivalent of the original finance charge, or charge more than 5 per cent of the delinquent instalments for reinstating a delinquent account or charge more than its out-of-pocket expense plus a reasonable amount for the time of its employees as collection or repossession expenses;

(6) The finance company will not require the dealer to take a chattel mortgage or other lien on property other than the automobile purchased, as additional security for the payment for such automobile sold for private and noncommercial use; and will not accept an assignment from the dealer of such a chattel mortgage or other lien;

(7) The finance company will not represent to any person that it is, in any way, connected or affiliated with the Manufacturer, or that it has been approved, recommended or endorsed by the Manufacturer, or in any way ascribe to the Manufacturer or its dealers responsibility for, or authorization of, its acts; but this shall not prevent the finance company from stating if that be the case that it is a registered finance company, and at any time when a plan adopted by the Manufacturer is in effect this shall not prevent the finance company from stating if that be the case that it is a registered finance company and is offering financing service in accordance with the plan;

(8) The finance company will not intionally do any thing injurious to the good will of the Manufacturer or to the reputation of its products, or to the good will of its dealers except as may result from the assertion of any legal or contractual rights;

(9) The finance company will not without the consent of the Manufacturer disclose to any competitor of the Manufacturer information which it shall have received from the Manufacturer;

(10) The finance company will disclose to the purchaser whatever information is required to be disclosed by, and will otherwise comply with any further order of the court entered pursuant to paragraph 8 of the decree hereinbefore mentioned;

(11) The finance company will not violate any other reasonable rule hereinafter from time to time established by the Manufacturer, approved by the Department of Justice of the United States and incorporated herein by the further order of the United States District Court for the Northern District of Indiana, after notice by registered mail to all registered finance companies and notice in such form as the court may determine to be reasonable to other finance companies and interested parties and an opportunity for hearing to the persons so notified.

"(C) The area within which the finance company conducts its business is: [*insert either 'the United States' or the names of specific states, counties or cities*], and notwithstanding the designation of an area, the finance company nevertheless will comply with clauses (B) and (D) in all areas in which it may now or hereafter do business with dealers of the Manufacturer.

"(D) Until the effective date of any withdrawal of this statement by the finance company in the manner provided by paragraph 1 of sub-paragraph (k), or in the manner provided by paragraph 5 or by paragraph 6, of sub-paragraph (j), of paragraph 6 of said decree, all retail times sales paper, created after the effective date of any plan or plans or modification thereof and covering new automobiles made by the Manufacturer, acquired by the finance company from the Manufacturer's dealers (whether located in the area described in Clause (C) hereof or elsewhere), shall be acquired by it in accordance with the terms of any plan or plans of financing adopted by the Manufacturer as provided by said sub-paragraph (j) and then in effect; provided:

a. The finance charges included in such retail paper may be less than the finance

charges specified by such plan or plans or modification thereof and the other terms of such paper may be more favorable to the retail purchaser than the terms so specified; and b. the finance company may acquire retail time sales paper covering new automobiles made by the Manufacturer in which the retail purchaser of the automobile is required to pay a finance charge in excess of the finance charge specified in the plan so adopted or modification thereof, but only if the finance company shall promptly credit such retail purchaser on the time purchase price of the automobile with the amount of the excess. The words 'finance charge' as used in this statement shall mean the difference between the cash delivered price of an automobile and the price of that automobile when sold on an instalment payment plan, including or not including (as the plan may provide) insurance for the retail purchaser.

"(E) This statement is filed on behalf of, and shall bind, the undersigned finance company and all finance companies owned or controlled by the undersigned finance company and all finance companies which own or control the undersigned finance company or are under common ownership or control with it.

"(F) The address of the finance company's principal office is ....

....

.... Finance Company

By ....

President

Attest:

....

Secretary

State of
County of } ss.:

On this day of , 19 , personally appeared before me, a notary public, to me known and known to me to be the person who executed the foregoing statement, and who by me being duly sworn acknowledged and deposed that he is President of said corporation; that he executed the foregoing statement on its behalf; that he executed said statement by authority of the Board of Directors of said corporation and that the seal of said corporation was thereunto affixed by like authority.

....

Notary Public

State of
County of } ss.:

, being duly sworn, deposes and says that he is an officer, to wit the of , the finance company which executed the foregoing statement, and that said statement is in all respects true.

....

Signed and sworn to before me this day of , 19

....

Notary Public"

[Appropriate changes to be made for finance companies which are not corporations.]

[*Withdrawal of Statement*]

5. Any registered finance company may file with the court a notice in writing of its withdrawal of its sworn statement above mentioned, and serve upon the Manufacturer a copy of said notice, certified by the Clerk of the Court, and ninety days after such service or at such later date as may be stated in the notice, the finance company shall cease to be a registered finance company and the Manufacturer shall notify its deaders that such finance company has ceased to be a registered finance company.

[*New Rules; Notice*]

6. The Manufacturer shall notify each finance company, which makes written specific or continuing request therefor, by registered mail of every additional rule which is incorporated in the sworn statement as provided in sub-division (11) of clause (B) of sub-paragraph (j) of this paragraph 6. The notice shall set forth the provisions of the rule and the date, not less than thirty days after the date of mailing the notice, upon which the rule shall go into effect. Any registered finance company so notified may before that date file with the court notice in writing setting forth that it withdraws its sworn statement because it does not intend to be bound by said rule, and serve upon the Manufacturer a copy of said notice certified by the Clerk of the Court, and thereupon the finance company at once and without lapse of any time shall cease to be a registered finance company and the Manufacturer shall notify its dealers that said finance company has ceased to be a registered finance company.

[*Violation of Statement*]

7. The Petitioner, the Manufacturer or any registered finance company shall be entitled to make application to the court, for an order herein finding and adjudging that a registered finance company has failed to comply with its sworn statement, and jurisdiction of this cause is reserved for the entry of orders upon such applications as the facts and justice may require (after such notice and hearing as the court may direct) suspending or revoking the registration of any registered company or dismissing the application. If the order shall provide that such finance company shall cease to be a registered finance company indefinitely, the finance company may, not less than six months thereafter, apply to the court for an order reinstating it as a registered finance company, and jurisdiction of this cause is reserved to grant or deny such application, or grant it upon such terms and conditions, if any, as the court may determine for the purpose of assuring further compliance with such finance company's sworn statement. Upon the entry of an order finding that a finance company has failed to comply with its sworn statement, as aforsaid, if the Manufacturer shall have made the application for such an order, or upon service upon the Manufacturer of a copy of said order certified by the Clerk of the Court if another party shall have made such application, the Manufacturer shall notify its dealers of the entry and the terms of such order and shall treat said company as a company that is not a registered finance company or as the order of the court may require.

8. Withdrawal of its sworn statement by a registerd finance company and any order suspending or revoking the registration of any registered company or dismissing the application shall be applicable to all finance companies embraced by the sworn statement under clause (E) thereof.

[*Service of Papers*]

9. Service of all papers hereinbefore required to be made upon the Manufacturer shall be made personally upon an officer of the Manufacturer, or by registered mail to the Manufacturer, at its principal office now located in Highland Park, Detroit, Mich.

10. Service of all parers upon a finance company pursuant to this decree shall be made personally or by registered mail addressed to it at its principal office as shown in its statement.

[*Manufacturer's Advertising of Finance Companies*]

(k) The Manufacturer shall not, except as hereinafter provided, recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public; provided, however, that nothing in this decree contained shall prevent the Manufacturer in good faith:

(1) From adopting from time to time a plan or plans of financing retail sales of new automobiles made by the Manufacturer or from time to time withdrawing or modifying the same;

(2) From recommending to its dealers the use of such plans;

(3) From advising its dealers that such plans are available through all registered finance companies which have indicated their readiness to do business under the plan in such dealers' area or from advising the names of such companies;

(4) From advertising to the public and recommending the use of such plans;

(5) From advertising to the public that such plans are available through all registered finance companies which have indicated their readiness to do business under the plan in the area to which such advertisement is directed or from advertising the names of such companies.

1. The Manufacturer shall notify each finance company, which makes written specific or continuing request therefor by registered mail, of every plan and modification thereof that the Manufacturer shall adopt. The notice shall set forth the provisions of the plan or modification and the date, not less than thirty days after the date of mailing the notice, upon which the plan or modification shall go into effect. Any registered finance company so notified may before that date file with the court notice in writing, setting forth that it withdraws its sworn statement because it does not intend to be bound by said plan or modification, as the case may be, and serve upon the Manufacturer a copy of said notice certified by the Clerk of the Court, and thereupon the finance company at once and without lapse of any time shall cease to be a registered finance company and the Manufacturer shall notify its dealers that said finance company has ceased to be a registered finance company.

2. Nothing in this decree shall prevent the Manufacturer from obtaining such assurances as it may desire from one or more finance companies before or after adoption of any plan or modification that it or they will make such plan or modification available for at least a specified period of time; provided, however, that the Manufacturer may not give such finance company or finance companies, as consideration for such assurances, any consideration prohibited by this decree.

3. The adoption or modification of any plan under this sub-paragraph (k) shall not preclude any aggrieved finance company or any other aggrieved person, who considers that such plan or modification constitutes an unreasonablbe restraint of trade or commerce in automobiles under the Sherman Anti-trust Law from applying to this court to vacate such plan, and the court reserves jurisdiction to make an order upon such application approving or vacating such plan, upon the execution of proper bond against damages for an order of vacation subsequently reversed or vacated.

(l) The Manufacturer shall not use any information obtained from any dealer, his agents, representatives, servants and employees, either directly by examination or inspection of his books or records, or through financial, operating or other statements or reports or otherwise, nor shall it require disclosure of any such information, for the purpose of influencing such dealer to patronize Respondent Finance Company or any other finance company or group of finance companies. Nothing herein contained shall apply to the disclosure or use of any information at the dealer's written request or for the purpose of assisting the dealer, at his specific written request, to obtain wholesale or retail financing or special facilities or services from Respondent Finance Company or any other finance company designated by the dealer in such written request.

[*Duties of Financing Companies*]

7. The Respondent Finance Company:

(a) Shall not represent in any manner to any dealer that the Manufacturer requires him to patronize Respondent Finance Company, or that his failure to do so will result in the cancellation or termination by the Manufacturer of his contract, franchise of agreement, or in the loss of any advantage, service or facility furnished by the Manufacturer, or that Respondent Finance Company can obtain from the Manufacturer any facility, service or privilege which is not available to any other finance company, except (if Respondent Finance Company is a registered finance company) such services, facilities or privileges as result from the registration of a registered finance company, under paragraph 6 of this decree;

[*Payment of Dealer Reserves*]

(b) Until further order of this court pursuant to paragraph 8 hereof, shall pay to every dealer who ceases to do business with it the amount of all reserves standing to the credit of such dealer, less any off-setting indebtedness of such dealer, such payment to be made not later than thirty (30) days after liquidation of all of the retail paper acquired from such dealer, and shall comply with any provisions relating thereto contained in any further decree entered pursuant to paragraph 8 of this decree;

[*Wholesale Financing Contracts*]

(c) Shall not enter into any contract, agreement or understanding with any dealer, in connection with wholesale financing for which a separate charge is not made, which requires the dealer to deal with Respondent Finance Company in respect of retail financing of automobiles not financed at wholesale by Respondent Finance Company;

[*Manufacturer-Finance Company Joint Solicitation*]

(d) Shall not, except upon written request of the dealer or prospective dealer, arrange or agree with the Manufacturer that an agent of the Manufacturer and an agent of Respondent Finance Company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective dealer to patronize Respondent Finance Company; provided, however, that it shall not be a violation of this decree for Respondent Finance Company by joint conference with a dealer or prospective dealer and a representative of the Manufacturer to agree to furnish to such dealer or prospective dealer, because of his financial situation or requirements, special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business)

and in part consideration of such special facilities or services to arrange for the dealer or prospective dealer to do business with Respondent Finance Company on an exclusive basis for such reasonable period of time as may be agreed between them.

[*Effect of Any General Motors Decree*]

8. In the event that a final decree not subject to further review is entered by a court of competent jurisdiction in any proceeding hereafter instituted by the United States against General Motors Corporation and General Motors Acceptance Corporation, granting relief to the Government against said corporations upon allegations substantially identical with the allegations in Paragraph 18 of Section III of the petition herein, then and in that event the court shall have jurisdiction to enter its supplemental decree herein granting such relief, if any, against the Respondent Finance Company or any of them, with respect to the allegations of said paragraph of the petition, as justice may then require. Such proceeding shall be upon application of the United States and upon proper notice and opportunity for hearing to the respondents and the presentation of evidence (including evidence with respect to the other acts and practices of the Respondent Finance Company and the Manufacturer alleged in the petition and evidence of the acts and practices of other finance companies and the volume of business done by them) relevant in determining the legality under the Sherman Anti-trust Law of the acts and practices of the Respondent Finance Company alleged in Paragraph 18 of Section III of the petition and established before the court, considered in combination with any other acts and practices of the Respondent Finance Company and the Manufacturer alleged in the petition and established before the court, and relevant in determining what further decree, if any, is necessary in addition to this decree in order to require Respondent Finance Company thereafter to conduct its business in accordance with the Sherman Anti-trust Law in respect of the acts and practices alleged in said paragraph, reserving to each of the Respondent Finance Company the right to present all defenses in law or fact as to any of the matters tendered by the Government in such proceeding which would be open if this decree had not been entered, provided, however, that such supplemental decree shall be subject to review as fully as though entered as the final decree in an original non-jury action and shall be vacated upon motion of any party if not so reviewable.

9. The respondents shall not in combination or conspiracy do any act which this decree forbids or omit any act which this decree requires.

[*Proof of Alleged Violations of Paragraphs 6 and 7*]

10. Upon complaint by the petitioner that any respondent has failed to comply with the provisions of the foregoing sub-paragraphs (e), (f), (i) and (l) of paragraph 6, or of sub-paragraph (d) of paragraph 7 of this decree, and the defense of such respondent that the act or acts complained of were not done for the forbidden purpose or purposes, the burden shall be upon such respondent to prove that the act complained of was done for a purpose not forbidden.

[*Notice of Decree*]

11. The Manufacturer shall mail a copy hereof to its dealers, regional and district managers and field representatives in the continental United States and Respondent Finance Company shall mail a copy hereof to its zone, regional and branch managers in the continental United States; and said Manufacturer and Respondent Finance Company respectively shall within thirty (30) days after the entry of this decree file with this court an affidavit or affidavits showing the manner in which they severally shall have complied with this provision hereof.

[*Retail Time Sales Paper Commissions*]

12. The Respondent Finance Company shall not pay to any automobile manufacturing company and the Manufacturer shall not obtain from any finance company any money or other thing of value as a bonus or commission on account of retail time sales paper acquired by the finance company from dealers of the Manufacturer. The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company or any other finance company, and if it shall pay any money to Respondent Finance Company or any other finance company with the purpose or effect of inducing or enabling such finance company to offer to the dealers of the Manufacturer a lower finance charge than it would offer in the absence of such payment, it shall offer in writing to make, and if such offer is accepted it shall make, payment upon substantially

similar bases, terms and conditions to every other finance company offering such lower finance charges; provided, however, that nothing in this paragraph contained shall be construed to prohibit the Manufacturer from acquiring notes, bonds, commercial paper, or other evidence of indebtedness of Respondent Finance Company or any other finance company in the open market.

[*Nonentry of Any General Motors Decree*]

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1943 * requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order for decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

12a. It is a further express condition of this decree that:

(1) If the proceeding now pending in this court against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, or any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, is finally terminated in any manner or with any result except by a judgment of conviction against General Motors Corporation and General Motors Acceptance Corporation therin, then and in that event, every provision of this decree except those contained in this sub-paragraph (1) of this paragraph 12a of this decree, shall forthwith become inoperative and be suspended, until such time as restraints and requirements in terms substantially identical with those imposed herein, shall be imposed upon General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries either (a) by consent decree, or (b) by final decree of a court of competent jurisdiction not subject to further review, or (c) by decree of such court which although subject to further review continues effective. The court reserves jurisdiction upon application of any party to enter orders at the foot of this decree in accordance with the provisions of this paragraph.

(2) A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or nolo contendere by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purposes of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors

* [On December 21, 1940, Section 12 was modified by District Judge Slick, on motion of the United States, after argument and over objections of defendants, by changing the year from 1941 to 1942. The order of modification provided that, except as thusly modified, the original decree shall remain in full force and effect. Further modifications extending the date have been made, the most recent of which is an order of January 28, 1948, the text of which follows the decree, herein, extending the date to May 1, 1948.]

Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1040;

(3) After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporations by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:

(i) suspending each of the restraints and requirements contained in sub-paragraphs (d) to (f) and (h) to (l), inclusive, of paragraph 6 of this decree to the extent that it is not then imposed and until it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in sub-paragraphs (a), (c) and (d) of Paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree, or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the provisions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to sub-paragraphs (j) and (k) of paragraph 6 of this decree are different from said sub-paragraphs of this decree, then upon application of the respondents any provision or provisions of said sub-paragraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

(ii) suspending each of the restraints and requirements contained in the remaining subparagraphs (a), (b), (c) and (g) of paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of this clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining sub-paragraphs, and suspending each of the restraints and requirements contained in sub-paragraph (b) of Paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its subsidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement act or practice prohibited to Respondent Finance Company by said sub-paragraph (b) of Paragraph 7;

(iii) suspending the restraints of sub-paragraph (d) of paragraph 7 of this decree as to Respondent Finance Company in the event that the restraints of sub-paragraph (i) of paragraph 6 of this decree are suspended as to the Manufacturer;

(4) The right of the respondents or any of them to make any application for the suspension of any provision of this decree in accordance with the provisions of this paragraph 12a and to obtain such relief is hereby expressly granted.

In the event that at any time prior to the date when General Motors Corporation has permanently divested itself of all ownership and control of and interest in General Motors Acceptance Corporation, General Motors Acceptance Corporation shall make available to dealers of General Motors Corporation in any area a finance charge, on all or any class of automobiles sold by dealers of General Motors Corporation, less than the finance charge then generally available to dealers of the Manufacturer within such area, nothing in this decree shall prevent the Manufacturer from making, and the Manufacturer may make, adjustments, allowances or payments to or with all of its dealers in such area who agree to reduce to an amount approved by the Manufacturer (but not less than that made available by General Motors Acceptance Corporation) the finance charges which such dealers of the Manufacturer in such area receive from any class of retail purchasers of automobiles, provided that such adjustments, allowance or payments shall not discriminate among such dealers in such area.

[*Subsequent Anti-Trust Violations*]

13. This decree shall not be pleaded in bar by the respondents in any action under the

Anti-Trust Laws instituted by the petitioner against them or any of them in this court or in a court in any other judicial district as to matters arising after the entry of this decree; provided, however, that this paragraph shall not apply to matters which are covered by this decree or which form a part of the cause of action herein or which are a continuance or repetition of acts or practices in which the respondents now engage which form a part of the cause of action herein.

[*Retention of Jurisdiction*]

14. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the court at any time for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification thereof (including, without limitation, any modification upon application of the respondents or any of them required in order to conform this decree to any Act of Congress enacted after the date of entry of this decree), for the enforcement of compliance therewith, the punishment of violations thereof, and the carrying out of the provisions of sub-paragraphs (j) and (k) of paragraph 6 hereof, and the October, 1938 Term of this court is hereby extended indefinitely for such purposes.

[*Unlawful Practices by Competitors*]

15. It is hereby further provided that if it shall appear to the court upon application of any respondent that, (A) in any twelve (12) months' period after the date of entry of this decree, any present or future competitor of the Manufacturer other than General Motors Corporation or Ford Motor Company shall have sold in the United States, or any State thereof, a quantity of automobiles that shall equal or exceed 25% of the automobiles sold by the Manufacturer in the United States or said State in said period, and (B) that such competitor is doing or engaging in any of the acts, practices, procedures or things then prohibited hereunder or is failing to do or engage in any act, practice, procedure or thing required hereunder, and (C) that the doing or engaging in said acts, practices, precedures or things, or the omission of them, as the case may be, by such competitor has resulted or threatens to result in placing the Manufacturer at a competitive disadvantage in the sale of automobiles as against such competitor, and (D) that the petitioner herein has not obtained or is not proceeding with due diligence by civil or criminal proceedings to obtain an adjudication of the illegality of such acts, practices, procedures or things so performed or engaged in, or omitted to be performed or engaged in, as the case may be, under the Anti-Trust Laws, the court upon application of the respondents or any of them will enter its further order and decree providing that the provisions of this decree not so imposed upon or sought to be adjudicated against such competitor shall be inoperative and that they shall have no future force or effect in the United States or said State, as the case may be, and the right of the respondents to make such applications and to obtain such relief is hereby expressly granted.

It is hereby further provided that if it shall appear to the court upon application of any respondent that (A) in any twelve (12) months' period after the date of entry of this decree any present or future competitor of Respondent Finance Company other than General Motors Acceptance Corporation or Commercial Investment Trust Corporation or Universal Credit Company shall have financed the retail sale of a quantity of automobiles in the United States or any State thereof that shall equal or exceed 25% of the automobiles the sale of which was financed by Respondent Finance Company in the United States or said State in said period, and (B) that such competitor is doing or engaging in any of the acts, practices, procedures or things then prohibited hereunder or is failing to do or engage in any act, practice, procedure or thing required hereunder, and (C) that the doing or engaging in of said acts, practices, procedures or things, or the omission of them, as the case may be, by such competitor has resulted or threatened to result in placing the Respondent Finance Company at a disadvantage in financing the sale of automobiles as against such competitor, and (D) that the petitioner herein has not obtained or is not proceeding with due diligence by civil or criminal proceedings to obtain an adjucation of the illegality of such acts, practices, procedures or things so performed or engaged in, or omitted to be performed or engaged in, as the case may be, under the Anti-Trust Laws, the court upon application of the respondents or any of them will enter its further order and decree providing that

the provisions of this decree not so imposed upon or sought to be adjudicated against such competitor shall be inoperative and that they shall have no future force or effect in the United States or said State, as the case may be, and the right of the respondents to make such applications and to obtain such relief is hereby expressly granted.

[*Scope of Decree*]

16. Nothing in this decree shall limit the control by the Manufacturer of a subsidiary or limit the control by Respondent Finance Company of any subsidiary or affiliated company.

[*State Law Obligations*]

17. Whenever obligations are imposed upon the respondents by the laws or regulations of any state with which the respondents by law must comply in order to do business in such state, the court upon application of the respondents or any of them will from time to time enter orders relieving the respondents from compliance with any requirements of this decree in conflict with such laws or regulations and the right of the respondents to make such applications and to obtain such relief is expressly granted.

[*Future Vacation of Decree*]

18. After four years after the date of the entry of this decree any respondent may apply to the court to vacate this decree or any supplemental decree entered pursuant to paragraph 8 hereof or to vacate or modify any provision thereof on the ground that the commission or omission of any of the agreements, acts or practices herein prohibited or required, under the economic or competitive conditions existing at the time of such application, does not constitute an unreasonable restraint of trade or commerce among the states in automobiles within the meaning of the Sherman Anti-Trust Law as amended to the date of such application, regardless of whether or not such economic or competitive conditions are new or unforeseen. Jurisdiction of this cause is retained for the purpose of granting or denying such applications as justice may require and the October, 1938, Term of this court is hereby extended indefinitely for such purpose and the right of the respondents to make such applications and to obtain such relief is expressly granted. The provisions of this paragraph are in addition to, and not in limitation of, the provisions of any other paragraph of this decree.

[*Foreign Business Excepted*]

19. This decree shall have no effect with respect to respondents' acts and operations without the continental United States or to their acts and operations within the continental United States relating exclusively, to acts and operations without the continental United States.

[*Effective Dates*]

20. This decree shall go into effect one hundred and twenty days after the date of entry hereof, except as to the provisions of paragraphs 8, 11, and 12 hereof, which said paragraphs shall take effect as therein provided.

Final Decree—In Modification of Final Decree as Modified

SWYGERT, D. J.: This matter having been submitted to the Court by stipulation by counsel for the United States of America and by counsel for the Chrysler Corporation:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the final decree herein as modified by this Court on December 21, 1940, February 16, 1942, December 26, 1942, December 30, 1943, December 20, 1944, December 31, 1945, June 29, 1946, August 1, 1946, September 12, 1946, January 7, 1947, February 14, 1947, May 17, 1947, August 27, 1947, and December 1, 1947, is hereby further modified so that the second paragraph of Section 12 thereof shall read as follows:

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before May 1, 1948, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any fi-

nance company or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that (1) any party herein may, upon motion, call this matter on for full hearing *de novo* with the same force and effect as though this order or decree (hereinafter called "order") had never been entered, (2) by the filing of such motion the consent of the parties hereto shall be revoked and this order shall be and become automatically vacated fifteen days after the filing of such motion, and (3) the matter shall be heard as upon original application by the United States herein for such order; *and Provided further,* that, except to the extent necessary to give effect to the extension of said date as herein provided, (1) the making or entry of this order, as well as of the stipulation upon which it is entered, shall be without any prejudice whatever to the legal or equitable rights of the respondents, (2) the decree herein shall be interpreted as though this order and said stipulation had never been made, and (3) if any party or court shall interpret this order or the said stipulation as in any manner whatever limiting, modifying, or otherwise prejudicing said rights of respondents, then this order and the said stipulation shall be taken to be of no force or effect as if never agreed to or entered herein, and this order shall then automatically become vacated and the consent of the parties revoked *ab initio.*

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that except as thus modified the modified decree as previously entered shall stand in full force and effect.

[¶ 62,222] Ralph Greenleaf v. The Brunswick-Balke-Collender Co.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 6776. Filed December 8, 1947.

Clayton Antitrust Act

Suit for Damages and Injunction—Motion for Summary Judgment.—An action brought by a professional billiard player, charging that a manufacturer of billiard equipment, as a part of an unlawful plan to monopolize the billiard equipment industry, failed to invite plaintiff to participate in a national billiard tournament sponsored by it, is upheld as against a motion for summary judgment. A combination may be liable for acts which, but for the fact that it is conducting an unlawful monopoly, it could perform with impunity. An illegal monopoly cannot discriminate against or refuse to deal with a person without sufficient cause. Plaintiff is entitled to introduce evidence to prove that defendant was not justified in refusing to invite him to participate in the tournament. It does not matter that the acts done in pursuance of the monopoly which injure plaintiff are not themselves a part of interstate commerce.

See the Clayton Act Annotations, Vol. 1, ¶ 2024.48, 2036.

For plaintiff: Francis T. Anderson, Philadelphia, Pennsylvania.

For defendant: Philip H. Strubing, Evans, Bayard & Frick, Philadelphia, Pennsylvania.

[*Nature of Action*]

GANEY, J.: This is a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, by the defendant in an action in which the plaintiff seeks threefold damages in the amount of One Hundred Thousand Dollars ($100,000.00) and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U. S. C. A. Secs. 15 and 26.

The plaintiff, Ralph Greenleaf, is and has been for many years a professional carom and pocket billiard player and has participated in many exhibition matches and world's championship tournaments; he has been publicly recognized as the world's champion pocket billiard player a number

of times and is considered to be one of the top ranking billiard players of our time. The defendant, The Brunswick-Balke-Collender Company, is engaged in the business of manufacturing, selling and servicing billiard tables and various supplies and equipment incident thereto among the several States.

The complaint alleges that for some time prior to December of 1946, the defendant, with the intent and effect of achieving a monopoly in the billiard equipment business, has eliminated by means forbidden by the Anti-Trust Laws[1] all substantial competitors; that in order to increase the interest in billiards and at the same time to maintain and further its monopoly, the defendant, from time to time, conducted billiard tournaments in which the outstanding billiard players in the country competed for prize moneys, and that the winner of these tournments has been publicly recognized as the world's champion; that in order to conceal from the public its position of complete dominance over the tournaments, the defendant conducted them through The Billiard Association of America, an Illinois non-profit corporation organized for the avowed purpose of stimulating interest in billiards, which it controls; that the players who are to compete in such tournaments are chosen or invited by the president of the Billiard Association of America and they usually consist of the five players who made the best record in the previous tournament and three other players whose ability, in his judgment, merited participation; that as a condition precedent to their taking part in the tournament, the players are required to sign an agreement which, among other things, provides that all tournament games shall be played on equipment sold by the defendant and that "Permission is given The Brunswick-Balke-Collender Company to use the names of players for blanket testimonial purposes for a period of one year"; that from December 3 to 11, 1946, the defendant, through the Billiard Association of America, held one of its publicly advertised world's championship pocket billiard tournaments; that immediately prior to and during the tournament, the plaintiff, being publically regarded as such, was able and willing to compete in the tournament, but his request to participate therein has been refused by the Association; that a large part of a professional billiard player's earnings are derived from his performances in exhibition matches staged in various parts of the country, and that the players most in demand are those who took part and established a good record in the last world's championship tournament; that as a result of the Association's refusal, the plaintiff's reputation as a professional billiard player has been injured and his earning power appreciably diminished for the reason that in the public's mind all of the better billiard players in the country are presumed to take part in the tournament and the failure of a former world's champion to enter the tournament is regarded by the public as an indication of his loss of ability and skill.

The reason given by the defendant for its refusal to invite the plaintiff to compete in the tournament is that his participation therein, as shown by his behavior in past events, will be detrimental to the game. This is denied by the plaintiff who contends that the real reason for his being barred is because during the spring and summer of 1946, he went on a tour and played in exhibition matches arranged by a wholesale dealer of billiard equipment not manufactured by the defendant.

For the plaintiff to succeed in this action, he must establish (1) that the defendant has violated the Anti-Trust Laws, and (2) that he has sustained damage to his business or property proximately resulting from the acts of the defendant which constitute a violation of the Laws. *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885. In support of its motion for summary judgment, the defendant insists that the manner in which it conducted the tournaments, including the conditions it imposed on the players and the exclusion of the plaintiff from participation in one of them for any reason it saw fit, was not a violation of the Anti-Trust Laws. Therefore it argues that the damage, if any, sustained by the plaintiff was not the proximate result of an act forbidden by the Laws. The plaintiff concedes that the acts of the defendant in conducting the tournaments, standing alone, do not constitute a violation of the Laws. However, he takes the position that, viewing the defendant's action as a whole, since it has unlawfully monopolized the billiard equipment business, its reaching out and taking control of professional billiard tournaments and its barring him therefrom without just cause was in furtherance of its unlawful monopoly. As an explanation of how his being barred

[1] 15 U. S. C. A. Secs. 1-7, 12-27.

assisted the defendant in furthering or maintaining its monopoly, the plaintiff asserts that it set an example and provided a warning for the other players who competed in the tournament in that if they played in public on billiard equipment not manufactured by the defendant they too would not be invited to take part in the tournaments to be held in the future; in this way the defendant insured to itself from year to year the blanket use of the names of the outstanding billiard players in the country for endorsement purposes so that it could proclaim in advertisements that they used the defendant's equipment exclusively.

Of course damages are not awarded to a plaintiff for loss to his business or property as the result of any act done by an illegal monopoly; the act must have some reasonable connection with the furtherance or maintenance of the monopoly. See *United Copper Securities Co. v. Amalgamated Copper Co.*, 2 Cir. 232 Fed. 574, 576-7; *Alexander Melburn Co. v. Union Carbide and Carbon Corporation*, 4 Cir., 15 F. (2d) 678, cert. den. 273 U. S. 750. Once it becomes apparent, as in the case before us, that the particular act or acts complained of as causing the injury are connected with or part of an unlawful plan to monopolize, the court will not segregate them to determine if they have gone beyond the bounds of legality; it will view the defendant's acts as a whole, for the parts take on the coloring of the general plan or scheme. *Swift & Company v. United States*, 196 U. S. 375; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Standard Oil Co. v. United States*, 283 U. S. 163, 169; *Marienelli v. United States*, D. C. N. Y., 227 Fed. 165, 170; 36 Am. Jur. Sec. 148. A combination may be liable for acts [which], but for the fact that it is conducting an illegal monopoly, it could perform with impunity. Thus an illegal monopoly cannot discriminate against or refuse to deal with a person without sufficient cause. *Binderup v. Pathe Exchange*, 263 U. S. 291; *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U. S. 359, 375; 36 Am. Jur. Sec. 24. The fact that the plaintiff is not engaged in interstate commerce will not aid the defendant. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; nor does it matter whether the acts done in pursuance of the monopoly which injure the plaintiff are themselves a part of intrastate commerce. *Swift & Company v. United States, supra; Nash v. United States*, 229 U. S. 373.

Finally the defendant argues that, even assuming its billiard equipment business is an unlawful monopoly, the plaintiff, as shown by his answers to interrogatories, will not be able to prove by direct evidence that it was not justified in refusing to write him to compete in the tournament. This may well be, but the plaintiff should not be prevented from proffering evidence to establish a fact which the jury may infer from the circumstances. *Eastman Kodak Co. v. Southern Photo Material Co., supra*, p. 375. For if the facts are as they are alleged in the complaint, which for the purpose of this motion we must assume them to be (*Zell v. American Seating Co.*, 2 Cir., 138 F. (2d) 641; *Ramsouer v. Midland Valley R. Co.*, 8 Cir., 135 F. (2d) 101, 105-6), the defendant is unjustified in barring him from the tournament. Therefore we think that the sound advice given in *Doehler Metal Furniture Co. v. United States*, 2 Cir., 149 F. (2d) 130, 135-136, regarding the great care to be used before granting motions for summary judgment where there is the slightest doubt as to the facts, should be followed.

Motion denied.

[¶ 62,223] United States v. Scovill Manufacturing Company.

In the United States District Court for the District of Connecticut. Civil Action No. 1853. February 17, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Consent Judgment—Antitrust Violations Enjoined—Patent Licensing Required.—A consent judgment entered in a civil action charging a manufacturer of button fastening machinery with attempting to monopolize the button fastening business by means of illegal leasing agreements and by refusing to lease its machinery enjoins defendant from: leasing or selling its machinery on the condition that the lessee or purchaser shall not use the fasteners of a competitor; conditioning the availability of fastening machinery upon the purchase of fasteners from defendant; removing machinery from the premises of any

lessee because such lessee purchases fasteners from competitors of defendant; conditioning any license or immunity to practice any invention related to fastening machinery claimed in any United States patent upon the purchase of fasteners or any similar product from defendant or from any other designated source; instituting or threatening to institute, or maintaining, any proceeding for infringement or for damages or royalties alleged to have accrued prior to the date of this judgment under any existing patent; and participating in any agreements or arrangements having the purpose or effect of continuing, reviving or renewing any of the antitrust violations alleged in the complaint, paragraphs 6 to 8. Defendant is required to grant to any applicant a non-exclusive, non-assignable and unrestricted license, at a uniform, reasonable royalty under any and all existing patents listed herein.

See the Sherman Act Annotations, Vol. 1, ¶ 1270.401, 1590, and the Clayton Act Annotations, Vol. 1, ¶ 2023.11; and see comment on complaint, '44-'47 Court Decisions Supp. 54,103.

For plaintiff: John F. Sonnett, Assistant Attorney General; Manuel M. Gorman, Sigmund Timberg, Richard B. O'Donnell; Tom C. Clark, Attorney General; Wendell Berge, Assistant Attorney General; Robert A. Nitschke, Special Assistant to the Attorney General; Adrian W. Maher, U. S. Attorney (Hartford, Conn.); Grant W. Kelleher, Lawrence W. Somerville, Special Assistants to the Attorney General.

For defendant: Frederick H. Wiggin, Wiggin and Dana, New Haven, Connecticut, Francis P. Reeves, Waterbury, Conn.

Final Judgment

HINCKS, J.: The plaintiff, United States of America, having filed its complaint in this action on July 30, 1946; defendant, Scovill Manufacturing Company, having appeared and filed its answer to said complaint denying the substantive allegations thereof; and the plaintiff and said defendant by their respective attorneys having consented to the entry of this final judgment herein;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and without any admission by any party with respect to any such issue, and upon the consent of the parties hereto, the Court being advised and having considered the matter, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties to this judgment; the complaint states a cause of action against defendant, Scovill Manufacturing Company, under the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said Act being commonly known as the "Sherman Anti-trust Act," and under the Act of Congress of October 15, 1914, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," amendatory thereof and supplementary thereto, said Act being commonly known as the "Clayton Act."

II

[*Terms Defined*]

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(a) "Fasteners means tack-attached or staple-attached buttons, rivets, burrs, and snap fasteners for the fastening of clothing.

(b) "Fastening machinery" means machinery and accessories for attaching fasteners to clothing.

(c) "Existing patents" means all presently issued United States letters patent owned or controlled by defendant, Scovill Manufacturing Company, or under which it has power to issue licenses or sublicenses, relating to fastening machinery, consisting of the following numbered United States patents:

1,620,468	2,230,795
1,809,322	2,248,086
1,836,887	2,248,087
1,860,148	2,301,547
1,879,895	2,310,007
1,913,648	2,310,008
1,975,413	2,329,047
2,067,225	2,345,476
2,071,506	2,345,640
2,071,507	2,354,717
2,134,404	2,361,688
2,136,536	2,373,436
2,160,146	2,406,516
2,164,743	

and renewals, reissues, divisions and extensions of any such patent.

III

[*Applicability of Provisions*]

The provisions of this judgment applicable to defendant, Scovill Manufacturing Company, shall apply to each of its subsidiaries, successors, and assigns, and to each of its officers, directors, agents, nominees, employees, and to any other person acting under, through or for such defendant.

IV

[*Practices Enjoined*]

Defendant, Scovill Manufacturing Company, be and hereby is enjoined and restrained from:

A. Leasing or making any sale or contract, or adhering to any contract for the sale or lease of fastening machinery, whether patented or unpatented, for use or resale within the United States, or any territory thereof, or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or from fixing a price charged therefor or discount from or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not purchase, use or deal in the fasteners of a competitor or competitors of defendant, Scovill Manufacturing Company.

B. Conditioning the availability of fastening machinery or parts or repairs thereof upon the securement of fasteners from the defendant, Scovill Manufacturing Company, or any other designated source.

C. Removing fastening machinery from the premises of any lessee because such lessee purchases, uses or deals in fasteners manufactured or sold by any person other than defendant.

D. Engaging in, or participating in, contracts, agreements, understandings or arrangements having the purpose or effect of continuing, reviving, or renewing any of the violations of the anti-trust laws alleged in paragraph 6 to 8 inclusive, in the complaint herein.

E. Conditioning any license or immunity, expressed or implied, to practice any invention related to fastening machinery claimed in any United States patent by the tying of any license or immunity for such invention to the purchase or securement of fasteners or any similar product or article from the defendant, Scovill Manufacturing Company, or any other designated source.

F. Instituting or threatening to institute or maintaining any suit, counter-claim or proceeding, judicial or administrative, for infringement or to collect charges, damages, compensation or royalties alleged to have accrued prior to the date of this judgment under any existing patent.

V

[*Licensing Required*]

Defendant, Scovill Manufacturing Company, be and hereby is directed to grant to any applicant making a written request therefor a non-exclusive, non-assignable and unrestricted license, save for and at a uniform reasonable royalty, under any or all existing patents as listed in Section II (c). Any applicant for such license who fails to agree with defendant, Scovill Manufacturing Company, upon a reasonable royalty may apply to this court upon thirty (30) days' notice to defendant, Scovill Manufacturing Company, and to the Attorney General at Washington, D. C., to determine the reasonable royalty for such license.

VI

[*Webb-Pomerene Act*]

Nothing in this judgment shall prevent defendant, Scovill Manufacturing Company from availing itself of the benefits of (a) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, (b) the Act of Congress of 1937, commonly called the Miller-Tydings Proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," or (c) save as elsewhere in this judgment provided of the patent laws.

VII

[*Inspection to Secure Compliance*]

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and upon reasonable notice to the defendant, Scovill Manufacturing Company, made to its principal office, be permitted, subject to any legally recognized privilege (1) access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in

the possession or under the control of said defendant relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; provided, however, that no information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings, to which the United States is a party, for the purpose of securing compliance with this judgment, or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification, or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment or violations thereof.

[¶ 62,224] **Carl E. Ring v. Harold Spina, et al.**

In the United States Circuit Court of Appeals for the Second Circuit. No. 138—October Term, 1947. Docket No. 20838. Decided March 1, 1948.

Sherman Antitrust Act

Civil Suit for Damages—Appeal from Order Striking Cause from Jury Calendar—Legal Issues Triable by Jury.—Plaintiff sued for treble damages and other relief for acts of defendant playwrights in preventing production by him of a play in which he had invested. On appeal from a denial of a temporary injunction pending trial, the court reversed for the issue of a temporary injunction. On appeal from an order denying jury trial notwithstanding plaintiff's claim therefor, it is held that, inasmuch as the allegations of the complaint stress financial damage, and since no mention is made of equitable rights or remedies, the action is basically one for legal damages, triable by jury on timely demand of a party. An order striking the cause from the jury calendar is reversed. Motions to dismiss plaintiff's appeal are denied.

See the Sherman Act annotations, Vol. 1, ¶ 1640.253, 1640.634; see also prior opinions reported in '44-'47 Court Decisions Supp. at ¶ 57,278, 57,347.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Carl E. Ring against Harold Spina, Edward Heyman, Walter Hannan, Edmund Pauker, and The Dramatists' Guild of the Authors' League of America, Inc., for treble damages under the Sherman Anti-Trust Act, as amended, 15 U. S. C. A. § 15, and for other relief in connection with agreements among the parties for the production of a dramatic musical composition called "Stovepipe Hat." From an order striking the cause from the jury calendar, plaintiff appeals. Defendants file motions to dismiss the appeal. Motions denied and order reversed.

Alfred S. Julien, New York City, for plaintiff-appellant.

Philip Wittenberg, New York City (Wittenberg, Carrington & Farnsworth, New York City, on the brief), for defendants-appellees Spina, Heyman, Hannan, and Pauker.

Greenbaum, Wolff & Ernst, New York City (Jonas J. Shapiro and Milton Ross, New York City, of counsel), for defendant-appellee The Authors' League of America, Inc., sued herein as The Dramatists' Guild of the Authors' League of America, Inc.

Before AUGUSTUS N. HAND, CLARK and WOODBURY, Circuit Judges.

[*Nature of Action*]

CLARK, C. J.: This action was before us previously on appeal from a denial of a temporary injunction pending trial. Plaintiff, suing under the Sherman Antitrust Act, 15 U. S. C. A. § 1 *et seq.*, claimed treble dam-

ages and other relief for injuries due to the acts of the defendants in preventing production by him of a dramatic musical composition called "Stovepipe Hat," in which he had invested heavily. On the previous appeal we held that there was sufficient *prima facie* showing of joint acts in restraint of trade to require the holding of matters in *statu quo* pending trial and without the immediate reference to arbitration which defendants were seeking. Accordingly we reversed for the issue of a temporary injunction. *Ring v. Spina,* 2 Cir., 148 F. 2d 647. The present appeal is from an order denying jury trial notwithstanding plaintiff's claim therefor; for as the case took its leisurely course through the district court, slowly advancing toward the head of the jury calendar, the court granted defendants' motion to strike the case from that calendar and plaintiff again appealed.

The action was originally instituted on June 14, 1944, at which time plaintiff also filed his jury demand. Answers were filed in July, 1944. Then—curiously, in view of the limitation of such motions to the period before answer, F. R. 12(e)—there were various motions for bills of particulars, one bill, indeed, being served pursuant to an order by consent on August 30, 1945, and a later motion being denied on November 2, 1945. On January 15, 1947, defendants made their motion for an order "striking this cause from the jury calendar of this Court" or, in the alternative, for orders separating the legal and equitable issues, the latter to be tried by the court without a jury, or directing trial by the court of the issue of violations of the Antitrust Act, with the issue of damage alone, if violation was found, to be thereafter referred to a jury. On January 20, 1947, the court made its order that the motion be granted "to the extent of striking this cause from the jury calendar of this Court," with a further provision giving plaintiff leave, "if he be so advised," to amend his complaint within ten days "so as to state a cause of action at law for damages for violation of the anti-trust laws of the United States." Plaintiff, however, took his appeal without adopting the court's suggestion. The individual defendants and the corporate defendant have separately made motions to dismiss the appeal, as not from a final order within the appellate jurisdiction of this court. We must consider these motions, therefore, before we pass to consideration of the appeal on the merits.

[*Order Not Final*]

Clearly, as the order discloses, the district court did not intend it to be final and it cannot be so considered. Appealability therefore rests entirely upon the ground that it is to be considered in substance the grant of an injunction against an action at law and hence reviewable under 28 U. S. C. A. § 227, as interpreted by *Enelow v. New York Life Ins. Co.,* 293 U. S. 379, and *Ettelson v. Metropolitan Life Ins. Co.,* 317 U. S. 188. The *Enelow* case was decided before the union of law and equity achieved by the federal rules of civil procedure in 1938. It held appealable as such an injunction an order striking from the law side of the court, and thus from trial by jury, an action to recover on an insurance policy wherein the company had filed an affidavit of defense alleging fraud and praying cancellation of the policy. The *Ettelson* case presented essentially the same situation after adoption of the rules. The order it held appealable was that the counterclaim there filed should be heard and disposed of by the court sitting in equity prior to trial of the issue raised by the complaint and answer in the action at law. The Supreme Court refused to accept the contention that the union achieved by the federal rules had made the *Enelow* ruling obsolete, saying that the relief afforded by § 227 was not restricted by the terminology used, but looked to the substantial effect of the order made. Procedural experts have criticized this result as an unnecessary resurrection of procedural fictions, *cf.* 3 Moore's Federal Practice, 1947 Cum. Supp., § 39.01, pp. 29-35; but for our purposes we must of course accept it as gloss upon the statute, intended to promote prompt settlement in a case of the important question of form of trial.[1]

[1] The criticism has pointed out that although basic the jury-trial issue may either become moot as the trial proceeds or become so clearly required as to be settled unhesitatingly by the court by later order. *Beaunit Mills v. Eday Fabric Sales Corp.,* 2 Cir., 124 F. 2d 563, 565; 55 Harv. L. Rev. 861; 20 Tex. L. Rev. 619. Thus here the district court's suggestion of an amendment indicates no intent to deprive the plaintiff of a jury finally or arbitrarily. Apparently the court was looking for a separate statement of claims, which is largely a matter of trial discretion—even though there is no basis in modern procedure for finding a dichotomy of "causes of action" between law and equity. *Cf. Original Ballet Russe v. Ballet Theatre,* 2 Cir., 133 F. 2d

[*Order Held Appealable*]

Defendants assert that, using preamalgamation analogies as we must under the Supreme Court's interpretation, we do not have here the case of a chancellor enjoining an action at law, but rather that of a chancellor making an order in an equity case already pending before him, as described in *Beaunit Mills v. Eday Fabric Sales Corp.*, 2 Cir., 124 F. 2d 563, 564. It may well be that, if we were to hold the action predominantly equitable in character, our decision should be a dismissal of the appeal, rather than affirmance of the order. However important such a distinction might be for the science of the law, the parties would presumably view it as somewhat academic, since it would be but another way of stating our decision upon the merits. Obviously the question of jury trial is here inextricably intertwined with that of appealability. Since, as later developed, we view the action as one of legal aspect, entitling the plaintiff to a jury trial on demand, our case is clearly within the *Ettelson* ruling and the order is appealable. The Dramatists' Guild urges further that, whatever the situation as to the individual author defendants, the claim against it is only of an equitable nature to prevent its enforcement of its Minimum Basic Agreement. This it has developed as a defense in its answer, but it is not the theory of the complaint. That clearly charges this defendant, as well as the others, with actionable wrongs under the Sherman Act, for which plaintiff can recover treble damages. It is of course the plaintiff's allegations which determine the case to be presented, and hence there is no ground for a differentiation among the defendants. Consequently both motions must be denied.

[*Question of Jury Trial*]

The question of jury trial, too, must be decided upon the allegations of the complaint. As pointed out in our eariler opinion, it is a lengthy and verbose document of some fifty-three paragraphs. It shows that the plaintiff, a lawyer, was induced to put $50,000 into the production of this musical play during its tryout stages at New Haven and Boston, preparatory to its being taken to Philadelphia and to New York City. Three of the four individual defendants are the authors of the play, and the fourth is the agent of the authors. To keep the show going, plaintiff was required to put up an additional $75,000 and to sign the Guild's Minimum Basic Agreement. This agreement limits contracts by both managers and authors to those made under its own extensive terms, including such requirements as that managers shall be in good standing with the Guild, that its scale of minimum royalties shall be observed, and that all disputes be submitted to arbitration in the manner therein provided. A dispute having arisen as to changes urged by plaintiff, the authors took the position that he had breached the Basic Agreement by making changes without the consent of the authors and hence that the production contract was terminated. The play being thus forced to close, the authors demanded arbitration of the dispute pursuant to the arbitration clause of the Basic Agreement. The complaint, in stating these asserted facts with detail, alleged in several places the great damage and injury plaintiff had suffered and his monetary loss. Finally in the fifty-third paragraph it alleged that he had been damaged in the amount of $140,000 as to each of the defendants except Hannon. (With Hannon, one of the authors, he had no dealings and therefore claimed only the right to produce the show.) These various allegations stressing financial damage, together with the absence of any stress or even mention of equitable rights or remedies, stamp the complaint proper as basically one for legal damages.

[*Prayers for Relief*]

If, in addition, we turn to the prayers for relief for indications of the pleader's intent —though, as we pointed out before, 148 F. 2d at 653, these would not limit recovery at the trial in view of F. R. 54(c)—we must reach the same result. For the first three emphatically stress the same contention: First is a claim of $140,000 against each defendant except Hannon; second is the demand for this amount trebled to make $420,000; and third is an additional claim for a $1,500 deposit with the Guild, to be

187; *Munson Line v. Green*, 2 Cir., Jan. 5, 1948; *Reeves v. Beardall*, 316 U. S. 283, 285; Clark, *Code Pleading*, 2d Ed. 1947, 137, 146-148, 444, 463, 475; F. R. 10(b). And the grant of the right of interlocutory appeal does not settle all issues, *e. g.*, jury waiver, as *cf. Bereslavsky v. Caffey*, 2 Cir., 161 F. 2d 499, certiorari denied *Caffey v. Bereslavsky*, 68 S. Ct. 82, and *Bereslavsky v. Kloeb*, 6 Cir., 162 F. 2d 862, certiorari denied *Kloeb v. Bereslavsky*, 68 S. Ct. 156, where mandamus was resorted to.

trebled to $4,500. The remaining prayers, except for the final general prayer for other and further relief, are either for declarations —obviously but gildings of the lily if damages are already being awarded—that the Minimum Basic Agreement is illegal and the plaintiff has the right to produce the show or for injunctions on matters of detail or of a temporary nature, such as the issue of compulsory arbitration so prominent on the previous appeal. True, one prayer is for a permanent injunction against interference by the three authors with the production or reproduction of the show, although, as we pointed out, 148 F. 2d 647, 653, the costly dispute which has arisen with the authors is likely to keep the matter of production of this play, particularly by the plaintiff, a lawyer and not a producer, within the realm of the academic. But the basic nature of the claim for damages for violation of the Antitrust Act to this complaint is, we think, quite clear.[2]

[*No Waiver of Jury*]

Such a claim, it is well settled, is triable by jury on timely demand of a party. *Fleitmann v. Weisbach Street Lighting Co. of America,* 240 U. S. 27; *Decorative Stone Co. v. Building Trades Council of Westchester County,* 2 Cir., 23 F. 2d 426, certiorari denied 277 U. S. 594; *cf. Bigelow v. RKO Radio Pictures,* 327 U. S. 251, 254. There seems only one avenue of possible escape from the conclusion that such trial must be accorded here. That would be through acceptance of the view advanced in some state courts, notably New York, *Di Menna v. Cooper & Evans Co.,* 220 N. Y. 391, 115 N. E. 993, that the plaintiff, by uniting legal and equitable claims, has waived his right to a jury. But this is rationally unsound and practically undesirable, if not quite improper. Rationally there is no basis upon which to ground such a waiver short of resurrecting the ancient divisions now abolished to say that plaintiff has brought his "legal" claims into an "equitable" cause. This is contrary to that complete union and consolidation of all claims, legal and equitable, in a single civil action which the new rules not only permit, but encourage. Practically the thesis results in forcing the plaintiff to yield his jury-trial right if all his claims are to be presented properly in the single action.[3] Hence this conception of jury waiver has been repudiated under the federal rules. 3 Moore's Federal Practice 3010, 1947 Cum. Supp., 6, 22, citing cases such as *Bruckman v. Hollzer,* 9 Cir., 152 F. 2d 730; *Ford v. C. E. Wilson & Co.,* D. C. Conn., 30 F. Supp. 163; *Elkins v. Nobel,* D. C. E. D. N. Y., 1 F. R. D. 357; and *Columbia River Packers Ass'n v. Hinton,* D. C. Ore., 34 F. Supp. 970, 978, reversed on other grounds 9 Cir., 117 F. 2d 310, reversed on other grounds 315 U. S. 143 (dealing with claims under the Sherman Act). See also *Hargrove v. American Cent. Ins. Co.,* 10 Cir., 125 F. 2d 225, 228; *Ryan Distributing Corp. v. Caley,* D. C. E. D. Pa., 51 F. Supp. 377; *Bynum v. Prudential Life Ins. Co.,* D. C. E. D. S. C., 10 Fed. Rules Serv. 38a.5, Case 1; *Connell v. Bowes,* 19 Cal. 2d 870, 123 P. 2d 456; *Back v. People's Nat. Fire Ins. Co.,* 97 Conn. 336, 116 A. 603; Clark, *Code Pleading,* 2d Ed. 1947, 106-110, 120-122.

[*Legal Issues Triable by Jury*]

Plaintiff's timely demand therefore entitles him to trial by jury and, since he does not appear to have specified particular issues, to such trial "for all the issues so triable." F. R. 38(c). Nevertheless, the court, "upon motion or of its own initiative," may find that some of the issues are not so triable and order them tried to the court. F. R. 39(a)(2). This does not contemplate some formal finding by the court, as is claimed; its simple order, made at any time necessary or desirable, is itself obviously the only finding required. And if the court so determines, it will be a simple matter, under the flexible procedure contemplated by the rules, for the judge presiding at the jury trial to decide any equitable issues at the same time and without delay. See *Ford v. C. E. Wilson & Co.* and other cases and authorities cited *supra.* In view of the delay caused by this appeal, the court may appropriately advance the case on its calendar for speedy trial.

[*Ruling*]

Motions denied; order reversed.

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[2] For the "basic issue test" of the jury-trial right, as explained by Professor Moore, 3 Moore's Federal Practice 3015, 3016, see *Beaunit Mills v. Eday Fabric Sales Corp., supra,* 2 Cir., 124 F. 2d 563, 566.

[3] If he tries to avoid losing his right by bringing separate actions, he will probably be met with the contention that he is splitting his claims and that his first case to go to judgment is *res judicata* of the other. See cases collected Clark, *Code Pleading,* 2d Ed. 1947, 475, 476.

[¶ 62,225] United States v. Line Material Company, General Electric Company, James R. Kearney Corporation et al.

In the Supreme Court of the United States. No. 8. October Term, 1947. March 8, 1948.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Sherman Antitrust Act

Patent Licenses—Combination of Patent Monopolies—Control of Sale Price.—Two or more patentees in the same patent field may not legally combine their valid patent monopolies to secure mutual benefits for themselves through contractual agreements, between themselves and other licensees, for control of the sale price of the patented devices. Such a combination restrains trade in violation of Section 1 of the Sherman Act. Even if a patentee has a right in the absence of a purpose to restrain or monopolize trade, to fix prices on a licensee's sale of the patented product in order to exploit properly his invention, when patentees join in an agreement to maintain prices on their several products, that agreement is unlawful *per se* under the Sherman Act. The unlawful element is the use of the power that cross-licensing gives to fix prices.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201.

Concurring Opinion—Price-Fixing Provision in Patent License Unlawful.—The prohibition of the Sherman Act against price-fixing combinations applies to patents as well as to other property. The decision in the case of *United States v. General Electric Company,* which held that price-fixing combinations outlawed by the Sherman Act are lawful when the property involved is a patent, contravenes the Constitutional provision which limits the purpose of patent statutes to the promotion of the progress of science and useful arts, and makes the rewards to inventors secondary.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201.

Dissenting Opinion—Price-Fixing Provision in Cross-Licensing Agreement Not Unlawful.—A patentee may grant a license upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. Where two owners of complementary patents execute cross-license agreements fixing minimum selling prices at which their sub-licensees under the agreements may make and vend devices embodying the patented inventions, and where there is no evidence of intent to restrain trade, there is no violation of the antitrust laws.

See the Sherman Act annotations, Vol. 1, ¶ 1250.175; see also prior opinion, '44-'47 Court Decisions Supp. ¶ 57,455.

Reversing and remanding the decision of the United States District Court for the Eastern District of Wisconsin, reported in '44-'47 Court Decisions Supp. at ¶ 57,455.

[*Nature of Action*]

MR. JUSTICE REED delivered the opinion of the Court.

The United States sought an injunction under §§ 1 and 4 of the Sherman Act[1] in the District Court against continuance of violations of that Act by an allegedly unlawful combination or conspiracy between appellees, through contracts, to restrain interstate trade in certain patented electrical devices. The restraint alleged arose from a cross-license arrangement between the patent owners, Line Material Company and Southern States Equipment Corporation, to fix the sale price of the devices, to which arrangement the other appellees, licensees to make and vend, adhered by supplemental contracts.[2]

[1] 26 Stat. 209, as amended by 36 Stat. 1167:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ."

[2] The names of appellees and the abbreviations hereinafter used as well as the percentage of production of the dropout fuse devices manufactured under the patents are listed below:

The District Court, 64 F. Supp. 970, dismissed the complaint as to all defendants upon its conclusion that the rule of *United States v. General Electric Co.,* 272 U. S. 476, was controlling. That case approved as lawful a patentee's license to make and vend which required the licensee in its sales of the patented devices to conform to the licensor's sale price schedule. Appeal was taken directly to this Court, 32 Stat. 823, and probable jurisdiction noted here on October 21, 1946. We have jurisdiction.[3]

I. *The Facts*

The challenged arrangements center around three product patents, which are useful in protecting an electric circuit from the dangers incident to a short circuit or other overload. Two of them are dropout fuse cutouts and the third is a housing suitable for use with any cutout. Dropout fuse cutouts may be used without any housing. The District Court found that 40.77 per cent of all cutouts manufactured and sold by these defendants were produced under these patents. This was substantially all the dropout fuse cutouts made in the United States. There are competitive devices that perform the same functions manufactured by appellees and others under different patents than those here involved.

The dominant patent, No. 2,150,102, in the field of dropout fuse cutouts with double jointed hinge construction was issued March 7, 1939, to the Southern States Equipment Corporation, assignee, on an application of George N. Lemmon.[4] This patent reads upon a patent No. 2,176,227, reissued December 21, 1943, Re. 22,412, issued October 17, 1939 to Line Material Company, assignee, on an application by Schultz and Steinmayer.[5] The housing patent No. 1,781,876, reissued March 31, 1931, as Re. 18,020, and again February 5, 1935, as Re. 19,449, was issued November 18, 1930 to Line, assignee, on an application by W. D. Kyle. The Kyle patent covers a wet-process porcelain box with great dielectric strength, which may be economically constructed and has been commercially successful. We give no weight to the presence of the Kyle patent in the licenses.

The applications for the Lemmon and Schultz patents were pending simultaneously. They were declared in interference and a contest resulted. The decision of the

Appellee	*Abbreviated title*	*Percent*
General Electric Co.	General Electric	29.2
Line Material Co.	Line	25.4
James R. Kearney Corp.	Kearney	18.9
Southern States Equipment Corp.	Southern	7.9
Westinghouse Electric Corp.	Westinghouse	5.3
Schweitzer & Conrad, Inc.	Schweitzer & Conrad	5.1
Railway & Industrial Engineering Co.	Railway	3.8
W. N. Matthews Corp.	Matthews	2.0
Porcelain Products Co.	Porcelain	1.5
Royal Electric Mfg. Co.	Royal	.5
Pacific Electric Mfg. Co.	Pacific	.2
T. F. Johnson	Johnson	.2
		100.0

All are corporations of various states except T. F. Johnson, doing business as Johnson Manufacturing Company, Atlanta, Georgia.

[3] The case was argued April 29, 1947, and at our request reargued November 12-13, 1947. *United States v. United States Gypsum Co.,* decided today *post,* page 364, considers related phases of Sherman Act legislation.

[4] ". . . The Lemmon device consists essentially of an expulsion tube supported by a double jointed hinge at its lower end. As the tube moves into closed circuit position, the hinge is locked and a latch engages a terminal on top of the tube to hold the tube in place. The hinge is released by a relatively complicated and expensive solenoid mechanism when the current becomes excessive because of a short circuit or overload. Thereupon the circuit is broken in the tube and the tube drops downwardly, its upper end disengaging from the latch, which permits the tube to swing out and down. By reason of claims covering the double jointed hinge construction in cutouts, this patent dominates the manufacture of dropout fuse cutouts involved in this suit." Findings of Fact, No. 6.

[5] ". . . The Schultz patent covers a dropout fuse cutout which is an improvement on the device disclosed in the Lemmon patent, and is dominated by the Lemmon patent. In the Schultz structure an expulsion tube is supported by a double jointed hinge which is held rigid by a fuse link. On overload, the fuse melts, breaking the circuit in the tube and the hinge is released automatically, which permits the tube to drop down and then swing outwardly. This Schultz dropout fuse is much simpler, and can be manufactured at considerably less than the cost of a comparable solenoid operated cutout, and has met widespread commercial demand and use." Findings of Fact, No. 7.

Patent Office, awarding dominant claims to Southern and subservient claims to Line on the Lemmon and the Schultz applications made it impossible for any manufacturer to use both patents when later issued without some cross-licensing arrangement. Cf. *Temco Electric Motor Co. v. Apco Mfg. Co.*, 275 U. S. 319, 328. Only when both patents could be lawfully used by a single maker could the public or the patentees obtain the full benefit of the efficiency and economy of the inventions. Negotiations were started by Line which eventuated in the challenged arrangements.

[*Cross-License Agreement*]

The first definitive document was a bilateral, royalty-free, cross-license agreement of May 23, 1938, between Southern and Line after the Patent Office award but before the patents issued. This, so far as here pertinent, was a license to Southern by Line to make and vend the prospective Schultz patented apparatus with the exclusive right to grant licenses or sublicenses to others. Line also granted Southern the right to make and vend but not to sublicense the Kyle patent. Southern licensed Line to make and vend but not to sublicense the prospective Lemmon patent for defined equipment which included the Schultz apparatus. Sublicense royalties and expenses were to be divided between Line and Southern. Although a memorandum of agreement of January 12, 1938, between the parties had no such requirement, Line agreed to sell equipment covered by the Southern patent at prices not less than those fixed by Southern. Southern made the same agreement for equipment covered solely by the Line patent. No requirement for price limitation upon sales by other manufacturers under license was included.

Six of the other manufacturers[6] here involved were advised by Line by letter, dated June 13, 1938, that Southern had authority to grant licenses under the Schultz prospective patent. On October 3, 1938, Kearney took from Southern a license to practice the Lemmon and Schultz patents. The license had a price, term and condition of sale clause, governed by Southern's prices, which bound Kearney to maintain the prices on its sales of devices covered by the patents. On October 7, 1938, the five other manufacturers mentioned above were offered by Southern the same contract as the standard licensor's agreement. The Kearney contract was discussed at Chicago in October, 1938, by all of the above manufacturers except Railway. Pacific also participated. It never was enforced. The first patent involved in this case did not issue until March, 1939. Those manufacturers who were making double jointed open and enclosed dropout cutouts wanted to and did explore cooperatively [F. F. 15] the validity of the patents. They failed to find a satisfactory basis for attack. They were faced with infringement suits. Other reasons developed for the refusal of the six manufacturers to accept the Kearney form contracts [F. F. 16 & 17] unnecessary to detail here. One reason was that the prospective sublicensees preferred Line to Southern as licensor because of the fact that Line, as owner and manufacturer, would license the Kyle patent. New arrangements were proposed for the licensees. After mutual discussion between the licensees and patentees, these new agreements were submitted. A finding to which no objection is made states:

> "On October 24, 1939, General Electric, Westinghouse, Kearney, Matthews, Schweitzer and Conrad, and Railway met with Line in Chicago and jointly discussed drafts of the proposed license agreements under the Lemmon, Schultz, and Kyle patents. Thereafter, identical sets of revised licenses were sent by Line to General Electric, Westinghouse, Matthews, Schweitzer and Conrad, and the attorneys for Railway and Kearney."

A form for a proposed licensing agreement that contained the essential elements of the price provision ultimately included in the licenses had been circulated among prospective licensees by Line by letters under date of October 6, 1939.

To meet the various objections of the future licensees, the agreement of May 23, 1938, between Southern and Line was revised as of January 12, 1940. Except for the substitution of Line for Southern as licensor of other manufacturers, it follows generally the form of the earlier agreement. There were royalty-free cross-licenses of the Schultz and Lemmon patents substantially as before. Line was given the exclusive right to grant

[6] Schweitzer & Conrad, General Electric, Westinghouse, Railway, Kearney, Matthews.

sublicenses to others for Lemmon.[7] Southern retained the privilege, royalty free, of making and vending the Kyle patent, also. Southern bound itself to maintain prices, so long as Line required other licensees to do so.[8] Even if it be assumed that the proper interpretation of the Line-Southern agreement permitted Southern to manufacture under its own Lemmon patent without price control, the practical result is that Southern does have its price for its products fixed because the only commercially successful fabrication is under a combination of the Lemmon and Schultz patents. Findings of Fact 7 and 10.

The price maintenance feature was reflected in all the licenses to make and vend granted by Line, under the Line-Southern contract, to the other appellees. There were variations in the price provisions that are not significant for the issues of this case. A fair example appears below.[9] The execution of these sublicenses by the other appellees, except Johnson and Royal,[10] followed within a year. Licenses were executed by the two on June 15, 1943, and March 24, 1944, respectively. After August 1, 1940, since a number of the appellees had executed the license contracts, two consultations of

[7] "The Southern Corporation grants to the Line Company a fully paid license to make, use and sell, with the exclusive right to grant sublicenses to others to make, use and sell, expulsion tube electric circuit interrupting equipment in which the circuit interruption is caused by the thermally initiated rupturing of a current carrying element in an expulsion tube, coming under claims 3, 4 to 10, inclusive, 15 to 22 inclusive, 25, and 27 to 30 of the patent to G. N. Lemmon, No. 2,150,102, dated March 7, 1939, entitled "Circuit Breaker" and/or any division, continuation, substitute, renewal and/or reissue thereof."

[8] "15. The licenses hereby granted or agreed to be granted are on the express condition that the prices, terms and conditions of sale of the Southern Corporation for electric fuse equipment made and sold under the licenses herein granted shall, so long as such electric fuse equipment continues to be covered by Letters Patent of the Line Company under which a license is granted by this agreement, be not more favorable to the customer than those established from time to time and followed by the Line Company in making its sales.

"It is the purpose and intent of this agreement that there shall not be directly, or indirectly, any modification of the prices set by the Line Company as they exist from time to time, as for instance, by including in the transaction other material or parts, or labor, or services, at less than the regular price at which the party making the same is at the time selling such other material or parts or furnishing such labor or services or by making allowances for freight or terms of payment other than those employed by the Line Company.

"Prices, terms and/or conditions of sale may be changed by the Line Company from time to time through reasonable notice in writing to the Southern Corporation, but not less than ten (10) days' written notice shall be given before the change shall go into effect.

"It is agreed that if the Line Company shall grant a license to a third party under any of the patents of this agreement (but excepting from the provisions of this paragraph a license to be granted to General Electric Company of Schenectady, New York, under said Kyle reissue patent 19,449), without a provision for maintenance by said third party of prices, terms and conditions of sales as set forth in the first paragraph of this section, then Southern Corporation shall be relieved from its obligation under said section."

[9] In the Line-General Electric license agreement of March 15, 1940, the first under the revised Line-Southern contract, the price maintenance provision was as follows:

"9. The license hereby granted by the Licensor is subject to the express limitations that

> as to dropout fuse cutouts manufactured and sold by Licensee which are comparable in respect to general type and purpose, ampere and voltage rating, and rupturing capacity, to dropout fuse cutouts manufactured and sold by Licensor,

Licensee's prices, terms and conditions of sale of dropout fuse cutouts

> for use in the United States made under the license herein granted to Licensee under the aforesaid Letters Patent, Lemmon No. 2,150,102, and Schultz and Steinmayer No. 2,176,227, and as long as such dropout fuse cutouts continue to be covered by such Letters Patent,

shall be no more favorable to a customer of the Licensee than those established from time to time and followed by the Licensor in its sales. The prices, terms and conditions of sale as at present established and in force are those set forth in Schedule A annexed hereto and forming a part hereof. This schedule of prices may be changed from time to time by the Licensor upon ten (10) days' notice in writing to the Licensee.

"10. The spirit and intent of this license agreement, contemplates that in no transaction shall there be any modification of Licensee's prices, either directly or indirectly, as for instance by inclusion in the transaction of other material or parts or services or labor at less than the regular prevailing prices at which the party making the sale is at the time accustomed to sell such other material or parts or furnish such services or labor, as will serve in effect to reduce Licensee's prices below those named in Schedule A as it exists from time to time."

This was repeated in the Line-General Electric revised agreement of November 17, 1941. A variable appears in the Westinghouse and other licenses. In its price provisions, the Lemmon patent is not mentioned but the Lemmon patent was included in its grant of license and the subsidiary Schultz patent could not be practiced without the right to use the dominant Lemmon.

[10] These two produced an aggregate of less than one percent of the devices.

the licensees and the patentees were held to classify the products of the various licensees in comparison with the licensor's devices.[11] The trial judge found that prices were not discussed. These were fixed by Line without discussion with or advice from any other appellee. There can be no doubt, however, that each licensee knew of the proposed price provisions in the licenses of other licensees from the circulation of proposed form of license on October 6, 1939, subsequent consultations among the licensees and an escrow agreement, fulfilled July 11, 1940. That agreement was entered into after General Electric took its license and required for fulfillment the acceptance of identical licenses by Matthews, Kearney and Railway. The licenses that were the subject of the escrow contained the price provisions of General Electric's license. This awareness by each signer of the price provisions in prior contracts is conceded by appellees' brief. A price schedule became effective January 18, 1941. Thereafter, all the appellees tried to maintain prices. Where there was accidental variation, Line wrote the licensee calling attention to the failure.[12]

The licenses were the result of arm's length bargaining in each instance. Price limitation was actively opposed *in toto* or restriction of its scope sought by several of the licensees, including General Electric, the largest producer of the patented appliances. A number tried energetically to find substitutes for the devices. All the licensees, however, were forced to accept the terms or cease manufacture. By accepting they secured release from claims for past infringement through a provision to that effect in the license. The patentees through the licenses sought system in their royalty collections and pecuniary reward for their patent monopoly. Undoubtedly one purpose of the arrangements was to make possible the use by each manufacturer of the Lemmon and Schultz patents. These patents in separate hands produced a deadlock. Lemmon by his basic patent "blocked" Schultz' improvement. Cross-licenses furnished appellees a solution.

[*Lower Court Ruling*]

On consideration of the agreements and the circumstances surrounding their negotiation and execution, the District Court found that the arrangements, as a whole, were made in good faith, to make possible the manufacture by all appellees of the patented devices, to gain a legitimate return to the patentees on the inventions; and that apart from the written agreements, there was no undertaking between the appellees or any of them to fix prices.[13] Being convinced, as we indicated at the first of this opinion, that

[11] All appellees, except Royal, Pacific and Johnson, attended one or another of these conferences. We do not find it necessary to determine whether or not the selling prices also of the licensees were before the conference. The agreements adequately show an intention to fix prices.

[12] The licenses contained provisions for records of sale, inspection thereof and cancellation of the license for breach.

[13] Findings of Fact:

"32. The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly. Each of the licenses granted to the licensee-defendants was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order that the licensee could continue lawfully to manufacture and sell its dropout fuse cutouts. Apart from the written license agreements here in evidence, there was no agreement, express or implied, between the licensor and any licensee, or between any two or more licensees, with respect to the prices of licensed dropout fuse cutouts.

"33. All of the devices for which minimum prices were established by Line were comparable to, and competitive with, devices which Line manufactured and sold regularly or which it was ready to manufacture and sell to its customers on special order.

"34. The cross-license agreements between Line and Southern were limited to the commercially practicable device covered by the subservient Schultz patent, and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements. The inflexible intention to insist upon price limitation existed independently in each of the patent owners prior to any discussions or arrangements between them. Such cross-license agreements were entered into in good faith, not for the purpose of fixing prices in the industry but to permit the manufacture and sale of the cheaper device covered by the subservient patent, to facilitate the negotiation of licenses, and to provide royalty income. There was no agreement, express or implied, between Line and Southern with respect to prices on cutouts other than the written cross-license agreements.

"35. The license agreements here in evidence did not restrain trade but promoted it by making available several sources where the patented devices could be obtained, thus increasing competition in such devices, particularly with respect to design, quality and service. Competition among the defendants for business in these devices continued to be vigorous after the making of the license agreements.

"36. There was no combination or conspiracy among the defendants, or any of them, to fix, maintain or control prices of droput fuse cutouts or parts thereof, or to restrain trade or commerce therein."

the *General Electric* case controlled and permitted such price arrangements as are disclosed in the contracts the District Court dismissed the complaint. The Government attacks the rationale of the *General Electric* case and urges that it be overruled, limited and explained or differentiated.

II. *The General Electric Case*

That case was decided in 1926 by a unanimous court, Chief Justice Taft writing. It involved a bill in equity to enjoin further violations of the Sherman Act. While violations of the Act by agreements fixing the resale price of patented articles (incandescent light bulbs) sold to dealers also were alleged in the bill, so far as here material the pertinent alleged violation was an agreement between General Electric and Westinghouse Company through which Westinghouse was licensed to manufacture lamps under a number of General Electric's patents, including a patent on the use of tungsten filament in the bulb, on condition that it should sell them at prices fixed by the licensor. On considering an objection to the fixing of prices on bulbs with a tungsten filament, the price agreement was upheld as a valid exercise of patent rights by the licensor.

Speaking of the arrangement, this Court said: "If the patentee . . . licenses the selling of the articles [by a licensee to make], may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." P. 490. This proviso must be read as directed at agreements between a patentee and a licensee to make and vend. The original context of the words just quoted makes clear that they carry no implication of approval of all a patentee's contracts which tend to increase earnings on patents. The opinion recognizes the fixed rule that a sale of the patented article puts control of the purchaser's resale price beyond the power of the patentee. P. 489. Compare *United States v. Univis Lens Co.*, 316 U. S. 241. Nor can anything be found in the *General Electric* case which will serve as a basis to argue otherwise than that the precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is freed from competition of price, service, quality or otherwise. Compare *Mercoid Corporation v. Mid-Continent Inv. Co.*, 320 U. S. 661, 665, 666; *United States v. Masonite Corp.*, 316 U. S. 265, 277-78, 280; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 510.

General Electric is a case that has provoked criticism and approval. It had only bare recognition in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456. That case emphasized the rule against the extension of the patent monopoly, p. 456, to resale prices or to avoid competition among buyers. Pages 457-58. We found it unnecessary to reconsider the rule in *United States v. Masonite Corp.*, 316 U. S. 265, 277, although the arrangement there was for sale of patented articles at fixed prices by dealers whom the patentee claimed were *del credere* agents. As we concluded the patent privilege was exhausted by a transfer of the articles to certain agents who were part of the sales organization of competitors, discussion of the price-fixing limitation was not required. In *Katzinger Co. v. Chicago Mfg. Co.*, 329 U. S. 394, 398, where a suit was brought to recover royalties on a license with price limitations, this Court refused to examine the *General Electric* rule because of the claimed illegality of the Katzinger patent. If the patent were invalid, the price-fixing agreement would be unlawful. We affirmed the action of the Circuit Court of Appeals in remanding the case to the District Court to determine the validity of the patent. The *General Electric* case was cited with approval in *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27, 31. Other courts have explained or distinguished the *General Electric* rule.[14] As a

[14] For illustration and without implication as to this Court's position on the issues, we call attention to the following:

Barber-Colman Co. v. National Tool Co., 136 F. 2d 339. In a suit by the licensor against the licensee, injunctive belief to compel compliance with a price-fixing provision in the patent license was denied. The *General Electric* case was held not to permit the patentee to fix prices on unpatented hobs which were produced under a process patent by a patented machine.

Cummer-Graham Co. v. Straight Side Basket Corp., 142 F. 2d 646. Licensee was denied relief in an action against licensor for failing to require other licensees to comply with price-fixing provisions; licensor of a patent on an attachment to a basket-making machine may not fix prices on baskets produced by the machine.

United States v. Vehicular Parking, Ltd., 54 F. Supp. 828. Antitrust proceeding against patent holding company and manufacturing licensees in parking meter industry. The patent licenses fixed the prices at which parking meters could be sold and contained restrictive provisions on marketing practices. In ordering compulsory licensing at a reasonable royalty, the court dis-

reason for asking this Court to reexamine the rule of the *General Electric* case, the Government states that price maintenance under patents through various types of agreements is involved in certain pending cases.[15] Furthermore, the point is made that there is such a "host of difficult and unsettled questions" arising from the *General Electric* holding that the simplest solution is to overrule the precedent on the power of a patentee to establish sale prices of a licensee to make and vend a patented article.[16]

Such a liquidation of the doctrine of a patentee's power to determine a licensee's sale price of a patented article would solve problems arising from its adoption. Since 1902, however, when *E. Bement v. National Harrow Co.*, 186 U. S. 70, was decided, a patentee has been able to control his licensee's sale price within the limits of the patent monopoly.[17] Litigation that the rule has engendered proves that business arrangements have been repeatedly, even though hesitatingly, made in reliance upon the contractors' interpretation of its meaning. Appellees urge that Congress has taken no steps to modify the rule.[18] Such legislative attitude is to be weighed with the counterbalancing fact that the rule of the *General Electric* case grew out of a judicial determination. The writer accepts the rule of the *General Electric* case as interpreted by the third subdivision of this opinion. As a majority of the Court does not agree with that position, the case cannot be reaffirmed on that basis. Neither is there a majority to overrule *General Electric.* In these circumstances, we must proceed to determine the issues on the assumption

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tinguished the *General Electric* case principally on the ground that the patentee in this case did not itself manufacture the parking meters; other distinctions noted were the number and active concert of licensees, the weakness of the patents, the fixing of prices on unpatented articles, and the existence of marketing restrictions.

[15] For example, such price arrangements under the type of agreement indicated are in litigation as follows:

United States v. Allegheny Ludlum Steel Corp., D. N. J. Civil 45-83, stainless steel company owning patents on a particular type of stainless steel allegedly issued licenses fixing prices on all types of stainless steel.

United States v. American Optical Co., S. D. N. Y. Civil 10-391, optical patents owned by patent holding company which gave exclusive licenses; exclusive licensee sublicensed to other manufacturers who agreed to maintain prices and comply with marketing restrictions.

United States v. Bausch & Lomb Optical Co., S. D. N. Y. Civil 10-394, patent holding company issued licenses to two licensees to manufacture bifocal lenses, the licenses fixing prices at which the bifocal lenses were to be sold and the selection of wholesalers and retailers for the lenses.

United States v. Catalin Corporation of America, D. N. J. Civil 7743, manufacturer of phenolic resins licensed other manufacturers under its process patents, the licensees agreeing to sell at prices established by the licensor.

United States v. General Cable Corp., S. D. N. Y. Civil 40-76, cross licenses among holders of patents on fluid filled cable, the licensees agreeing to adhere to uniform prices and to observe territorial marketing limitations.

United States v. General Electric Co., D. N. J. Civil 1364, cross-licensing agreements between manufacturers of electrical bulbs providing for price and quantitative restrictions.

United States v. General Electric Co., Fried. Krupp, S. D. N. Y. Cr. 110-412, cross-licensing of tungsten carbide patents with price and territorial restrictions.

United States v. General Instrument Corp., D. N. J. Cr. 3960-C, Civil 8586, owners of variable condenser patents assigned patents to holding company and took back licenses with price-fixing provisions; explicit price-fixing provisions subsequently removed but allegedly continued by tacit agreement.

United States v. Phillips Screw Co., N. D. Ill. Civil 47-C-147, holder of patents on cross recessed head screws granted exclusive license to leading screw manufacturer who sublicensed to other manufacturers; patent holder, exclusive licensee, and sublicensees agreed on price terms for all screws produced.

[16] The United States lists: Uncertainty as to the nature of the patent, process or product, which justifies price control; extent of patent domination over the device; may a patent pooling corporation control all licensees' sale prices; extent of price control in an industry. U. S. Brief 65 *et seq.*

[17] In earlier cases involving the National Harrow Company the lower courts held that an industry-wide combination to fix prices was illegal. *National Harrow Co. v. Hench*, 83 F. 36; *National Harrow Co. v. Quick*, 67 F. 130, *affirmed on other grounds*, 74 F. 236. Compare *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 F. 358, and *Indiana Manufacturing Co. v. J. I. Case Threshing Machine Co.*, 154 F. 365. upholding industry-wide price-fixing, with *Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.*, 166 F. 555, holding such price-fixing illegal.

[18] Bills have been introduced which would outlaw price limitation in patent licenses: H. R. 22345, 62d Cong., 2d Sess. (1912); S. 2730, 77th Cong., 2d Sess. (1942); S. 2491, 77th Cong., 2d Sess. (1942), and Hearings thereon; H. R. 7713, 77th Cong., 2d Sess. (1942); H. R. 109, 78th Cong., 1st Sess. (1943); H. R. 1371, 78th Cong., 1st Sess. (1943); H. R. 3874, 78th Cong., 1st Sess. (1943); H. R. 97, 79th Cong., 1st Sess. (1945); H. R. 3462, 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947).

See Final Report of Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941), p. 36; Report of the National Patent Planning Commission, H. R. Doc. No. 239, 78th Cong., 1st Sess. (1943), p. 9.

that *General Electric* continues as a precedent. Furthermore, we do not think it wise to undertake to explain, further than the facts of this case require, our views as to the applicability of patent price limitation in the various situations listed by the Government. On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee. The assumption is stated in this way so as to leave aside the many variables of the *General Electric* rule that may arise. For example, there may be an aggregation of patents to obtain dominance in a patent field, broad or narrow, or a patent may be used as a peg upon which to attach contracts with former or prospective competitors, touching business relations other than the making and vending of patented devices. Compare *United States v. United States Gypsum Co., post,* p. 364, decided today; *United States v. Masonite Corp.,* 316 U. S. 265.

It may be helpful to specify certain points that either are not contested or are not decided in this case. The agreements, if illegal, restrain interstate commerce contrary to the Sherman Act. No issue of monopoly is involved. [F. F. 31.] Cf. *American Tobacco Co. v. United States,* 328 U. S. 781, 788. That is to say, the complaint charges restrain of trade under § 1 and does not charge "monopoly" under § 2 of the Sherman Act, so that we need not deal with the problems of consolidation, merger, purchase of competitors or size of business as tending toward attaining monopoly. See *United States v. United Shoe Machinery Co.,* 247 U. S. 32, 44-55; *United States v. Aluminum Co. of America,* 148 F. 2d 416, 427-31; *United States v. American Tobacco Co.,* 221 U. S. 106, 181-83; *United States v. United States Steel Corp.,* 251 U. S. 417, 451. We are not dealing with a charge of monopoly or restraint because of the aggregation of patents, by pooling or purchase, by an owner or owners, in a single industry or field. See *United States v. United Shoe Machinery Co.,* 247 U. S. 32. Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes. It is stipulated by the United States that the validity of the patents is not in issue. With these points laid aside, we proceed to the issues presented by this record.

III. *The Determination of the Issue.*

Under the above-mentioned assumption as to *General Electric,* the ultimate question for our decision on this appeal may be stated, succinctly and abstractly, to be as to whether in the light of the prohibition of § 1 of the Sherman Act, note 1, *supra,* two or more patentees in the same patent field may legally combine their valid patent monopolies to secure mutual benefits for themselves through contractual agreements, between themselves and other licensees, for control of the sale price of the patented devices.

The appellees urge that the findings of the District Court, quoted in note 13 *supra,* stand as barriers to a conclusion here that § 1 of the Sherman Act has been violated by the licenses. Since there was material evidence to support the District Court's finding of the evidentiary facts and the Court necessarily weighed the credibility of the witnesses and the probative value of their testimony to establish appellees' contentions, appellees insist that the inferences or conclusions as to violations of the Sherman Act, drawn by the District Court, must be accepted by us.[19] As to the evidentiary facts heretofore stated, there is no dispute. From them the District Court made findings of fact Nos. 32 to 36, inclusive, hereinbefore set out in note 13. Even though we accept, as we do, these findings on preliminary facts as correct, the last sentence in findings 32 and 34 crumbles their asserted bar to an examination by us as to whether the agreements are violative of the Sherman Act. Those sentences are to the effect that there was an agreement to fix prices between all parties in the language of the contracts as set out in notes

[19] Rules of Civil Procedure, Rule 52:
Findings by the Court.—"(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

8 and 9 *supra*. If the patent rights do not empower the patentees to fix sale prices for others, the agreements do violate the Act. The previous summary in this opinion of the agreements which compose these arrangements demonstrates that the agreements were intended to and did fix prices on the patented devices. Compare *Interstate Circuit v. United States*, 306 U. S. 208, 226. While Line's sublicenses to others than General Electric, note 9, gave to Line the power which it exercised to fix prices only for devices embodying its own Schultz patent, the sublicense agreements licensed the use of the dominant Lemmon patent. As the Schultz patent could not be practiced without the Lemmon, the result of the agreement between Southern and Line for Line's sublicensing of the Lemmon patent was to combine in Line's hands the authority to fix the prices of the commercially successful devices embodying both the Schultz and Lemmon patents. Thus, though the sublicenses in terms followed the pattern of *General Electric* in fixing prices only on Line's own patents, the additional right given to Line by the license agreement of January 12, 1940, between Southern and Line, to be the exclusive licensor of the dominant Lemmon patent, made its price-fixing of its own Schultz devices effective over devices embodying also the necessary Lemmon patent. See note 9. By the patentees' agreement the dominant Lemmon and the subservient Schultz patents were combined to fix prices. In the absence of patent or other statutory[20] authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act.[21] This is true whether the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale.

It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly.[22] By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act. See *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. United States Gypsum Co., post*, p. 364, decided today. During its term, a valid patent excludes all except its owner from the use of the protected process or product. *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 58; *Special Equipment Co. v. Coe*, 324 U. S. 370, 378. This monopoly may be enjoyed exclusively by the patentee or he may assign the patent "or any interest therein" to others. Rev. Stat. § 4898, as amended 55 Stat. 634. As we have pointed out, a patentee may license others to make and vend his invention and collect a royalty therefor. Thus we have a statutory monopoly by the patent and by the Sherman Act a prohibition, not only of monopoly or attempt to monopolize, but of every agreement in restraint of trade. Public policy has condemned monopolies for centuries. *The Case of Monopolies (Darcy v. Allein)* 11 Co. Rep. 84-b. See *United States v. Aluminum Co. of America*, 148 F. 2d 416, 428-49. See Employment Act of 1946, § 2, 60 Stat. 23. Our Constitution allows patents. Art. I, § 8, cl. 8. The progress of our economy has often been said to owe much to the stimulus to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception. *Bement v. National Harrow Co., supra*, 92, 21 Cong. Rec. 2457. Public service organizations, governmental and private aside, our economy is built largely upon competition in quality and prices. *Associated Press v. United States*, 326 U. S. 1, 12-14. Validation by Congress of agree-

[20] *E. g., Miller-Tydings Acts*, 50 Stat. 693.

[21] *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 58; *United States v. Trenton Potteries Co.*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 222-24; *United States v. Univis Lens Co.*, 316 U. S. 241, 250; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co. v. Chicago Mfg. Co.*, 329 U. S. 394.

Appalachian Coals v. United States, 288 U. S. 344, cannot be cited to support a contrary view. In that case, this Court held that "The plan cannot be said either to contemplate or involve the fixing of market prices." P. 373. See the *Socony-Vacuum* case, *supra*, 214 *et seq.* Perhaps arbitrary or monopoly prices were in mind in *Appalachian*. Pp. 358, 359, 365, 371.

[22] *United States v. National Lead Co.*, 332 U. S. 319; *Hartford-Empire Co. v. United States*, 323 U. S. 386, 406; *Standard Oil Co. v. United States*, 283 U. S. at 169 and cases cited; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48-49. See *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637, 641, 647, and cases cited.

ments to exclude competition is unusual.[23] Monopoly is a protean threat to fair prices. It is a tantalizing objective to any business compelled to meet the efforts of competitors to supply the market. Perhaps no single fact manifests the power and will to monopolize more than price control of the article monopolized. There can be no clearer evidence of restraint of trade. Whatever may be the evil social effect of cutthroat competition on producers and consumers through the lowering of labor standards and the quality of the produce and the obliteration of the marginal to the benefit of the surviving and low-cost producers, the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each industry an opportunity to choose employment conditions and consumers a selection of product and price, have been considered to overbalance the disadvantages. The strength of size alone, the disappearance of small business are ever-present dangers in competition. Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them. The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 452, 455; *United States v. Univis Lens Co.*, 316 U. S. 241; *Hartford-Empire Co. v. United States*, 323 U. S. 386. It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly.

The development of patents by separate corporations or by cooperating units of an industry through organized research group is a well known phenomenon. However far advanced over the lone inventor's experimentation this method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research. It may be true, as Carlyle said, that "Genius is an infinite capacity for taking pains." Certainly the doctrine that control of prices, outside the limits of a patent monopoly, violates the Sherman Act is as well understood by Congress as by all other interested parties.

We are thus called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act. That adjustment has already reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the *General Electric* case and that the grant of patent rights is the limit of freedom from competition under the cases first cited at note 22.

With the postulates in mind that price limitations on patented devices beyond the limits of a patent monopoly violate the Sherman Act and that patent grants are to be construed strictly, the question of the legal effect of the price limitations in these agreements may be readily answered. Nothing in the patent statute specifically gives a right to fix the price at which a licensee may vend the patented article. 35 U. S. C. §§ 40, 47. While the *General Electric* case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds good. The stimulus to seek competitive inventions is reduced by the mutually advantageous price-fixing arrangement. Compare, as to acts by a single entity and those done in combination with others. *Swift & Co. v. United States*, 196 U. S. 375, 396; *United States v. Reading Co.*, 226 U. S.

[23] The Interstate Commerce Act authorizes carriers to pool revenues and authorizes mergers of carriers, provided that approval of the Interstate Commerce Commission is obtained. The antitrust laws are inapplicable to such agreements. 49 U. S. C. § 5 (1), (2) and (11).

324, 357; *Eastern States Lumber Dealers' Assn. v. United States,* 234 U. S. 600; *Binderup v. Pathé Exchange,* 263 U. S. 291. The merging of the benefits of price-fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods.

If the objection is made that a price agreement between a patentee and a licensee equally restrains trade, the answer is not that there is no restraint in such an arrangement but, when the validity of the *General Electric* case is assumed, that reasonable restraint accords with the patent monopoly granted by the patent law. Where a patentee undertakes to exploit his patent by price-fixing through agreements with anyone, he must give consideration to the limitations of the Sherman Act on such action. The patent statutes give an exclusive right to the patentee to make, use and vend and to assign any interest in this monopoly to others. The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price. There is no suggestion in the patent statutes of authority to combine with other patent owners to fix prices on articles covered by the respective patents. As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly.

We turn now to the situation here presented of an agreement where one of the patentees is authorized to fix prices under the patents. The argument of respondents is that if a patentee may contract with his licensee to fix prices, it is logical to permit any number of patentees to combine their patents and authorize one patentee to fix prices for any number of licensees. In this present agreement Southern and Line have entered into an arrangement by which Line is authorized to and has fixed prices for devices produced under the Lemmon and Schultz patents. It seems to us, however, that such argument fails to take into account the cumulative effect of such multiple agreements in establishing an intention to restrain. The obvious purpose and effect of the agreement was to enable Line to fix prices for the patented devices. Even where the agreements to fix prices are limited to a small number of patentees, we are of the opinion that it crosses the barrier erected by the Sherman Act against restraint of trade though the restraint is by patentees and their licensees.

As early as 1912, in *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, this Court unanimously condemned price limitation under pooled [24] patent licenses.[25] As the arrangement was coupled with an agreement for limitation on jobbers' resale prices, the case may be said to be indecisive on patent license agreements for price control of a product without the jobber's resale provision. No such distinction appears in the opinion. This Court has not departed from that condemnation of price fixing. Even in *Standard Oil Co. v. United States,* 283 U. S. 163, where an arrangement by which the patentees pooled their oil cracking patents and divided among themselves royalties from licensees fixed by the pooling contracts was upheld, the theory was reiterated that a price limitation for the product was unlawful *per se.* Pp. 170, 173, 175. Of course, if a purpose or plan to monopolize or restrain trade is found, the arrangement is unlawful. P. 174. The Government's contention in that case that the limitation on royalties in itself violated the Sherman Act by fixing an element in the price was dismissed because the Court was of the view that controlled royalties were effective as price regulators only when the patentees dominated the industry. P. 174. This domination was thought by this Court not to have been proven.

When a plan for the patentee to fix the sale prices of patented synthetic hardboard

[24] The words "patent pool" are not words of art. The expression is used in this opinion to convey the idea of a linking of the right to use patents issued to more than one patentee.

[25] 226 U. S. at 48:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the *Bement* case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry v. A. B. Dick Co.,* 224 U. S. 1, which contravenes the views herein expressed."

on sales made through formerly competing manufacturers and distributors, designated as *del credere* agents,[28] came before this Court on allegations that the plan was in violation of the Sherman Act, we invalidated the scheme. We said that the patentee could not use its competitor's sales organization as its own agents so as to control prices. The patent monopoly, under such circumstances, we said, was exhausted on disposition of the product to the distributor. We reasoned that such an arrangement was a restriction on our free economy, "a powerful inducement to abandon competition," and that it derogated "from the general law [against price limitation] beyond the necessary requirements of the patent statute." *United States v. Masonite Corp.*, 316 U. S. 265, 281, 280.

We think that this general rule against price limitation clearly applies in the circumstances of this case. Even if a patentee has a right in the absence of a purpose to restrain or monopolize trade, to fix prices on a licensee's sale of the patented product in order to exploit properly his invention or inventions, when patentees join in an agreement as here to maintain prices on their several products, that agreement, however advantageous it may be to stimulate the broader use of patents, is unlawful *per se* under the Sherman Act. It is more than an exploitation of patents. There is the vice that patentees have combined to fix prices on patented products. It is not the cross-licensing to promote efficient production which is unlawful. There is nothing unlawful in the requirement that a licensee should pay a royalty to compensate the patentee for the invention and the use of the patent. The unlawful element is the use of the control that such cross-licensing gives to fix prices. The mere fact that a patentee uses his patent as whole or part consideration in a contract by which he and another or other patentees in the same patent field arrange for the practice of any patent involved in such a way that royalties or other earnings or benefits from the patent or patents are shared among the patentees, parties to the agreement, subjects that contract to the prohibitions of the Sherman Act whenever the selling price, for things produced under a patent involved, is fixed by the contract or a license authorized by the contract. Licensees under the contract who as here enter into license arrangements, with price-fixing provisions, with knowledge of the contract, are equally subject to the prohibitions.

The decree of the District Court is reversed and the case is remanded for the entry of an appropriate decree in accordance with this opinion.

Mr. Justice Jackson took no part in the consideration or decision of this case.

[Concurring Opinion]

Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Rutledge, join, concurring.

While I have joined in the opinion of the Court, its discussion of the problem is for me not adequate for a full understanding of the basic issue presented. My view comes to this—it is a part of practical wisdom and good law not to permit *United States v. General Electric Co.*, 272 U. S. 476, to govern this situation, though if its premise be accepted, logic might make its application to this case wholly defensible. But I would be rid of *United States v. General Electric Co.* My reasons for overruling it start with the Constitution itself.

The Constitution grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. I, § 8, Cl. 8. It is to be noted first that all that is secured to inventors is "the exclusive right" to their inventions; and second that the reward to inventors is wholly secondary, the aim and purpose of patent statutes being limited by the Constitution to the promotion of the progress of science and useful arts. *United States v. Masonite Corp.*, 316 U. S. 265, 278 and cases cited.

Congress, faithful to that standard, has granted patentees only the "exclusive right to make, use, and vend the invention or discovery." Rev. Stat. § 4884, 35 U. S. C. § 40. And as early as 1853 the Court, speaking through Chief Justice Taney, defined the narrow and limited monopoly granted under the statutes as follows: "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee."

[28] Cf. *United States v. General Electric Co.*, *supra*.

Bloomer v. McQuewan, 14 How. 539, 549. But the ingenuity of man has conceived many ways to graft attractive private perquisites onto patents. The effort through the years has been to expand the narrow monopoly of the patent. The Court, however, has generally been faithful to the standard of the Constitution, has recognized that the public interest comes first and reward to inventors second, and has refused to let the self-interest of patentees come into the ascendency. As we stated in *B. B. Chemical Co. v. Ellis,* 314 U. S. 495, 498, "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant." From *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502, which overruled *Henry v. A. B. Dick Co.* 224 U. S. 1, to *International Salt Co. v. United States,* 332 U. S. 392, decided only the other day, the Court has quite consistently refused to allow the patentee's "right to exclude" to be expanded into a right to license the patent on such conditions as the patentee might choose. For the power to attach conditions would enable the patentee to enlarge his monopoly by contract and evade the requirements of the general law applicable to all property. The philosophy of those decisions was summed up in *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U. S. 661, 666, where we said:

> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. . . . The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines. When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts."

The Court, however, allowed an exception in this long line of cases. In *United States v. General Electric Co., supra,* decided in 1926, it followed *Bement v. National Harrow Co.,* 186 U. S. 70, decided in 1902, and sustained a price-fixing provision of a license to make and vend the patented invention. By that decision price-fixing combinations which are outlawed by the Sherman Act (*United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150) were held to be lawful when the property involved was a patent. By what authority was this done ?

The patent statutes do not sanction price-fixing combinations. They are indeed wholly silent about combinations. So far as relevant here, all they grant, as already noted, is the "exclusive right to make, use, and vend the invention or discovery." Rev. Stat. § 4884, 35 U. S. C. § 40. There is no grant of power to combine with others to fix the price of patented products. Since the patent statutes are silent on the subject, it would seem that the validity of price-fixing combinations in this field would be governed by general law. And since the Sherman Act outlaws price-fixing combinations it would seem logical and in keeping with the public policy expressed in that legislation to apply its prohibitions to patents as well as to other property. The Court made an exception in the case of these price-fixing combinations in order to make the patent monopoly a more valuable one to the patentee. It was concerned with giving him as high a reward as possible. It reasoned that if the patentee could not control the price at which his licensees sold the patented article, they might undersell him; that a price-fixing combination would give him protection against that contingency and therefore was a reasonable device to secure him a pecuniary reward for his invention. Thus the *General Electric* case inverted Cl. 8 of Art. I, § 8 of the Constitution and made the inventor's reward the prime rather than an incidental object of the patent system.

In that manner the Court saddled the economy with a vicious monopoly. In the first place, this form of price-fixing underwrites the high-cost producer. By protecting him against competition from low-cost producers, it strengthens and enlarges his monopoly. It is said in reply that he, the patentee, has that monopoly anyway—that his exclusive right to make, use, and vend would give him the right to exclude others and manufacture the invention and market it at any price he chose. That is true. But what he gets by the price-fixing agreement with his competitors is much more than that. He then gets not a benefit inherent in the right of exclusion but a benefit which flows from suppression of competition by combination with his competitors. Then he

gets the benefits of the production and marketing facilities of competitors without the risks of price competition. Cf. *United States v. Masonite Corp., supra.* In short, he and his associates get the benefits of a conspiracy or combination in restraint of competition. That is more than an "exclusive right" to an invention; it's an "exclusive right" to form a combination with competitors to fix the prices of the products of invention. The patentee creates by that method a powerful inducement for the abandonment of competition, for the cessation of litigation concerning the validity of patents, for the acceptance of patents no matter how dubious, for the abandonment of research in the development of competing patents. Those who can get stabilized markets, assured margins, and freedom from price cutting will find a price-fixing license an attractive alternative to the more arduous methods of maintaining their competitive positions. Competition tends to become impaired not by reason of the public's preference for the patented article but because of the preference of competitors for price fixing and for the increased profits which that method of doing business promises.

Price fixing in any form is perhaps the most powerful of all inducements for abandonment of competition. It offers security and stability; it eliminates much of the uncertainty of competitive practices; it promises high profits. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear. The prices charged by the regimented industry are determined not by representatives of the public, as in the case of electric, water, and gas rates, but by private parties who incline to charge all the traffic will bear. And the type of combination in this case has the power to inflict precisely the type of public injury which the Sherman Act condemns. This price-fixing scheme does far more than secure to inventors "the exclusive right" to their discoveries within the meaning of Cl. 8 of Art. I, § 8 of the Constitution. It gives them a leverage on the market which only a combination, not a patent by itself, can create. Yet it is "every" combination in restraint of trade which § 1 of the Sherman Act condemns, price-fixing combinations dealing with patents not excluded.

Congress has much to say as to the pattern of our economic organization. But I am not clear that Congress could expand "the exclusive right" specified in the Constitution into a right of inventors to utilize through a price-fixing combination the production and marketing facilities of competitors to protect their own high costs of production and eliminate or suppress competition. It is not apparent that any such restriction or condition promotes the progress of science and the useful arts. But however that may be, the Constitution places the rewards to inventors in a secondary role. It makes the public interest the primary concern in the patent system. To allow these price-fixing schemes is to reverse the order and place the rewards to inventors first and the public second. This is not the only way a patentee can receive a pecuniary reward for his invention. He can charge a royalty which has no relation to price fixing. Or he can manufacture and sell at such price as he may choose. Certainly if we read the patent statutes so as to harmonize them as closely as possible with the policy of antitrust laws, we will strike down a combination which is not necessary to effectuate the purpose of the patent statutes. If we did that in this case we would overrule the *General Electric Co.* case.

This Court, not Congress, was the author of the doctrine followed in that case. The rule it sanctions is another of the private perquisites which the Court has written into the patent laws. See *Special Equipment Co. v. Coe,* 324 U. S. 370, 383. Since we created it, we should take the initiative in eliminating it. It is hard for me to square it with the standards which the Constitution has set for our patent system. It plainly does violence to the competitive standards which Congress has written into the Sherman Act.

[Dissenting Opinion]

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur, dissenting.

This dissent is impelled by regard for the soundness, authority and applicability to this case of the unanimous decisions of this Court in *Bement v. National Harrow Co.,* 186 U. S. 70, and *United States v. General Electric Co.,* 272 U. S. 476.

The complaint charges violation of § 1 of the Sherman Antitrust Act[1] by the defend-

[1] 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. § 1.

ant patent owners and cross-licensors, Line Material Company and Southern States Equipment Corporation (here called respectively Line and Southern), and also by the ten defendants who hold licenses under the two complementary patents, owned respectively by Line and Southern. These patents are for dropout fuse cutouts. Southern's patent is the dominant patent but the product made under it alone has not been commercially successful. Line's patent is for an improvement of that product which has made it commercially successful. Each of the twelve defendants has received and exercised authority under both patents to make and sell this improved product, but the Government charges them with having engaged in an unlawful combination and conspiracy in restraint of trade to fix, maintain and control the prices at which they have sold, in interstate commerce, their respective products under these patents. It is not disputed that the sales were made in interstate commerce. The trial court's findings of fact demonstrate, however, that there have been no agreements between any of the defendants with respect to the prices of these products other than the price-limiting provisions contained in their respective licenses.[2] The findings of fact show also that, unless the Government sustains its contention that those provisions constitute, *per se*, an unlawful restraint of trade, its complaint should be dismissed.[3]

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[2] "32. . . . Apart from the written license agreements here in evidence, there was no agreement, express or implied, between the licensor and any licensee, or between any two or more licensees, with respect to the prices of licensed dropout fuse cutouts.

* * * * *

"34. . . . There was no agreement, express or implied, between Line and Southern with respect to prices on cutouts other than the written cross-license agreements.

* * * * *

"36. There was no combination or conspiracy among the defendants, or any of them, to fix, maintain or control prices of dropout fuse cutouts or parts thereof, or to restrain trade or commerce therein." (Findings of fact.)

[3] In addition to the findings quoted in note 2, *supra*, the trial court found:

"9. The validity of the United States letters patent involved in the licenses of the defendants is not contested by the plaintiff in this action, and therefore is not here in issue.

* * * * *

"27. None of the license agreements aforesaid restrains trade in any article moving in interstate commerce, and none of them was entered into as a result of any conspiracy to restrain such trade.

"28. . . . The prices listed in Schedule A are Line's own selling prices, determined solely by Line without discussion with or advice from any other defendant.

"29. Under the cross-licenses with Southern and its licenses to others, Line established minimum prices only for structures within the ambit of the claims of its own patents. The classification schedules attached to the license agreements were only such as were reasonably necessary to protect the business of the licensor and implement the license agreement so as to prevent evasion by a licensee of lawful price limitation provisions. Line did not establish minimum selling prices for any devise not covered by a claim of its Schultz patent Re. 22,412 or its Kyle patent Re. 19,449.

* * * * *

"31. There is no charge of monopoly by the defendants. There was no fixing of resale prices on licensed dropout fuse cutouts by the defendants or any of them. . . .

"32. The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly. Each of the licenses granted to the licensee-defendants was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order that the licensee could continue lawfully to manufacture and sell its dropout fuse cutouts. . . .

* * * * *

"34. The cross-license agreements between Line and Southern were limited to the commercially practicable device covered by the subservient Schultz [Line's] patent, and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements. . . . Such cross-license agreements were entered into in good faith, not for the purpose of fixing prices in the industry but to permit the manufacture and sale of the cheaper device covered by the subservient patent, to facilitate the negotiation of licenses, and to provide royalty income. . . .

"35. The license agreements here in evidence did not restrain trade but promoted it by making available several sources where the patented devices could be obtained, thus increasing competition in such devices, particularly with respect to design, quality and service. Competition among the defendants for business in these devices continued to be vigorous after the making of the license agreements."

That the patents did not represent an industry-wide control appears from the following finding:

"5. The defendants are all manufacturers of electrical devices of various kinds. The dropout fuse cutouts manufactured by the defendants under the patent licenses have been and are in open competition with many other devices which perform the same functions and are not manufactured under the patent licenses, such as open single hinge dropout fuse cutouts; open non-dropout fuse cutouts; non-dropout fuse cutouts enclosed in materials other than cast wet-process porcelain, such as Prestite; automatic circuit breaker cutouts; and others listed in Defendants' Exhibit L-23. The average aggregate annual sales of licensed dropout fuse cut-

The question thus presented is: do the price-limiting provisions in some or all of the licenses under Line's or Southern's patents constitute a restraint of trade in violation of § 1 of the Sherman Act? We agree with the court below that they do not.[4] The price-limiting provisions in this case are comparable to those which, in the *Bement* and *General Electric* cases, *supra,* were held not to violate the Sherman Act. This Court sustained the agreement in the *Bement* case because the Sherman Act—

> "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers." (At p. 92.)

The license in that case was issued under several patents and, as here, it limited the prices at which the licensee was authorized to sell articles produced by the licensee under that license. In the *General Electric* case, this Court, in speaking of the patent holder's right to limit the selling prices of his licensee's products, said:

> "We think he [the patent holder] may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold." (At p. 490.)

In the present case, there are two types of license agreements. The price-limiting provisions are the same in each. The first type is that of the cross-licensing agreement between Line and Southern. In it Line granted to Southern a nonexclusive, royalty-free license to make and sell the products here in question. Line also prescribed that Southern's prices, terms and conditions of sale should be "not more favorable to the customer than those established from time to time and followed by the Line Company in making its sales." The difference between this license agreement and Line's agreements with each of the other defendants is that Southern, in return for this license, instead of paying cash royalties to Line, issued to Line a limited cross-license under Southern's complementary patent on a dropout fuse cutout. Southern also granted to Line an exclusive right to issue sublicenses under that patent. Southern inserted no price limitation in its cross-license to Line and Line made no commitment to insert price limitations in any sublicense which it might issue under Southern's patent. As far as price limitations were concerned, they all were contained in the royalty-free, nonexclusive license from Line to Southern and were applicable only to products made and sold by the latter under Line's patent. Assuming that the limitations thus placed by Line on the price of Southern's products, made and sold by it under Line's complementary patent, were reasonable limitations, especially in relation to Line's own operations under the same patent, they represented a lawful protection of Line's patent interests. They evidenced a normal exercise by a manufacturing patentee "of the exclusive right of a patentee . . . to acquire profit by the price at which the article is sold."[5] In some ways, they were even more natural and reasonable provisions for insertion by Line than would have been a bare provision for royalties. Line evidently needed these price limitations to enable it to continue to make and sell the product which its own improvement had converted from a commercial failure into a commercial success. It will be demonstrated later that Line's receipt of a royalty-free, unconditional cross-license under Southern's complementary patent, as consideration for Line's license to Southern, did not, *per se,* convert this otherwise lawfully limited license into an invalid license violating the Sherman Act.

The other type of license that was used by Line was that of a direct license issued separately to each of the ten other licensee-defendants. These licenses closely

outs manufactured by all the defendants from 1940 to 1944 was $1,918,247.78 and constituted only 40.77% of the average aggregate annual sales of all licensed and competitive cutouts manufactured and sold by all the defendants, and were distributed among the defendants as follows: General Electric, 29.2%; Line [,] 25.4% [;] Kearney, 18.9%; Southern, 7.9%; Westinghouse, 5.3%; Schweitzer and Conrad, 5.1%; Railway, 3.8%; Matthews, 2%; Porcelain, 1.5%; Royal, 0.5%; Pacific, 0.2%; and Johnson, 0.2%."

[4] "2. The cross-licenses and the license agreements entered into between the various defendants, as set forth in the preceding Findings of Fact, are lawful agreements." (Conclusions of law.)

[5] *United States v. General Electric Co., supra,* at p. 490.

resembled each other. Each was a nonexclusive license calling for the payment of a modest royalty to Line on each product made and sold by the licensee under Line's patent. Each included price limitations comparable to those in Line's license to Southern. These price-limiting licenses from Line are, as such, entirely comparable to those in the *Bement* and *General Electric* cases. Each license, however, also included a sublicense issued by Line under Southern's complementary patent. The royalties on the products made and sold under the two complementary patents were to be divided equally between Line and Southern. It will be demonstrated later that this sublicense under Southern's complementary patent and the agreement by Line to divide with Southern the royalties received upon products made and sold under the two patents did not, *per se,* convert these otherwise lawfully limited licenses into invalid licenses violating the Sherman Act.

Line also granted to certain licensee-defendants desiring it, a license under Line's so-called "Kyle patent" for enclosed fuse boxes. Some of these licenses carried price limitations on products made and sold by the licensee under the Kyle patent. These licenses are entirely comparable to those in the *Bement* and *General Electric* cases. They are well within the scope of those precedents and carry no suggested basis for a distinction claimed to convert them into invalid licenses violating the Sherman Act.

The Government now asks this Court to overrule the *Bement* and *General Electric* cases. The opinion by Mr. Justice Reed rejects that request but seeks to justify a reversal of the judgment below by distinguishing this case from those precedents. This dissent undertakes not only to emphasize the soundness of the *Bement* and *General Electric* decisions, but to demonstrate that the basic principles which sustain those decisions apply to this case with at least equal force. This initial discussion will omit the consideration of the cross-license from Southern to Line, the grant from Southern to Line of the exclusive right to issue sublicenses under the Southern patent and the agreement for the division of royalties between Southern and Line. The *Bement* and *General Electric* decisions are authority for upholding the remaining portions of such agreements in the light of the previously mentioned findings of fact which show that the agreements "arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor" [6] and that "the conditions of sale are normally and reasonaby adapted to secure pecuniary reward for the patentee's monopoly." [7] This dissent accordingly reexamines the foundation for those decisions and emphasizes the development, nature and effect of the patent rights which are decisive of the main issue both in those cases and in this.

Patent Rights

An understanding of the historical development and of the nature of patent rights in the United States is essential to a discussion of the relation between them and the restraints of trade prohibited by the Sherman Act. American patent rights find their origin in Great Britain. That nation appears to have been the first to issue "patents" to secure to inventors for limited times exclusive rights to their respective discoveries. These "patents" were called *"literae patentes," i. e.,* "open letters," because they were not sealed up but were exposed to view with the Great Seal pendant at the bottom. They were addressed by the sovereign to all subjects of the realm. Such instruments were, and to a degree still are, the common form used for making grants of dignities, such as peerages, appointments to certain offices and grants of privilege of various kinds. Their form, therefore, was similar to that of the "patents" used to grant exclusive rights or "monopolies" to trade guilds, corporations and, in some cases, individuals, permitting them to exclude competitors from the conduct of certain lines of profitable business.[8]

The contrast between these two kinds of exclusive rights in their relation to the public was reflected later in acts of the British Parliament and in the Constitution and stat-

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[6] *Bement* case, *supra,* at p. 92.

[7] *General Electric* case, *supra,* at p. 490.

[8] An early patent for the establishment of a new industry was granted to a Flemish weaver in 1331. There are records of a merchant, in 1347, having a monopoly for exporting Cornish tea and of an individual, in 1376, having a monopoly to sell sweet wines in the City of London. The first patent for a new invention that has been found in the records dates from 1561 and covers the manufacture of saltpetre. Meinhardt, Inventions, Patents and Monopoly, pp. 30, 35 (London, 1946).

utes of the United States. A patent to an inventor took nothing from the public which the public or the inventor's competitors already had. By hypothesis, it dealt with a new asset available to civilization only through its inventor. The royal patent served to encourage the inventor to disclose his invention. By granting to the inventor the right to exclude all others from making, using or selling the invention for a limited time, it was felt that the public was well served by the invention's disclosure, its early availability under the patent and its later general availability to everyone. This procedure was popular. On the other hand, royal patents securing exclusive rights to private parties to conduct profitable enterprises to the exclusion of existing or available competitors were issued to show royal favor or to secure funds at the expense of the public. Such patents became highly unpopular. The courts, at an early date, held them invalid.[9]

As early as 1602, Francis Bacon, in the House of Commons, supported the principle that a monopoly should be granted only for a "new manufacture." In 1623, there was enacted the Statute of Monopolies (21 Jac. I, c. 3, § 1; 1 Walker on Patents, pp. 18-21 (Deller's ed. 1937)) which declared void all monopolies and letters patent "of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, . . .". However, § VI of this Act made an express exception in favor of patents for inventions.[10] That Section has become the foundation of the patent law securing exclusive rights to inventors not only in Great Britain but throughout the world.

The result, historically and in principle, has not been a conflict between two legislative mandates. It has been rather a long standing approval, both by the British Parliament and the Congress of the United States, of the unique value of the exercise, for limited periods, of exclusive rights by inventors to their respective inventions, paralleled by an equally sustained and emphatic disapproval of certain other restraints of trade not representative of exclusive rights of inventors to their inventions.

The long and unfaltering development of our patent law often has been touched upon in our decisions. However, in the face of the direct attack now made upon some of its underlying principles, the infinite importance of our inventions justifies a brief review here of the development and nature of the patent rights attacked. The decision in this case must turn upon this Court's understanding of the relation between the licenses before it, the patent rights to which they relate and the Sherman Act. As interpreter of the Congressional Acts that have expressed the patent policy of this nation since its beginning, this Court is entrusted with the protection of that policy against intrusions upon it. The crucial importance of the development of inventions and discoveries is not limited to this nation. As the population of the world has increased, its geographical frontiers have shrunk. However, the frontiers of science have expanded until civilization now depends largely upon discoveries on those frontiers to meet the infinite needs of the future. The United States, thus far, has taken a leading part in making those discoveries and in putting them to use.

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[9] In 1602, in *The Case of Monopolies, Darcy v. Allein*, 6 Co. Rep. [Q. B.] 159, Part XI-84b; 1 Am. & Eng. Pat. Cas. (Abbott) 1; Webs. Pat. Cas. 1; a royal grant of exclusive right to manufacture playing cards within the realm was held void as violating the common law and several Acts of Parliament. And see 1 Walker on Patents, pp. 12-16 (Deller's ed. 1937).

[10] "VI. Provided also, and be it declared and enacted, That any Declaration before-mentioned shall not extend to any Letters Patents and Grants of Privilege for the Term of fourteen Years or under, hereafter to be made, of the sole Working or Making of any manner of new Manufactures within this Realm, to be the true and first Inventor and Inventors of such Manufactures, which others at the Time of Making such Letters Patents and Grants shall not use, so as also they be not contrary to the Law, nor mischievous to the State, by raising Prices of Commodities at home, or Hurt of Trade, or generally inconvenient: The said fourteen Years to be accounted from the Date of the first Letters Patents, or Grant of such Privilege hereafter to be made, but that the same shall be of such Force as they should be, if this Act had never been made, and of none other." 21 Jac. I, c. 3 (1623).

"The Statute of Monopolies created no new right either in the Crown or the people; it was simply declaratory of the common law and enacted into statute law, which bound the Sovereign, the doctrines that the courts had repeatedly affirmed, and reiterated those principles of the Magna Charta (9 Henry III, Ch. XXXVII, A. D. 1225) which declared that the liberties of his subjects shall not be infringed or broken by royal usurpation, and it limited the royal prerogative to certain definite terms and conditions under which it might be lawfully exercised. It is to be noted that there was a reservation of Letters Patent and grants of the privilege of the sole working or making of any new manufactures within the realm to the true and first inventor; conferring upon him an exclusive privilege for the term of fourteen years." 1 Walker on Patents, *supra*, at p. 22.

The Constitution of the United States provides that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, *by securing for limited Times to Authors* and *Inventors the exclusive Right to their respective* Writings and *Discoveries; . . .*" (Italics supplied.) Art. I, § 8.

The statutes primarily implementing this provision state:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, . . . not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor." R. S. § 4886, as amended, 46 Stat. 376, 53 Stat. 1212, 35 U. S. C. § 31.

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a *grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery* . . . throughout the United States and the Territories thereof, referring to the specification for the particulars thereof. . . ." (Italics supplied.) R. S. § 4884, as amended, 46 Stat. 376, 35 U. S. C. § 40.[11]

"Every application for patent or *patent or any interest therein shall be assignable* in law by an instrument in writing, and the applicant or patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent or patent to the whole or any specified part of the United States. . . ." (Italics supplied.) R. S. § 4898, as amended, 55 Stat. 634, 35 U. S. C. (Supp. V, 1946) § 47.

Conway P. Coe, Commissioner of Patents of the United States from 1933 to 1945, discussed the historical significance of the early establishment of the American patent system in his testimony before the Temporary National Economic Committee in 1939. He said:

"The American patent system was established at a time when mechanical inventions had already begun to affect not only the industrial conditions, but also the economic, social, and political status of Europe and the new Nation just erected on this continent. The significance of the inventions put to work in England and the States of the Confederation was realized by the American statesmen of that era. It is agreed that their recognition of the value of these new economic factors prompted them to write into the Constitution the provision of article I, section 8, empowering Congress 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries.' This provision, by the way, is impressive not only because it is included in the Constitution as one of the major grants of power to Congress, but equally because it bestows on patentees a complete monopoly, and therefore raises a question as to the constitutionality of an attempt to compel the owner of a patent to share with others the title, use, and avail of his property. I do not presume to determine the point; but I must contemplate it as an issue to be met here or hereafter.

"The authors of our patent system, judging by the language of article I, section 8, held the *exclusiveness* of the rights vested in a patentee as a powerful aid to

[11] The first Act to implement the constitutional provision was approved April 10, 1790. It provided:

"Section 1. . . ., That upon the petition of any person or persons to the Secretary of State, the Secretary for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefor, it shall and may be lawful to and for the said Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States, to bear teste by the President of the United States, reciting the allegations and suggestions of the said petition, and describing the said invention or discovery, clearly, truly and fully, and thereupon *granting to such petitioner or petitioners, his, her or their heirs, administrators or assigns for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery; . . . .*" (Italics supplied.) 1 Stat. 109-110.

progress in arts and sciences."[12] Hearings before the Temporary National Economic Committee, 76th Cong., 1st Sess. 839-840 (1939).

He analyzed the "patent rights" granted to the inventor and stated his reasons for concluding that the "monopoly" vested in a patentee is not in conflict with our antitrust laws as follows:

"It occurs to me that a great deal of misapprehension results from the failure to distinguish between the monopoly or privilege vested in a patentee and the sort of monopoly that British sovereigns once conferred. It is only when we appreciate this distinction that we can understand how Jefferson could consistently advocate the monopoly of patents for inventions

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[12] The Commissioner referred to the special interest of President Jefferson in this subject:

"No American among his contemporaries or his successors has achieved a greater reputation as an opponent of monopoly than Thomas Jefferson. Yet he not merely sanctioned, he eloquently advocated the form of monopoly represented in patents. I cite his commentary on an early act of Congress, presumably that of 1790, in the administration of which he collaborated with Henry Knox, Secretary of War, and Edmund Randolph, Attorney General.

" 'An act of Congress authorizing the issue of patents for new discoveries has given a spring to invention beyond my conception. Being an instrument of granting the patents, I am acquainted with their discoveries.

* * * *

" 'In the arts, and especially in the mechanical arts, many ingenious improvements are made in consequence of the patent-right giving *exclusive* use of them for 14 years.

" 'Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. Nobody wishes more than I do that ingenuity should receive liberal encouragement.' " Hearings before the Temporary National Economic Committee, *supra,* at p. 840.

Some conception of the degree to which the present patent system has been resorted to is found in Commissioner Coe's testimony that, up to 1939, over 2,000,000 patents had been issued, apart from design patents and reissues. The figure is now approximately 2,500,000 of which all but about 100,000 have been issued since 1870. He showed also that only about 60% of the applications filed are finally granted. (*Id.* at p. 844, and Exhibits 179 and 180.) See also, Official Gazette, U. S. Pat. Off., Vol. 605, p. 714 (Dec. 30, 1947).

After the final report of the Temporary National Economic Committee, the President issued Executive Order No. 8977, December 12, 1941, 1 C. F. R. Cum. Supp. 1040, establishing the National Patent Planning Commission to conduct a comprehensive survey and study of the American patent system and, among other things, to—

"consider whether the system now provides the maximum service in stimulating the inventive genius of our people in evolving inventions and in furthering their prompt utilization for the public good; . . . whether there are obstructions in our existing system of patent laws, and if so, how they can be eliminated; . . . and what methods and plans might be developed to promote inventions and discoveries which will increase commerce, provide employment, and fully utilize expanded defense industrial facilities during normal times."

The President appointed Charles F. Kettering, Chairman, Chester C. Davis, Francis P. Gaines, Edward F. McGrady and Owen D. Young as members of the Committee. The Report of the Committee, transmitted by the President to Congress June 18, 1943 (H. R. Doc. No. 239, 78th Cong., 1st Sess. 1), contained the following:

"The American patent system established by the Constitution giving Congress the 'power to promote the progress of science and useful arts,' is over 150 years old. The system has accomplished all that the framers of the Constitution intended. It is the only provision of the Government for the promotion of invention and discovery and is the basis upon which our entire industrial civilization rests.

"The American people and their Government should recognize the fundamental rightness and fairness of protecting the creations of its inventors by the patent grant. The basic principles of the present system should be preserved. The system has contributed to the growth and greatness of our Nation; it has—

(1) Encouraged and rewarded inventiveness and creativeness, producing new products and processes which have placed the United States far ahead of other countries in the field of scientific and technological endeavor;

(2) Stimulated American inventors to originate a major portion of the important industrial and basic inventions of the past 150 years;

(3) Facilitated the rapid development and general application of new discoveries in the United States to an extent exceeding that of any other country;

(4) Contributed to the achievement of the highest standard of living that any nation has ever enjoyed;

(5) Stimulated creation and development of products and processes necessary to arm the Nation and to wage successful war;

(6) Contributed to the improvement of the public health and the public safety; and

(7) Operated to protect the individual and small business concerns during the formative period of a new enterprise.

The strongest industrial nations have the most effective patent systems and after a careful study, *the Commission has reached the conclusion that the American system is the best in the world.*" (Italics supplied.)

In its summary of findings and recommendations it added:

"The patent system is the foundation of American enterprise and has demonstrated its value over a period coextensive with the life of our Government. The principle of recognizing a property right in intellectual creation is sound and should be continued as contemplated in the Constitution." (*Id.* at p. 9.)

while condemning the traditional form of monopoly.

"Americans generally detest monopoly in the true sense of the term because it makes possible the ruthless exercise of power. Indeed, the American Revolution was precipitated by popular resentment of the monopoly on tea held by the East India Co. It would, therefore, have been exceedingly strange if, only a few years later, the delegates sent to the Constitutional Convention by Massachusetts and the other Colonies had been willing to sanction an equivalent form of monopoly under the new government they were creating. In the sixteenth and seventeenth centuries a king or queen of England could reward a favorite by granting him a monopoly on salt or some other necessary of life. This beneficiary of royal favor was not, of course, the discoverer of salt. That came ready-made from the hands of the Creator eons before the advent of man. What the darling of his or her majesty received was the power to compel others to use salt solely of his supplying and only on terms of his dictation.

"But a patent is no such monopoly. It is a reward for the invention or discovery of something new, something before unknown, something added to the sum total of human knowledge, utility, well-being; something which the inventor or discoverer, despising the lure of money or fame, might have withheld from his fellow men. By the monopoly that goes with a patent, then, the Government recompenses and, for a limited time, protects the inventor or discoverer who gives to the world the use and benefit of his invention or discovery. This is a kind and a degree of mutuality that negatives monopoly in the old or the current concept. Monopoly in the latter sense of the term gave to an individual or a group complete dominion of something already existent. A patent awards monopoly to the producer of something original, something superadded to the common store. So it is that two things bearing the same name need not be of the same nature.

"It has been contended that there sometimes occurs a clash between the antitrust laws and the patent statutes. I might suggest that since the first antitrust legislation in 1890, the patent laws and the antitrust laws have coexisted without any irreconcilable conflicts between them. They have each of them at least one common objective, namely, the retention by the public of a right once acquired by it. As a matter of fact, patents accomplish more than the retention of the acquired rights. Their influence is creative; they operate to multiply and expand acquisitions by the public." (*Id.* at pp. 840-841.)

A comparable analysis of the nature of the grant to inventors of the exclusive right to their respective inventions or discoveries for a limited time has been made by this Court.

"Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. *Seymour v. Osborne,* 11 Wall. 516, 533. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge. *United States v. Bell Telephone Co.,* 167 U. S. 224, 239; *Paper Bag Patent* case, 210 U. S. 405, 424; *Brooks v. Jenkins,* 3 McLean 432, 437; *Parker v. Haworth,* 4 McLean 370, 372; *Allen v. Hunter,* 6 McLean 303, 305-306; *Attorney General v. Rumford Chemical Works,* 2 Bann. & Ard. 298, 302. He may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted. An exclusive enjoyment is guaranteed him for seventeen years, but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use. *Kendall v. Winsor,* 21 How. 322, 327; *United States v. Bell Telephone Co., supra,* p. 239. To this end the law requires such disclosure to be made in the application for patent that others skilled in the art may understand the invention and how to put it to use." *United States v. Dubilier Condenser Corp.,* 289 U. S. 178, 186-187.[13]

[13] In *Grant v. Raymond,* 6 Pet. 218, 241-242, 243, Chief Justice Marshall said:

"The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give

This constitutional and legislative policy toward inventions is specific in contrast with the generality of the language in the Sherman Act of 1890. The constitutional and long standing statutory approval of the exclusive rights of an inventor to make, use and sell products of his invention for a limited time was an ample guaranty that the Sherman Act did not directly or impliedly repeal such approval. The prohibition of unreasonable restraints of trade and the approval of exclusive rights of inventors to their inventions for limited periods of time continued to exist together. This was nothing new. As long as the inventors kept within their statutory exclusive rights, they were not engaging in unreasonable restraints of trade violating the Sherman Act.

There was nothing to indicate an intent that the general language of the Sherman Act was to change the nation's traditional and specifically stated policy towards inventions. That policy had been widely regarded as having made a major contribution to the nation's exceptional economic progress. The Sherman Act unquestionably applied to any abuse of a patentee's exclusive rights which exceeded the limit of those rights and which amounted to an unreasonable restraint of interstate trade. However, there was nothing to indicate that the Sherman Act restricted the traditional patent rights. *Bement v. National Harrow Co., supra,* at p. 92.

Limited License Agreements

The primary issue in this case, therefore, is to determine whether or not Line by the issuance of its restricted licenses has thereby sought to exercise any right that is in excess of the exclusive right secured to Line by the patent laws of the United States. If it has done so, then such licenses, like other agreements, must be scrutinized to determine whether or not they create an unreasonable restraint of trade in violation of the Sherman Act.

The first consideration is the relation of the Sherman Act to provisions in a license agreement which place limitations—as in the *Bement* and *General Electric* cases—upon the prices which may be charged by the licensee for products made and sold by it under the protection of its license. The issue corresponds to that raised by the Westinghouse license in the *General Electric* case.[14] The Sherman Act's invalidation of agreements in restraint of trade applies only to those in unreasonable restraint of trade and the definition of such unreasonableness depends largely upon the common law meaning of restraint of trade.[15] This permits such invalidation where, for example, a license is a mere subterfuge for price fixing which otherwise would amount to unreasonable restraint of trade in violation of the Sherman Act. See *United States v. U. S. Gypsum Co., post,* p. 364, decided concurrently with this case.[16]

effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received: if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . .

* * *

"The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labour devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

[14] There is no issue here corresponding to the other issue examined and upheld in the *General Electric* case, namely, that involving the validity of the patentee's agency system of sales of its patented article. Another system for making sales of a patented article has been held invalid where the "agencies" were found not to be *bona fide* agencies. *United States v. Masonite Corp.,* 316 U. S. 265. That case, in turn, did not reach the issue raised by the Westinghouse license in the *General Electric* case. The Court there said (p. 277): "we need not reach the problems presented by *Bement v. National Harrow Co.,* 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company."

[15] *United States v. American Tobacco Co.,* 221 U. S. 106, 179-180. See also, *Standard Oil Co. v. United States,* 221 U. S. 1.

[16] The instant case also is to be distinguished sharply from those in which the parties to a license have sought to fix prices for the resale by the licensee of patented products previously sold to the licensee by the patentee or others. *United States v. Univis Lens Co.,* 316 U. S. 241, 252; *Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 452, 456-457; *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502, 516; *Straus v. Victor Talking Machine Co.,* 243 U. S. 490, 500-501; *Bauer & Cie v. O'Donnell,* 229 U. S. 1, 16-17. See also, *Standard Oil Co. v. United States,* 283 U. S. 163, 169; *United Shoe Mach. Co. v. United States,* 258 U. S. 451, 463-464; *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 48-49; *Adams v. Burke,* 17 Wall. 453, 455-456.

The Sherman Act's prohibition of unreasonable restraints of trade, accordingly, would not invalidate an unconditional, nonexclusive license agreement which served only to release the licensee from the right of the patent holder to exclude him from making, using or selling a patented article. The original, exclusive right of the patent holder, being secured to him through the terms of his patent, was not in violation of the Sherman Act. Accordingly, his release or waiver of a part of that exclusive right by issuance of an unconditional, nonexclusive license, *per se,* decreased rather than increased the statutory restraint of trade to which he was entitled.

The next question is whether the insertion in such a license of some limitation upon the licensee's right to sell the articles made by the licensee under the patent, *per se,* converts this otherwise lawful agreement into an unreasonable restraint of trade violative of the Sherman Act. The answer is no. Just as an unlimited license is a partial, but lawful, relaxation of the lawful restraint of trade imposed by the patent, so a limited license is but a correspondingly less relaxation of that same restraint.

The fact that the limitation in the license is a limitation on the price which may be charged by the licensee in making sales of the article made by the licensee under the protection of the patent does not change the answer, provided the price prescribed is "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."[17] Here again, the restraint of trade imposed by the patent itself is lawful. Therefore, as long as the license agreement has only the effect of reducing the lawful restraint imposed by the patent, such agreement merely converts the original lawful restraint into a lesser restraint, equally lawful.

Such agreements should be carefully scrutinized to make sure that they do not introduce new restrictions which, as judicially construed, unreasonably restrain trade and thus violate the Sherman Act. In the instant case the findings eliminate such possibilities and thus reduce the issue here to one comparable with the issue in the *Bement* and *General Electric* cases.

This brings us to a further discussion of the nature of the license in the present case and of the precise limitations contained in it. This requires, first of all, a consideration of the nature of the exclusive right to make, use and sell the patented product. The precise nature of such a "patent right" has been described as follows by Chief Justice Taft in a unanimous opinion of this Court:

> "It is the fact that the patentee has invented or discovered something useful and thus has the common law right to make, use and vend it himself which induces the Government to clothe him with power to exclude everyone else from making, using or vending it. In other words, the patent confers on such common law right the incident of exclusive enjoyment and it is the common law right with this incident which a patentee or an assignee must have [in order to bring a suit for infringement]. That is the implication of the descriptive words of the grant 'the exclusive right to make, use and vend the invention.' The Government is not granting the common law right to make, use and vend, but it is granting the incident of exclusive ownership of that common law right, which can not be enjoyed save with the common law right. A patent confers a monopoly. So this Court has decided in the *Paper Bag* case, *supra* [210 U. S. 405], and in many other cases. The idea of monopoly held by one in making, using and vending connotes the right in him to do that thing from which he excludes others." *Crown Co. v. Nye Tool Works,* 261 U. S. 24, 36-37.

This analysis is the key to the issue before us. It demonstrates that the common law right to make, use and sell the product of an unpatented invention exists without any right to exclude others from so making, using or selling such product. The additional "exclusive right," or so-called "patent right," which is added to the common law right of the inventor is added by authority of the Constitution and of the federal statutes, so as to promote the progress of science, the useful arts and, no doubt, the general welfare. The patent or any interest therein may be assigned. R. S. § 4898, as amended, 55 Stat. 634, 35 U. S. C. (Supp. V, 1946) § 47.[18] An assignee, exercising his right to exclude others during the life of the patent from making, using or selling

[17] *General Electric* case, *supra,* at p. 490.

[18] In discussing this patent monopoly and the patent laws of the United States this Court long ago said:

"The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign,

articles under protection of the patent, does not practice a restraint of trade in violation of the Sherman Act any more than would his assignor if the assignment had not been made.

Any attempted assignment or transfer short of those indicated in the statute "is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement." [19] The legal position of the holder of a simple, unconditional, nonexclusive license is important.[20] Before his receipt of his license, he had the common law right to make, use and sell the patented article as well as other articles, *except to the important extent prevented by the patentee's exclusive rights.* The license changed that position by withdrawing from the licensee, to the extent of the license, the restriction which the patent placed upon him. Accordingly, to the extent of his license, the restraint placed upon trade by the patent was diminished. In relation to the Sherman Act his license, instead of creating an added ground for asserting a violation of the Sherman Act, thus, *per se,* relaxed an existing restraint of trade. The previous restraint imposed by the patent was not a violation of the Sherman Act and, therefore, the mere lessening of that restraint was not a violation of that Act. The important point is the need to see to it that the lessening of the restraint resulting from the issuance of either an absolute license or a limited license is, in fact, no more than a mere withdrawal of the lawful restraint imposed by the patent and is not either directly or indirectly an imposition of a new restraint not within the ambit of the patent right. An unconditional, nonexclusive and royalty-free license presents, *per se,* no need for special scrutiny under the Sherman Act. A royalty-yielding license presents the issue suggested by the language in the *General Electric* case. In order not to violate the Sherman Act, the royalty must be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." [21] However, as well explained in that case, a royalty may not, by itself, satisfy the needs of the patent holder. Limitations on the price of sales by the licensee of products made by the licensee under the patent may be the best, or even the only, condition that is thus "normally and reasonably adapted" to the situation.

The following statements illustrate the directness with which this Court repeatedly has decided in favor of the validity of limited licenses when that question has been before it:

> ". . . the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." *Bement v. National Harrow Co., supra,* at p. 91.
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> "As was said in *United States v. General Electric Co.,* 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' The restriction here imposed [upon the licensee to manufacture and to sell the patented article for certain uses only] is of that character. The practice of granting the licenses for a restricted use is an old one, see *Rubber Company v. Goodyear,* 9 Wall. 788, 799, 800; *Gamewell Fire-Alarm Telegraph Co. v. Brooklyn,* 14 F. 255. So far as appears, its legality has never been questioned." *General Talking Pictures Corp. v. Western Electric Co.,* 305 U. S. 124, 127.

grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. . . . Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler v. Wilder,* 10 How. 477, 494, 495; *Moore v. Marsh,* 7 Wall. 515." *Waterman v. Mackenzie,* 138 U. S. 252, 255.

This was quoted with approval in *Crown Co. v. Nye Tool Works,* 261 U. S. 24, 37, and was enlarged upon in the *General Electric* case, *supra,* at p. 489.

[19] See note 18, *supra.*

[20] " 'As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,' . . . " Quoted with approval by Chief Justice Taft in a unanimous opinion of the Court in *De Forest Co. v. United States,* 273 U. S. 236, 242.

[21] *General Electric* case, *supra,* at p. 490.

The normality, reasonableness and practical necessity for inserting a price-limiting condition in certain licenses, without trespassing upon the prohibited area of unlawful restraints of trade, is effectively summarized in the *General Electric* case, at p. 490:

"If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell." [22]

During the hearings of the Temporary National Economic Committee, testimony was received from the Commissioner of Patents and manufacturers familiar with the commercial development of patented products bearing on the reasonableness and propriety of price limitations in patent licenses comparable to those in the present case. It was to the effect that commercially successful mechanical inventions, such as those in the electrical, communications and automotive industries, usually represent not only the intrinsic merit of the inventions themselves but a substantial investment in research, experimentation and promotion. If, after the disclosure of the invention, others are to be licensed to make the patented article, the costs of production by such licensees will reflect none of the investments above-mentioned. If the patentee is to be reimbursed for his expenditures, he will need, therefore, to secure the benefit of a royalty sufficient to accomplish this or of a restriction on the price at which licensees may sell their products under the patent. This price would have to be one that would enable the patentee to manufacture and sell the article in such quantities and at such prices as would produce a return to him commensurate with his investment in it. He might prescribe both a royalty and a restriction. As long as the royalties and the prices were "normally and reasonably adapted to secure pecuniary re-

[22] Chief Justice Taft, at pp. 490-491, made the following significant references to the *Bement* case:

"This question was considered by this Court in the case of *Bement v. National Harrow Company*, 186 U. S. 70. A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, or on more favorable terms of payment and delivery to purchasers, than were set forth in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. It was objected that this made for a monopoly. The Court, speaking by Mr. Justice Peckham, said (p. 91):

" 'The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.'

"Speaking of the contract, he said (p. 93):

" 'The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.' "

Judge Westenhaver, whose judgment in the District Court was affirmed by this Court in the *General Electric* case, said:

"If both licensor and licensee are making and selling, it is quite conceivable that the owner of the patent could not safely grant licenses at all on any other terms; otherwise, he would risk having his business destroyed, and hence, as a matter of ordinary business prudence, would feel obliged to keep his patent monopoly wholly within his own hands. And it was so held in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058." *United States v. General Electric Co.*, 15 F. 2d 715, 718.

ward for the patentee's monopoly"[23] they would perform much the same function.[24]

In cases where patents are owned by comparatively small industrial producers but licenses are to be issued by them to comparatively large industrial producers in the same field, the necessity for early reimbursement of the patent owners for their development costs is clear and the danger that a large licensee will undersell his smaller licensor is obvious. This is the situation in the present case. The General Electric Company and the Westinghouse Electric Corporation are among the licensees of the much smaller patent holders, Line and Southern. Similarly, where outside capital is needed to finance the development of an invention, it is normal and reasonable for the investors to require not only a valid patent but also to insist that any licenses issued during the initial operating period shall contain such price limitations as will allow the patent holder to amortize his original investment within a reasonable time. In this case, finding of fact No. 32 shows that "The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly."[25]

The following statement by Conway P. Coe, Commissioner of Patents, before the Temporary National Economic Committee in 1939, reinforces the above conclusions:

"Speculative capital must be encouraged to fall in behind a new enterprise and this is true whether the enterprise is wholly new or represents merely an expansion of an established organization. Some testimony has been offered to this committee by representatives of large corporations that they would continue to invent, and invent, and invent, and research, research, and research whether or not they were rewarded by the patent grant, but, if you will investigate, I believe you will find that whenever these large corporations, themselves firmly established, undertake a new development, that development is likely to be founded upon patent protection. Whatever opinions have been expressed to this committee or may hereafter be expressed as to whether or not the inventor will continue to invent without the patent system, I think I can present to you indisputable evidence that speculative capital will not back new inventions without the patent protection. And in the final analysis this is the crux and the most important thing in the whole patent question."[26] Hearings before the Temporary National Economic Committee, *supra,* at pp. 857-858.

The foregoing supports the conclusions reached in the *Bement* and *General Electric* cases, *supra.* The basis for such support is sufficiently broad to lead to the same result in the present case.

Sublicenses and Cross-Licenses

Under the foregoing principles and authorities, a simple price-limiting patent license, in which the price limitations meet the test stated in the *General Electric* case, is a lawful agreement. Such a license would involve, as a possible restraint of trade, only the exclusive right to make, use and sell the patented product. That restraint would exist by virtue of the statute and constitutional provision long antedating the Sherman Act. If the limitations in a license reach beyond the scope of the statutory patent rights, then they must be tested by the terms of the Sherman Act. Assuming

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[23] *General Electric* case, *supra,* at p. 490.

[24] Hearings before the Temporary National Economic Committee, *supra;* Conway P. Coe, Commissioner of Patents, pp. 839, *et seq.,* 857, *et seq.;* I. Joseph Farley, Patent Counsel, Ford Motor Co., Detroit, Michigan, p. 262, *et seq.;* Dr. Vannevar Bush, President, Carnegie Institution, Washington, D. C., p. 898, *et. seq.;* Ralph E. Flanders, President, Jones & Lamson, Springfield, Vermont (now U. S. Senator from Vermont), p. 928, *et seq.;* John A. Graham, President, Motor Improvements, Inc., Newark, New Jersey, p. 938, *et seq.;* Dr. Frank B. Jewett, President, Bell Telephone Laboratories, Inc., New York City, p. 958, *et seq.;* Maurice H. Graham, Independent Inventor, Minneapolis, Minnesota, p. 1076, *et seq.;* and George Baekeland, Vice President, Bakelite Corporation, New York City, p. 1082, *et seq.*

[25] See note 3, *supra.*

[26] In 1939, the Commissioner of Patents testified that of the patents issued, exclusive of design patents and reissues, large corporations (having respectively over $50,000,000 of assets) received but 17.2%, small corporations (having respectively less than $50,000,000 of assets) 34.5%, foreign corporations 5.4% and individuals 42.9%. Subsequent assignments did not materially affect these proportions. Hearings before the Temporary National Economic Committee, *supra,* at p. 846.

Clarence C. Carlton, president of the Automotive Parts and Equipment Manufacturers Association, testified that in the automotive parts industry:

"Patents are valued so much more by the small manufacturer than they are by the large manufacturer. . . . if anything happened to this patent system the fellow who would be hurt more than anyone else would be the smaller manufacturer." (*Id.* at pp. 1057, 1058.)

that in the instant case the price limitations do not reach beyond the restraint of the patent, the next question is: does the additional sublicense issued by Line under the Southern patent make a difference? The answer is no.

The sublicense, *per se, further diminishes* the statutory restraint of trade imposed by the patent law. It adds a release from the restraint of Southern's patent. Line's authority to issue the sublicense was an express grant by Southern to Line of an exclusive right to issue it. *Per se,* this sublicense certainly amounts to no more than another license under another patent. In the instant case it is under a complementary patent without which Line's license would be without commercial value. For that very reason it is a reasonable and necessary part of the transaction. In both the *Bement* and *General Electric* cases, the license in question was issued not merely under one, but under many patents held by the licensor. In those cases, apparently, it was not thought necessary to question the relation of those patents to one another or the authority of the licensor to issue the license under each of them. In any event, there hardly could have existed in those cases any closer relationship between the patents involved or a more essential and normal reason, of a patent nature, for combining rights under them than existed here between Line's and Southern's complementary patents. Except for the cross-licensing feature, to be next considered, the situation in relation to the Sherman Act is the same here as though Line had received an assignment of Southern's patent and issued licenses under it as well as under Line's patent.

In the present case, there are ten licensee-defendants instead of one as in each of the *Bement* and *General Electric* cases. In view of the positive finding that there was no agreement or understanding among the licensees amounting to an unreasonable restraint of trade, this mere multiplication of one license by ten produces a repetition of the same issue rather than a different issue. It is apparent also from the record in the *General Electric* case that, in that case, in addition to the Westinghouse license, there were licenses to 13 other manufacturers, which had been issued by the licensor, although the licensees under them were not made parties to the suit. 15 F. 2d 715, 716.

It is suggested also that the *Bement* and *General Electric* rule does not apply because there is a cross-licensing agreement between Line and Southern. The suggestion apparently is that such an agreement, *per se,* reaches beyond the scope of the exclusive rights of the parties under the patents and converts the price limitations in the respective licenses into unreasonable restraints of trade violating the Sherman Act.

The cross-license from Southern carries no price-limiting feature. At most it is a royalty-free cross-license issued to Line in consideration of Line's license to Southern. It is accompanied by a grant from Southern to Line of an exclusive license to grant sublicenses under Southern's patent. Provision is made also for the equal division between Southern and Line of such royalties as shall be received by Line upon products made and sold by the respective licensees under the Southern and Line patents.

These sublicenses and the royalties derived from them do not, however, increase the restraints on trade beyond those restraints which are inherent in the respective patents. In fact, each original license decreased those restraints under Line's patent and each sublicense did the same under Southern's patent. Because of the complementary relationship between the patents, these sublicenses have served substantially to remove the restraints which the respective patents, when held separately, put in the way of production. The two patents together completely covered the product. If the price limitations were valid under Line's licenses, the issuance by Line of the sublicenses under Southern's patent has no more effect on the question involved in this case than if Southern, instead of granting to Line an exclusive right to issue sublicenses under Southern's patent, had assigned that patent to Line and Line had then issued original licenses under it on the same terms as Line issued the sublicenses.

The next consideration is the effect of the cross-license by Southern to Line, coupled with the grant of the exclusive right to issue the above-mentioned sublicenses under Southern's patent and the division of certain royalties received by Line. Where, as here, there is no agreement, course of dealing or other circumstance than the existence of the cross-licenses between complementary patent holders, the cross-licensing agreements do not, *per se,* reach beyond the scope of the patent rights.

Patent pools, especially those including unrelated or distantly related patents and

involving the issuance of many forms of royalty-free, royalty-bearing or price-limiting licenses and cross-licenses, might present a different picture from that in this case. Such arrangements might be but a screen for, or incident to, an unlawful agreement in restraint of trade violating the Sherman Act. Here we have no such facts. The findings eliminate all bases for the claim of invalidity except the terms of the license agreements, *per se.* We are not here confronted with the effect of cross-licenses between unrelated patents. Here we have only that natural situation, common under our patent laws, where two or more complementary patents are separately owned. One is for an improvement that is commercially essential to the other. In such a case one solution is to combine the ownership of the two by purchase and complete assignment. That, *per se,* would not involve an unlawful restraint of trade.

The solution in the instant case was even more natural than a consolidation of the patents by purchase. It conduced even more to the maintenance of competition. Each patentee granted to the other a nonexclusive, royalty-free license. This cross-licensing amounted to a waiver by each patent holder of his right to exclude the other from making, using or selling the patented product. This resulted in a diminution of the restraint created by the patent statute. This, *per se,* was, therefore, well within the scope of the patent and not a violation of the Sherman Act. Both patentees became producers.

Unless the terms of the cross-licenses reach beyond those that are normally and reasonably adapted to the patent relationships of the parties, the cross-licenses are no more outside of the protection of the patent law than would be direct licenses. A reasonable price-limiting provision in at least one of two cross-licenses is just as normal and reasonable a patent provision as it would be in a direct license. In the present case the validity of the price limitation in Line's license to Southern is entitled to the same judicial support and for the same reasons as if no cross-license had been issued in exchange.

In the present case, the need for the price-limiting provisions, both in the license to Southern and in the licenses to the other ten defendants, rests upon the need of the patent holder to protect its opportunity to continue the manufacture of its own patented product. The substance of the situation is that the patent holder needs to protect itself precisely as much and in the same way as in the case of a direct license standing alone. The Sherman Act traditionally tests its violation not by the form but by the substance of the transaction.

In distinction from patent pools and from cross-licenses between holders of competing or even noncompeting but unrelated patents, we have here a case of a cross-license and a division of royalties between holders of patents which are complementary and vitally dependent upon each other. We have here complementary patents each of which alone is commercially of little value, but both of which, together, spell commercial success for the product. Cross-licenses between their holders, on terms within the needs of their patent monopolies, are essential to the realization of the benefits contemplated by the patent statutes. Far from being unlawful agreements violative of the Sherman Act, such agreements provide in fact the only reasonable means for releasing to the public the benefits intended for the public by the patent laws. A cross-license between mutually deadlocked complementary patents is, *per se,* a desirable procedure. *Standard Oil Co. v. United States,* 283 U. S. 163, 170, *et seq.* Its validity must depend upon the terms and substance of the surrounding circumstances.

The record in the *General Electric* case discloses that the license agreement between the General Electric Company and Westinghouse which was there upheld was itself a cross-licensing agreement.[27] In fact, the opinion of the lower court in the instant

[27] "As a part consideration for the granting of the foregoing licenses, the Licensee (Westinghouse) hereby grants and agrees to grant to the Licensor (General Electric) a non-exclusive license under the United States patents which it now owns or controls and under those which may issue on pending applications now owned or controlled by it, and under any United States patents which the Licensee may own or control, during the term of this agreement, for improvements in incandescent lamps specified in paragraphs *a, b, c* and *d* of Article 2, to make, use and sell throughout the United States and the territories thereof incandescent lamps of the kinds specified in said paragraphs of Article 2 hereof, such license being personal, non-assignable, indivisible and non-transferable except to successors to substantially the entire good will and business of the Licensor, and to continue for the period during which the licenses from the Licensor to the Licensee remain in force." Par. (8) of Agreement between General Electric Company and Westinghouse Electric & Manufacturing Company, March 1, 1912, Exhibit A, at p. 117 of the record in the Supreme Court of the United States, No. 113, O. T. 1926.

case commented on that cross-license as follows:

"A cross-license agreement existed between General Electric and Westinghouse which contained agreements even more restrictive than the price protection provisions of the cross-licenses involved in the case at bar." *United States v. Line Material Co.,* 64 F. Supp. 970, 975.

The opinion in the *General Electric* case makes no distinction between cross-licenses and direct licenses. That case, therefore, is itself a precedent for upholding a cross-licensing agreement under facts characterized below as being "even more restrictive" than those here presented.

The acquisition by a single party of patents on noncompeting machines has been held not to be, *per se,* a violation of the Sherman Act. In *United States v. Winslow,* 227 U. S. 202, 217, Mr. Justice Holmes, in a unanimous opinion of the Court, said:

"The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent* case, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, . . . they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. . . . we can see no greater objection to one corporation manufacturing seventy per cent. of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree."

See also, *United States v. United Shoe Mach. Co.,* 247 U. S. 32, 45, 51, *et seq.; United Shoe Mach. Co. v. United States,* 258 U. S. 451, 463-464.

In *Standard Oil Co. v. United States,* 283 U. S. 163, 170-171, 175, Mr. Justice Brandeis spoke as follows for a unanimous Court (except for Mr. Justice Stone who took no part in the case):

"The Government concedes that it is not illegal for the primary defendants to cross-license each other and the respective licensees; and that adequate consideration can legally be demanded for such grants. But it contends that the insertion of certain additional provisions in these agreements renders them illegal. It urges, first, that the mere inclusion of the provisions for the division of royalties, constitutes an unlawful combination under the Sherman Act because it evidences an intent to obtain a monopoly. This contention is unsound. Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. . . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation.[28] . .

* * * * *

"But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce."

In the above context, and for the reasons previously presented, it is evident that the agreements effecting a price fixation which thus may violate the Sherman Act are only those which "impose . . . an unreasonable restraint upon interstate commerce," within the meaning of the Sherman Act read in the light of the patent laws.[29] The agreements which remain within the ambits of the patents to which they relate still are lawful agreements by virtue of the patent laws, just as they have been throughout the life of our patent system.

Judicial and Legislative History Since the General Electric Case

Neither the *Bement* nor the *General Electric* cases, *supra,* has been overruled and

[28] In that *Standard Oil* case the footnote at this point stated (p. 171):

"This is often the case where patents covering improvements of a basic process, owned by one manufacturer, are granted to another. A patent may be rendered quite useless, or 'blocked,' by another unexpired patent which covers a vitally related feature of the manufacturing process. Unless some agreement can be reached, the parties are hampered and exposed to litigation. And, frequently, the cost of litigation to a patentee is greater than the value of a patent for a minor improvement."

[29] Before making this statement, Mr. Justice Brandeis already had joined in the opinion of the Court in the *General Electric* case, *supra,* and written the opinion in *Carbice Corp. v. American Patents Development Corp.,* 283 U. S. 27.

the reasoning upon which they are based has not been directly or indirectly rejected by this Court. On the other hand, this Court repeatedly has recognized the existence of the principles announced in them. See, for example, *Carbice Corp. v. American Patents Development Corp.*, 283 U. S .27, 31; *General Talking Pictures Corp. v. Western Electric Corp.*, 305 U. S. 124, 127:

> "Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it." (Citing the *Bement* and *General Electric* cases.) *Interstate Circuit, Inc. v. United States,* 306 U. S. 208, 228.

And see *United States v. Univis Lens Co.*, 316 U. S. 241, 252; *United States v. Masonite Corp.*, 316 U. S. 265, 277.

The rule of *stare decisis* applies to the interpretation given to the patent statutes and to the Sherman Act by the *Bement* and *General Electric* cases. There is no occasion here for such a relaxation of that rule as was suggested by Mr. Justice Brandeis in cases interpreting broad constitutional phrases. See his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 410. To the extent that the present holdings are based upon opinions of this Court, that element is inherent in the rule of *stare decisis.*

The exceptional recent activity in seeking, by statutory amendment, a change in the patent laws as interpreted in the *Bement* and *General Electric* cases indicates a widespread understanding that, if such interpretation is to be changed, the remedy calls for congressional action. The resistance to such a change which has been shown by Congress is impressive.[30] It indicates no dissatisfaction with the interpretation of existing law as expressed in the *Bement* and *General Electric* cases.

There appears, therefore, to be neither adequate reason nor authority for overruling the *Bement* and *General Electric* cases or for distinguishing this case from them.

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[30] Many bills relating to these issues have been introduced in Congress and referred to appropriate committees. Not one has been reported back to either House of Congress.

As early as 1912, H. R. 22345, 62d Cong., 2d Sess., proposed that a patentee be not permitted to fix the price of articles to be sold by others under his patent.

During the hearings held by the Temporary National Economic Committee, the Department of Justice recommended many fundamental as well as minor changes in the patent law. These included the prohibition of price-limiting patent licenses comparable to those here at issue. Preliminary Report, Temporary National Economic Committee, Sen. Doc. No. 95, 76th Cong., 1st Sess. 16-17 (1939). The Department of Commerce took an opposite position. It submitted recommendations for retaining but improving the patent system substantially in accordance with its traditional underlying policies. The Final Report of the Temporary National Economic Committee incorporated the substance of the proposals of the Department of Justice. It included a recommendation that patentees be not permitted to limit the price at which a licensee might sell a product made under the license. Final Report, Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. 36-37 (1941).

In 1941, the President appointed the National Patent Planning Commission to submit recommendations on questions dealt with in the report. (See note 12, *supra.*) In 1943, among the examples of the proposed reforms which it concluded "would not be a beneficial innovation in our patent system," it listed "outlawing certain limitations in patent licenses, . . . " This evidently referred to the above-mentioned proposals of the Temporary National Economic Committee to outlaw price restrictions and other limitations in patent licenses. Report of the National Patent Planning Commission, House Doc. 239, 78th Cong., 1st Sess. 9 (1943).

Bills to the same general effect as the proposals of the Temporary National Economic Committee have been introduced and referred to Committees of Congress but have advanced no further. Among them have been the following: S. 2491 (§ 4), S. 2730 (§ 3), H. R. 7713 (§ 3), 77th Cong., 2d Sess. (1942); H. R. 109 (§ 3), H. R. 1371 (§ 29), H. R. 3874 (§ 29), 78th Cong., 1st Sess. (1943); H. R. 97 (§ 29), H. R. 3462 (§ 29), 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947). Section 3 of S. 2730, *supra,* proposed that—

"Every sale, assignment, or conveyance of a patent and every grant of a license thereunder, in connection with any condition, agreement, or understanding which restricts the price at which the purchaser, assignee, grantee, or license [licensee] may sell any article producible under the patent and customarily marketed in interstate commerce, is hereby declared to be illegal."

[¶ 62,226] United States v. United States Gypsum Company et al.

In the Supreme Court of the United States. No. 13. October Term, 1947. March 8, 1948.

On Appeal from the District Court of the United States for the District of Columbia.

Sherman Antitrust Act

Patent Licensing Agreements—Price Fixing—Elimination of Competition.—Industry-wide license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through agreements and bulletins are sufficient to establish a *prima facie* case of conspiracy, in violation of the Sherman Act. The trial court erred in granting defendants' motion to dismiss.

See the Sherman Act annotations, Vol. 1, ¶ 1270.351, 1610.301.

Findings of Fact—Judicial Review.—The trial court erred in finding that the evidence failed to establish that the defendants associated themselves in a plan to blanket the gypsum industry under patent licenses and to stabilize prices. The Supreme Court may reverse findings of fact by a trial court where such findings are clearly erroneous.

See the Sherman Act annotations, Vol. 1, ¶ 1610.601.

Reversing and remanding the decision of the United States District Court for the District of Columbia reported in '44-'47 Court Decisions Supp. at ¶ 57,473.

[*Nature of Action*]

MR. JUSTICE REED delivered the opinion of the Court.

The United States instituted this suit on August 15, 1940, in the District Court of the United States for the District of Columbia against United States Gypsum Company, five other corporate defendants, and seven individual defendants, as a civil proceeding under the Sherman Act. The complaint charged that the appellees had violated both §§ 1 and 2 of the Sherman Act by conspiring to fix prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors.

The Attorney General filed an expediting certificate on December 16, 1941, and on September 17, 1942, a three-judge court was constituted to hear the case. By amendment to the complaint the government charged that the article claims of five patents owned by United States Gypsum were invalid and void. The appellees moved to strike the amendment to the complaint or in the alternative for partial judgment dismissing the amendment. On November 15, 1943, the court granted appellees' motion for partial judgment on the ground that the government had no standing to attack the validity of the patents in an antitrust proceeding. The case thereupon went to trial and upon conclusion of the government's case on April 20, 1944, the appellees moved to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure upon the ground that on the facts and the law the Government had shown no right to relief. On June 15, 1946, the court filed an opinion holding that the motion should be granted, and on August 5, 1946, the court filed findings of fact and conclusions of law and entered judgment dismissing the complaint. The government appealed directly to this Court, 32 Stat. 823, and probable jurisdiction was noted on December 16, 1946. The decisions below are reported as *United States v. United States Gypsum Co.*, 53 F. Supp. 889 and 67 F. Supp. 397. *United States v. Line Material Co.*, decided today, *ante*, p. 287, will be of value to the reader in considering this opinion.

I.

[*Facts*]

The appellees are engaged in the production of gypsum and the manufacture of gypsum products, including gypsum plasterboard, gypsum lath, gypsum wallboard, and gypsum plaster. At the time of the alleged conspiracy, appellees sold nearly all of the first three products which were marketed in states east of the Rocky Mountains and a substantial portion of the plaster sold in the same area. Gypsum products are widely used in the construction industry. In 1939,

the sales value of gypsum products was approximately $42,000,000, of which $23,000,000 was accounted for by gypsum board (plasterboard, lath, and wallboard), $17,000,000 by gypsum plaster and the remainder by gypsum block and tile and other products. Over 90 per cent of all plaster used in building construction in the United States is made with gypsum.

Gypsum is found in numerous deposits throughout the country. Gypsum board is made by taking the crushed and calcined mineral, adding water, and spreading the gypsum slurry between two paper liners. When the gypsum hardens, the mineral adheres to the paper and the resulting product is used in construction. Plasterboard and lath have a rough surface and are used as a wall and ceiling base for plaster; wallboard has a finished surface and does not require the addition of plaster.

Since its organization in 1901, United States Gypsum has been the dominant concern in the gypsum industry. In 1939 it sold 55 per cent of all gypsum board in the eastern area. By development and purchase it has acquired the most significant patents covering the manufacture of gypsum board, and beginning in 1926, United States Gypsum offered licenses under its patents to other concerns in the industry, all licenses containing a provision that United States Gypsum should fix the minimum price at which the licensee sold gypsum products embodying the patents. Since 1929, United States Gypsum has fixed prices at which the other defendants have sold gypsum board.

The other corporate appellees are National Gypsum Co., Certain-teed Products Corp., Celotex Corp., Ebsary Gypsum Co., and Newark Plaster Co. Appellee Gloyd is the owner of an unincorporated business trading under the name of Texas Cement Plaster Co. National produced 23 per cent of all gypsum board sold in the eastern area in 1939, Certain-teed 11 per cent, and the other four companies correspondingly smaller amounts. Seven companies which were active when the licensing plan was evolved in 1929 and before have been acquired by other companies, and defendant Celotex entered the industry in 1939 when the licensing plan was fully in effect by acquiring the assets and licenses of American Gypsum Company. The seven individual defendants are presidents of the corporate defendants. The tabulation in the margin lists the corporate and individual defendants, and shows the corporate changes which have taken place.[1]

Prior to 1912, gypsum board was manufactured with an open edge, leaving the gypsum core exposed on all four sides. In 1912, United States Gypsum received as assignee a patent issued to one Utzman, No. 1,034,746, covering both process and product claims on board with closed side edges, the lower paper liner being folded over the exposed gypsum core. Closed-edge

[1]

Name of firm	Date entered gypsum board industry	Sales of board in eastern area in 1939	Individual defendants	Companies acquired
United States Gypsum Co.	1901	$10,600,000	Sewell L. Avery, president, 1920-36; chairman of board, 1936 to date. Oliver M. Knode, president, 1936 to date.	Niagara Gypsum Co. (1929).
National Gypsum Co.	1925	4,500,000	Melvin H. Baker, president.	Universal Gypsum and Lime Co. (1935); Atlanta Gypsum Products Corp. (1936).
Certain-teed Products Corp.	1926	2,100,000	Henry J. Hartley, president.	Beaver Products Co. (1928); Beaver Board Co. (1928).
Newark Plaster Co.	1937	750,000	Frederick Tomkins, president.	Kelley Plasterboard Co. (1937).
Ebsary Gypsum Co.	1928	670,000	Frederick G. Ebsary, president.	
Celotex Corp.	1939	585,000	....	American Gypsum Co. (1939).
Texas Cement Plaster Co. (unincorporated).	1924	230,000	Samuel M. Gloyd, owner	

board was superior in quality to open-edge board, as it was cheaper to produce, did not break so easily in shipment, and was less subject to crumbling at the edges when nailed in place. United States Gypsum also acquired a number of other patents relating to the process of making closed-edge board. In 1917, United States Gypsum sued a competitor claiming infringement of the Utzman patent and in 1921 the Circuit Court of Appeals affirmed a judgment holding that the Utzman patent was valid and infringed.[2] United States Gypsum settled with an infringer, Beaver Products Co., in 1926, by granting Beaver a license to practice the closed-edge board patent with a provision that United States Gypsum should fix the price at which Beaver sold patented board. Shortly before the settlement with Beaver, United States Gypsum instituted suits against American Gypsum Co., Universal Gypsum and Lime Co., and gave notice of infringement to Niagara Gypsum Co. Universal did not contest the suit but accepted a license with price-fixing provisions, and two other small companies followed suit in 1927. American and Niagara would not settle, and in 1928 judgment was entered against American holding that American's partially closed-edge board infringed one of United States Gypsum's patents. United States Gypsum also instituted suits for infringement against National Gypsum Co. in 1926 and 1928 which were settled by the execution of a license and payment of damages as part of the industry-wide settlement with all other defendants in 1929. In that year, two sets of license agreements were signed in which United States Gypsum licensed all but two companies manufacturing gypsum board in substantially identical terms and from that date United States Gypsum has maintained rigid control over the price and terms of sale of virtually all gypsum board. Since 1937 the control has been complete.

Up to this point there is no dispute as to the facts. The government charged that the defendants acted in concert in entering into the licensing agreements, that United States Gypsum granted licenses and the other defendants accepted licenses with the knowledge that all other concerns in the industry would accept similar licenses, and that as a result of such concert of action, competition was eliminated by fixing the price of patented board, eliminating the production of unpatented board, and regulating the distribution of patented board. To support its allegations, the government introduced in evidence the license agreements, more than 600 documentary exhibits consisting of letters and memoranda written by officers of the corporate defendants, and examined 28 witnesses, most of whom were officers of the corporate defendants. Since the appellees' motion to dismiss when the government had finished its case was sustained, the appellees introduced no evidence. They did cross-examine the government's witnesses. The documentary exhibits present a full picture of the circumstances surrounding the negotiation of the patent license agreements, and are chiefly relied on by the government to prove its case.

Although the industry-wide network of patent licenses was not achieved until 1929, the government claims that the documentary exhibits show that the process of formulation of the plan began in 1925. On December 12, 1925, Augustus S. Blagden, president of Beaver, sent a memorandum to Sewell Avery, president of United States Gypsum. Beaver had been adjudged an infringer of the Utzman patent, and Blagden and Avery had negotiated terms for settling the suit. Blagden testified that Avery had offered to settle with Beaver by granting Beaver a license with a price-fixing limitation and provision that Beaver should pay damages for past infringement and acknowledge the validity of United States Gypsum's patents. In the memorandum Blagden analyzed in detail the consequences that would flow from five possible decisions of the Circuit Court of Appeals if the decree adjudging Beaver an infringer were appealed. Blagden noted that whether the court upheld or denied United States Gypsum's claim, United States Gypsum "would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices." The memorandum further pointed out that if the suit were settled on the terms offered by Avery, the result would be more favorable to United States Gypsum than any possible decision by the Court of Appeals. Beaver would accept a license and "would agree to use its best endeavors" to induce other manufacturers to accept similar licenses; if Beaver were successful in persuading other manufacturers to execute licenses, United States

[2] *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 F. 542.

Gypsum could "maintain a lawful price control and avoid the necessity of a reduction by plaintiff (United States Gypsum) of current prices to meet competition." Under such circumstances, United States Gypsum "would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses."

Although there is no proof that Avery approved Blagden's memorandum, Blagden did accept a license on the terms offered by Avery in July, 1926, and Blagden testified that he talked to a number of representatives from other companies and urged them to accept licenses from United States Gypsum. Frank J. Griswold, general manager of American Gypsum Company, also was active in promoting a scheme of industry-wide licensing. On May 12, 1926, Griswold wrote a letter to the president of American, stating that he had talked to Blagden, and added that "This matter will be discussed by all independent wallboard manufacturers at a meeting in Chicago next Wednesday afternoon." Griswold concluded the letter with the statement: "According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry."

Blagden and Griswold did not succeed in persuading other manufacturers to accept licenses in 1926. Universal accepted a license in September, 1926, but there is no evidence that Blagden and Griswold played any part in negotiating the settlement. Griswold suggested to Avery that United States Gypsum offer a shorter term license, but Avery was unwilling to make such a concession. During 1927 Griswold and Blagden continued their negotiations. Griswold and Samuel M. Gloyd, owner of the Texas Cement Plaster Co., corresponded with each other in regard to the licensing proposal. When Griswold informed Gloyd that Atlantic Gypsum Co. had signed a long-term license with United States Gypsum, Gloyd replied that he would apply for a license right away. Previously Gloyd had been trying to secure a shorter term license. Gloyd and Atlantic both signed licenses similar to the original license granted to Beaver.

In January 1928 Certain-teed Products Corp. purchased the assets of Beaver. Certain-teed had previously been making open-edge board and selling it at lower prices than the closed-edge board manufactured by United States Gypsum and its licensees. Certain-teed refused to accept the license agreement of Beaver and United States Gypsum filed suit to compel Certain-teed to accept the license. Certain-teed posted a million dollar bond and commenced to make open-edge board at all Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without result. The government introduced in evidence a memorandum written by Brown, dated March 1, 1928, in which Brown expressed confidence that he could make open-edge board and sell it in competition with United States Gypsum, and that he was afraid to sign up a license with price-fixing provisions because his competitors would grant secret rebates. Brown concluded that Certain-teed should answer the suit of United States Gypsum to enforce the Beaver license by claiming that the suit was filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown concluded with the statement that United States Gypsum's

> "determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed."

Certain-teed did file an answer to the suit couched in those terms. Griswold testified that in a conversation with Brown in the following month Brown stated that he might possibly consider taking out a license if "all of the other manufacturers, or certain ones of them" took out a license. Griswold also wrote the president of American that he had had a conference with Brown at which Brown had said that

> "they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

No settlement was reached between United States Gypsum and Certain-teed in 1928, and no other license agreements were signed. A meeting of representatives of the principal non-licensee manufacturers took place in October, and in November the board of directors of National adopted a

resolution authorizing the officials of the company to enter into a license agreement. Besides Certain-teed and National, American, Ebsary, Niagara, and Kelley Plasterboard Company manufactured gypsum board but did not hold licenses from United States Gypsum.

The patent licenses in force at the beginning of 1929 provided that United States Gypsum could fix prices only during the term of the principal Utzman patent, which was scheduled to expire on August 6, 1929, although the remaining features of the agreements were to remain in force until the expiration of the last patent included under the license, which was in 1937. In negotiations in 1929, various defendants expressed concern over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent. In a letter dated January 9, J. F. Haggerty, president of National, wrote Eugene Holland, president of Universal, asking his views as to possibility of continuing price control after the expiration of the Utzman patent. Holland in reply wrote as follows:

> "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict."

Holland also stated:

> "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included."

In point of fact, Holland's interpretation of Avery's views was incorrect; several months later licenses were granted to four unlicensed manufacturers but not to American or Kelley. Other exhibits suggest that the prospective licensees were interested in accepting licenses at the same time. In his letter of January 9, Haggerty wrote as follows:

> "The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point."

On May 14, 1929, the board of directors of National held a meeting

> "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co."

The minutes of the meeting further quoted the chairman as saying that

> "he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board."

The board of directors authorized the execution of the proposed license contract.

Two days later National signed the license agreement. On the following day National sent a telegram to Avery as follows:

> "Our contract signed and in mail Reeb [of Niagara] ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like."

On May 18 Avery dispatched identical telegrams to United States Gypsum's licensees, and to Certain-teed and Ebsary, as follows:

> "Mr. Kling [of American] has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license."

On May 20 Avery wrote Gloyd of Texas Cement Plaster, a licensee since 1927, stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorably "to this adjustment" and "it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter."

On the following day, a meeting of representatives of all but one of the licensed manufacturers, and all unlicensed manufacturers except American and Kelley, took place in Chicago. The three unlicensed manufacturers who were present—Certain-teed, Ebsary and Niagara—signed license agreements.

At the same meeting, Avery explained to the licensees that United States Gypsum had acquired applications for a patent cover-

ing so-called "bubble board" and suggested that the licensees take out licenses under these applications. The applications covered a process for making gypsum board by introducing a soap foam in the gypsum slurry which would result in a lighter and cheaper board. Avery subsequently mailed proposed license agreements under the "bubble board" applications to the licensees. George M. Brown of Certain-teed on June 4th acknowledged receipt of the license proposal in a noncommittal reply, but composed a memorandum for his own files in which he commented that the savings resulting from taking a license would be doubtful, and then added:

> "They would have a price control of our business, which might be to our advantage and might be to our disadvantage in future. They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once."

On June 6th the licensees met again in Chicago to discuss the question of accepting a license under the "bubble board" patents. Shortly thereafter Certain-teed agreed to take out a license. National also agreed to accept a license; the minutes of the meeting of the board of directors on July 23 read in part as follows:

> "The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wallboard known as the 'Bubble System.' The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wallboard would be fixed for the whole industry for the term of approximately seventeen years."

The board passed a resolution authorizing the executive committee to negotiate a license agreement,

> "provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wallboard, shall control the price of wallboard sold in the United States and its possessions."

Two days later another conference of licensees was held in Chicago. C. O. Brown, vice-president of Certain-teed, prepared a memorandum for George M. Brown, president of Certain-teed, describing what happened at that meeting. According to the memorandum, National and Universal were unwilling to accept "bubble board" licenses until they had settled their litigation over National's infringement of Universal's starch patent. That patent included process and product claims on wallboard made with starch. Brown noted that United States Gypsum was working on a proposal to combine the starch and "bubble board" processes; although such a combination would have technological advantages, Brown commented on the fact that the starch patent had already been issued "so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break." Brown further noted that Avery was trying to work out a proposition with Holland to buy the starch patent or to license the industry under both processes.

Another meeting of licensees was held in Chicago on August 6, the day on which the Utzman patent expired. In a memorandum summarizing what happened at the meeting, C. O. Brown said that it had been agreed that Universal would assign the starch patent to United States Gypsum, and the latter company would issue a single license contract covering all patents and patent applications. Brown further reported that "All of the Independent Gypsum Companies are willing to sign on this basis" and that "The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty." On August 27 the board of directors of National held a meeting at which the president was authorized to sign a license with United States Gypsum covering the "bubble board" and starch patents "provided that all the present licensees of the United States Gypsum Company enter into a similar license and

provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Soon thereafter, National, Certain-teed, Ebsary, Niagara and Atlantic executed licenses with United States Gypsum, to become effective on the date when Universal's receiver transferred the starch patents to United States Gypsum. On November 5 the starch patents were assigned to United States Gypsum, and on the same date Universal also accepted a license. On November 25 American settled its litigation with United States Gypsum and accepted a license. All manufacturers of gypsum board were now licensed by United States Gypsum, except Kelley Plasterboard Co., and that concern accepted a license in April of the following year. Texas Cement Plaster, a licensee under the Utzman patent, did not accept a license under the starch and "bubble board" patents until 1937 when the original license expired. Texas was thus free to sell board at any price from 1929 to 1937.

The contracts which became effective in November 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of "all plasterboard and gypsum wallboard of every kind" whether or not made by patented processes or embodying product claims. The contract covered fifty patents and seven patent applications, including the starch patent and the "bubble board" applications; the contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless United States Gypsum gave its consent as to each prospective purchaser. As in the previous contracts, United States Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered to sell. The more important provisions of the license to this litigation are set forth in an appendix to this opinion, *post*, p. 402. Nothing has been omitted that appears to be significant on the issues considered.

In 1934 and 1935 United States Gypsum offered supplemental licenses to practice a patent covering metallized board, which was accepted by almost all licensees, and in 1936 United States Gypsum offered licenses under its perforated lath patent which were also accepted by most licensees. These supplemental licenses contained provisions allowing United States Gypsum to fix the minimum price on board made according to the patents which were licensed.

The government charged that the execution of the license agreements in May and November 1929 marked a turning point in the gypsum industry. The government introduced evidence tending to show that the price of first quality wallboard was raised, that United States Gypsum standardized the type of board sold by requiring its licensees to sell No. 2 wallboard and seconds at the same price as standard wallboard, and standardized the methods of sale so that no licensee could offer more favorable terms to a customer than any other licensee.

Although the license contracts gave the licensor the right only to fix the minimum price at which the licensee should sell, United States Gypsum issued a series of bulletins which defined in minute detail both the prices and terms of sale for patented gypsum board. They are printed on nearly a thousand pages of the record. The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination. The freight was to be computed on specified uniform billing weights, in order to prevent variations in freight arising from the differences in weight of board made by different manufacturers, and each licensee was directed to charge exactly the same switching, cartage, and extra delivery charges. Specified board sizes and minimum quantities were prescribed, licensees were forbidden to employ commission salesmen without the written consent of the licensor, regulations were prescribed as to the size, quantity and markings of gypsum board used for packing shipments, granting of long-term credit was prohibited, sales on consignment were en-

joined and licensees were forbidden to deliver board directly to a building site.

It is not practicable to quote one of the hundreds of comprehensive bulletins on prices and terms. The industry accepted directions for distribution of product as corollary to price control, so that prices would not be infringed by variations of seller contracts. The detail of directives is well illustrated by the directive for computation of freight to be added to the mill price and the provision against subtle price reduction. The excerpts below are from the Board License Bulletin of June 10, 1939.[3]

In order to insure compliance with the price bulletins, United States Gypsum established a wholly owned subsidiary in 1932 named Board Survey, Inc. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect United States Gypsum's rights under the license agreements and patents. Although the record discloses no instance in which Board Survey took or even threatened to take legal action against any licensee, there are many instances in which Board Survey sent letters to licensees requesting an explanation as to alleged violations. Meetings of licensees were held at which doubtful provisions of the price bulletins were explained. The trial court found that "in the main" licensees complied with the bulletin conditions.

The government further charged that the defendants had discontinued the production of unpatented open-edge board, eliminated jobbers by requiring jobbers to purchase board at the same price as board sold to dealers, induced manufacturing distributors to observe bulletin prices upon resale of board purchased from licensees, and stabilized the price of gypsum plaster and other unpatented products.

It is undisputed that after 1929 the defendants ceased to manufacture open-edge board; the government claims that production of the unpatented board was discontinued in order to protect the patented board from competition. Prior to 1929 open-edge board had sold at lower prices than closed-edge board, and the government's exhibits show that the officers of the corporate defendants realized that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control. The license agreements provided that royalties should be paid on the sales of all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board. Although the government produced no evidence of any agreement between the defendants to eliminate production of open-edge board, corporate officers of the licensees testified that they anticipated that one result of industry-wide licensing would be the elimination of open-edge board.

The May 1929 licenses required licensees to obtain the consent of the licensor before selling board to manufacturing distributors or to jobbers and a price bulletin issued under those licenses allowed licensees to grant a 10 per cent discount to both classes. The November 1929 licenses, however, eliminated the consent requirement with respect to jobbers, although it was retained with respect to manufacturing distributors.

The jobbers' discount was continued in bulletins issued under the later licenses until August 8, 1930, when United States Gypsum ordered that the discount be eliminated. Although jobbers could still buy board if they so desired, jobbers could remain in business only by selling to dealers at an advance over the bulletin prices. The court below found that some jobbers were able to

[3] "In computing the delivered minimum price hereunder, rail freight, wherever mentioned in this bulletin shall mean rail freight in accordance with rail rates published in regular freight tariffs, using the weights shown above, and shall include all stopover, switching, cartage and other extra delivery charges applicable to the shipment. . . .

"Rebates, allowances, etc.:

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price."

remain in business by selling board in odd lots to dealers who did not wish to buy the minimum lot required in the price bulletins. The government points to the definition of "jobber" in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail," and points to uncontradicted testimony that jobbers as so defined were eliminated.

We do not stop to set forth the evidence upon which the government relied to support its charge that the defendants fixed prices at which manufacturing distributors sold gypsum board which they had purchased from United States Gypsum or its licensees, as that issue is not necessary for a decision of the case. To support the charge of stabilizing the price of unpatented plaster, the government cited letters written by officers of the corporate defendants showing that they anticipated that price stabilization in patented board would be accompanied with stabilization of all gypsum products. The trial court found that the price of plaster and miscellaneous gypsum products in fact did increase after 1929. The government charged that plaster prices were stabilized by requiring licensees who sold plaster together with patented board to sell plaster at prevailing prices. Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with board sales."

II.

Appellees admit that in the absence of whatever protection is afforded by valid patents the licensing arrangements described would be in violation of the Sherman Act. Accordingly, the government sought to amend its complaint to allege that the "bubble board" patents were not valid. The trial court held that the government was estopped to attack the validity of the patents in the present proceeding, on the ground that such attack would constitute a review of action by the Commissioner of Patents which was not authorized by statute.[4] The trial court thought that the issue was controlled by *United States v. Bell Telephone Co.*, 167 U. S. 224, in which the United States was held without standing to bring a suit in equity to cancel a patent on the ground of invalidity.

While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent. *Hurn v. Oursler*, 289 U. S. 238, 240. We cannot agree with the conclusion of the trial court. The United States does not claim that the patents are invalid because they have been employed in violation of the Sherman Act and that a decree should issue canceling the patents; rather the government charges that the defendants have violated the Sherman Act because they granted licenses under patents which in fact were invalid. If the government were to succeed in showing that the patents were in fact invalid, such a finding would not in itself result in a judgment for cancellation of the patents.[5]

In an antitrust suit instituted by a licensee against his licensor we have repeatedly held that the licensee may attack the validity of the patent under which he was licensed, because of the public interest in free competition, even though the licensee has agreed in his license not to do so. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co. v. Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor v. Westinghouse Co.*, 329 U. S. 402. In a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the same opportunity to show that the asserted shield of patentability does not exist. Of course, this appeal must be considered on a record that assumes the validity of all the patents involved.

III.

The trial court ruled that on motion to dismiss pursuant to Rule 41 (b), the court should weigh the evidence and grant the motion if the government failed to establish its case by a preponderance of the evidence,

[4] 53 F. Supp. 889.

[5] Compare *Becher v. Contoure Laboratories*, 279 U. S. 388.

and the court further ruled that the government had the burden of proving both the charge of conspiracy and the charge that the licensing agreements were not within the protection of the patent grant.[6] We do not stop to consider those rulings. They are not of importance in this case as we think the preponderance of evidence at the conclusion of the government's case indicated a violation of the Sherman Act.

We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration.[7] A consideration of that point really involves the heart of the case since the treatment of the declarations may vitally affect the outcome. Some may have doubts as to whether the agreements and bulletins alone are sufficient to establish a conspiracy but the admission of the separate declarations against all greatly strengthens the government's position. We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy. Each licensee, as is shown by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide. The license agreements themselves, on their face, showed this purpose. The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements. See the Appendix. Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry.

If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position stemmed logically from its understanding of *United States v. General Electric Co.*, 272 U. S. 476.[8] The opinions in *United States v. Line Material Co.*, decided today, *ante*, p. 287, whatever may

[6] 67 F. Supp. 397, 417, 441.

[7] See discussion of "The rule concerning admissibility of declarations of alleged co-conspirators," 67 F. Supp. at 451, and "Significance of the evidence, assuming the declarations connected," *id.*, at 500.

[8] To the District Court the *General Electric* case establishes "that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement ordinarily, and, when the prices are (as in the *General Electric* case) a part of the license contract, necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof, with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (*i. e.*, a divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiation and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no one such would be willing to suffer competitive disadvantages; no one such would be willing to sign in the dark as to the terms to be extended to the others; ordinarily, moreover, there will be discussion at large, *i. e.*, within the trade, of the advantages and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of

be the different views expressed, make clear that the District Court's interpretation of *General Electric* differs from that of this Court. With its interpretation of the rule of *General Electric,* the District Court was not required to balance the privileges of United States Gypsum and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize. Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege.

Under its view of the *General Electric* case, the District Court concluded that only a lack of good faith by defendants in the execution of what that court considered legitimate exploitation of the patents could justify in this case a determination adverse to the defendants.[9] The trial court held that an association of defendants in a common plan to organize the gypsum industry and stabilize prices through a network of patent licenses was legally permissible, and that in any event the government failed to prove that the defendants had associated themselves in such a plan. The trial court further found that the license agreements were entered into in good faith, in reliance upon *United States v. General Electric, supra,* and *Bement v. National Harrow Co.,* 186 U. S. 70, and were intended to bind the parties to the promises made; that the explicit terms in the licenses were within the scope of the patent grant, and that the government had failed to prove any agreement among the defendants to take actions which were outside the scope of the patent grant. Specifically, the trial court found that there was no agreement among the defendants to raise the price of board to arbitrary and noncompetitive levels, to standardize the production of board by pricing No. 2 board and seconds out of the market, to eliminate the production of open-edge board, to eliminate jobbers, to control the resale price of board sold to manufacturing distributors, or to stabilize the price of unpatented gypsum products. The court further held that as to all those charges except the last two the defendants would have been acting within the scope of the patent grant even if they had agreed to do the things charged. We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted. The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act. With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.[10] We think that all of the declarations and acts

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such a plurality constitute a 'combination' to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a 'combination' to the same end, such a 'combination' is not stigmatized by the law—provided in purpose and effect it does not secure to the patent owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom that monopoly is divided more than the advantages which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the *General Electric* case." 67 F. Supp. at 439-40.

Referring to the evidence above, the District Court said, *id.,* p. 457: "These items do not prove the conspiracy charged because they do not show that the licenses were not bona fide or that they were executed to accomplish restraints outside the proper limits of a patent monopoly."

[9] 67 F. Supp. 500-501:

"But in view of the importance of this case and the consequent probability that it will reach a higher tribunal, we think it desirable also to state our views as to the meaning of the evidence when the declarations are considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators. We have considered the evidence in this light, and we think the Government still has not proved that the license agreements were executed not as bona fide license agreements reasonably designed to secure to USG the pecuniary rewards of its patent monopoly but only as sham agreements to give color of legality to the illegal purposes alleged in the complaint, and has not proved that the operations of the defendants were carried beyond the proper limits of the USG patent monopoly, and therefore has not proved the combination and conspiracy charged. The evidence discussed in topics V and VI no more proves lack of bona fides in the execution of the license agreements, or operations beyond the limits of the patent monopoly, when the declarations are regarded as binding upon all of the alleged co-conspirators, than it does when such declarations are considered as binding only upon the declarant. This is necessarily so—in the view we take of the significance of the declarations. Since, as demonstrated in topics V and VI they fail to convict the declarants themselves of lack of bona fides in the execution of the licenses, or of operations beyond the proper limits of the USG patent monopoly, they cannot convict others thereof."

[10] *Van Riper v. United States,* 13 F. 2d 961, 967; *Lefco v. United States,* 74 F. 2d 66, 68; *Deacon v. United States,* 124 F. 2d 352, 358; *United States v. Compagna,* 146 F. 2d 524, 530.

which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929.

IV.

[*Correctness of Findings*]

We turn now to a different phase of the case—the correctness of the findings. The trial court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the trial court found that the evidence "fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices." The opinion indicates that in making this finding the trial court assumed *arguendo* that declarations of one defendant were admissible against all. 67 F. Supp. at 500. In examining the finding we follow *Interstate Circuit v. United States,* 306 U. S. 208, and *United States v. Masonite Corp.,* 316 U. S. 265, as to the quantum of proof required for the government to establish its claim that the defendants conspired to achieve certain ends. In those cases, as here, separate identical agreements were executed between one party and a number of other parties. This Court, in *Interstate Circuit,* concluded that proof of an express undertanding that each party would sign the agreements was not a "prerequiste to an unlawful conspiracy." We held that it was sufficient if all the defendants had engaged in a concert of action within the meaning of the Sherman Act to enter into the agreements. In *Masonite* the trial court found that the defendants had not acted in concert and that finding was reversed by this Court. One of the things those two cases establish is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan.

In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit,* errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice.[11] Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies [12] or by a jury,[13] this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.[14] A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of

[11] H. R. Doc. No. 588, 75th Cong., 3d Sess., Notes to Rules of Civil Procedure; Report of the Advisory Committee, Supreme Court of the United States, on Rules of Civil Procedure, April, 1937, Rule 59 and notes; Preliminary Draft, Rules of Civil Procedure for the District Court of the United States, May, 1936, Rule 68 and notes.

[12] *Corn Products Co. v. Federal Trade Comm'n,* 324 U. S. 726, 739; *Labor Board v. Greyhound Lines,* 303 U. S. 261, 268.

[13] *Lawrence v. McCalmont,* 2 How. 426, 453; *Reconstruction Finance Corp. v. Bankers Trust Co.,* 318 U. S. 163, 170.

[14] 2 Street, Federal Equity Practice (1909) §§ 1510, 1514; *Furrer v. Ferris,* 145 U. S. 132; *Tilghman v. Proctor,* 125 U. S. 136, 149-50; *District of Columbia v. Pace,* 320 U. S. 698, 701; *Virginian R. Co. v. United States,* 272 U. S. 658, 675.

the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

In Findings 54, 56, 62, 63, 64, 65, 66, 89 and 90, the trial court made findings adverse to the government's claim that the defendants conspired to eliminate the production of open-edge board.[15] The tenor of those findings is that there was no agreement among the licensees to discontinue the production of open-edge board, although the trial court conceded that it might be "inferred" that each licensee did not expect to continue the manufacture of open-edge board. The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid.

In Findings 75-79, 99-102,[16] the trial court considered the problem of jobbers. Those findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers. We are unable to agree to these holdings. Since the defendants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was undertaken by United States Gypsum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers.

In Findings 73, 94-97,[17] the trial court dealt with the government's charge that the defendants had stabilized the price of unpatented gypsum products. Those findings hold that there was no understanding or

[15] We quote Findings 54 and 89 as typical:

"54. The fact that for the privilege of using the patents, royalties are fixed in the license agreements at an amount equivalent to a designated percentage of the selling price of the licensees of all gypsum board manufactured by them, whether or not patented, does not establish an agreement to make only the patented product and does not establish that the license agreements were executed in bad faith. The patents were numerous and covered not only the patented board but machines and processes in the manufacture of board, and the rights and privileges granted were of great value to the manufacturers of gypsum board. This royalty provision is in effect a provision for a percentage of gross sales, and as such is but a convenient means of measuring the amount to be paid for the privilege of using the patents. It might with equal propriety have been a lump sum. This provision in the license agreements was not an attempt to impose a royalty upon an unpatented product, nor was it intended to drive open-edge board off the market, nor did it have that effect."

"89. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, accomplish any improper standardization of gypsum board or its method of production, as charged by the Government."

[16] We quote Findings 75 and 77 as typical:

"75. The license agreements were not executed with an intent to effectuate improper restriction upon the distribution of gypsum board, plaster or miscellaneous gypsum products, specifically, to 'eliminate' jobbers through the discontinuance of a sales discount."

"77. There was no agreement or understanding between any of the parties to the license agreements in the instant case whereby jobbers would be eliminated from the gypsum board distributive system. Nor was there any understanding or agreement that jobbers' discounts would be discontinued. The issuance of the bulletin of August 8, 1930 (Exhibit 430) making the price to jobbers the same as to dealers was the exercise of the right of USG to establish a price for the patented product."

[17] We quote Findings 73 and 95 as typical:

"73. There was at no time any understanding or agreement among any of the parties to the respective license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum product. Nor were the license agreements in the instant case executed with an intent to raise, maintain and stabilize the prices of unpatented materials such as plaster and miscellaneous gypsum products. The parties to the respective license agreements knew that the licensor's right to fix minimum prices was limited to the prices on patented

agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials. We reject all these findings as clearly erroneous. The bulletin provision and the complaints by licensees addressed to Board Survey convince us that the defendants attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial.

The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary.[18] Perhaps looked at in isolation some of the government's charges are not proven with that fullness that would justify our reversal of the finding of the District Court on the point. It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling.

V.

The foregoing discussion foreshadows our conclusion. What we have said above under III on the invalidity of the arrangements as tested by the Sherman Act in discussing the admissibility of the declarations and acts of separate defendants against all others is applicable here. These licenses and bulletins show plainly a conspiracy to violate the Sherman Act. Price fixing of this type offends. It is well settled that price fixing, without authorizing statutes, is illegal, *per se*. See note 21, *United States v. Line Material Co., ante,* p. 287. Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. *United States v. National Lead Co.,* 332 U. S. 319, 327; *Hartford-Empire Co. v. United States,* 323 U. S. 386, 406; *Standard Oil Co. v. United States,* 283 U. S. 163, 170-174; *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. *Fashion Originators' Guild v. Federal Trade Commission,* 312 U. S. 457, 465. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convince us that the defendants violated the Sherman Act.

The *General Electric* case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized. We apply the "rule of reason" of *Standard Oil Co. v. United States,* 221 U. S. 1, to efforts to monopolize through patents as well as in non-patent fields. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, con-

board manufactured and sold by the respective licensees."

"95. The Bulletin provision that 'Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price . . . by reducing the price of other products . . .' is but part of a larger provision concerning rebates and allowances made for the purpose and with the effect of reducing the licensee's price on patented board below the minimum price therefor—a price protective provision. It was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end. Nor did it have that effect. On the contrary the provision in question was a proper price protective measure reasonably designed to secure to USG the pecuniary reward of its patent monopoly. In operation, it was not used to raise, maintain or stabilize the price of unpatented materials."

[18] Objection was made to those findings which held that the defendants had not conspired to fix resale prices of board sold to manufacturing distributors.

stituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert.[19] Such concerted action is an effective deterrent to competition; as we said in *Masonite*, page 281:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. . . . Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . ."

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.

By the record now presented, violation of the Sherman Act is clear. As the order of dismissal came at the end of the government's presentation on appellee's motion to dismiss under Rule 41 (b)[20] of the Federal Rules of Civil Procedure, the order is reversed and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

APPENDIX

LICENSE AGREEMENT

This agreement made this 18th day of October, A. D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Ebsary Gypsum Co., Inc. a New York corporation, of Newark, New Jersey, hereinafter referred to as Licensee, Witnesseth, that

* * * * *

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number

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[19] *Binderup v. Pathé Exchange*, 263 U. S. 291; *Eastern States Lumber Dealers' Assn. v. United States*, 234 U. S. 600; *United States v. Reading Co.*, 226 U. S. 324, 357; *Swift & Co. v. United States*, 196 U. S. 375, 396.

[20] 4 Fed. Rules Serv. (Pike & Fischer) 931; *Gulbenkian v. Gulbenkian*, 147 F. 2d 173, 177. We know of no reason why the statement in the *Gulbenkian* case that it is unnecessary for the appellant to offer his evidence a second time is not here applicable.

1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; * * *

* * * * *

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee

agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of accounts and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, * * *

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; * * *

* * * * *

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

* * * * *

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; * * *

* * * * *

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted

hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

[Concurring Opinion]

MR. JUSTICE FRANKFURTER, concurring.

In Part II of the opinion the Court confessedly deals with an issue that "need not be decided to dispose of this case." Deliberate *dicta,* I had supposed, should be deliberately avoided. Especially should we avoid passing gratuitously on an important issue of public law where due consideration of it has been crowded out by complicated and elaborate issues that have to be decided. Accordingly, I join in the Court's opinion, except Part II.

The Court is agreed that the arrangements challenged by the Government as violative of the Sherman Law cannot find shelter under the patent law, howsoever valid the patents of the defendants may be. In short, we have found that the validity of the patents in the suit is irrelevant to the invalidity of the arrangements based upon them. While fully recognizing this, the Court needlessly considers the question whether the Government may, in view of *United States v. American Bell Telephone Co.,* 167 U. S. 224, attack the validity of the patents in the present proceeding.

It does so because "it seems inadvisable to leave . . . as a precedent" the decision of the trial court that "the Government was estopped to attack the validity of the patents in the present proceeding." But, surely, it is easy enough to sterilize the trial court's decision by the explicit declaration that the issue need not be decided.

I shall not follow the Court's lead and indulge in *dicta* on the question whether, in a suit like this, the issue of patentability can be contested by the Government. But, as bearing upon the undesirability of announcing *dicta* on this issue, it is pertinent to point out that the cases on which the Court relies for its pronouncement hardly dispose of the problem. They are cases in which a licensee resisted claims for royalties on what purported to be valid patents. Royalties were refused because there were no patents on which they were owed. Such was the issue involved in *Sola Electric Co. v. Jefferson Electric Co.,* 317 U. S. 173; *Katzinger Co. v. Chicago Mfg. Co.,* 329 U. S. 394; *MacGregor v. Westinghouse Co.,* 329 U. S. 402. Different considerations come into play when the Government seeks a declaration of invalidity. See *United States v. American Bell Telephone Co., supra.* I am not remotely intimating that the differences are decisive. I am merely suggesting that a due weighing of the differences, in the light of the *Bell Telephone* case, should await the duty of adjudication. It should not be the undesirable product of deliberate *dicta.*

The Court refers to *Hurn v. Oursler,* 289 U. S. 238, 240, as reason for passing on an issue that "need not be decided to dispose of this case," because "it seems inadvisable to leave the [trial court's] decision as a precedent." As to our problem, *Hurn v. Oursler* was exactly the opposite from this case. The issue on which this Court pronounced in *Hurn v. Oursler* was inescapably the issue that had to be decided to dispose of the case. The issue in *Hurn v. Oursler* was this: where a suit for infringement of a copyrighted play was brought in a federal court and with it was joined a non-federal cause of action based on unfair competition in regard to that play, has the federal court jurisdiction to pass on the merits of the claim of unfair competition after the court had rejected the federally-based suit of infringement ? The trial court held not, and dismissed the non-federal claim for want of jurisdiction after dismissing the federal claim on the merits. When the case came here this Court could not possibly sustain the trial court (which had been affirmed by the Circuit Court of Appeals) without necessarily affirming the trial court's ruling on the issue of jurisdiction. This Court reversed the trial court on that issue and held that the district court had jurisdiction. It found, however, that the cause of action should have been dismissed but *on the merits.* Accordingly, this Court modified the decree so that the dismissal was on the merits and not for want of jurisdiction. This Court could not have reached the merits without first determining whether there was juridiction to reach them. In short, in *Hurn v. Oursler* the precedent of the district

court had to be set aside in order to decide the case. Here, the "precedent" of the district court is upon an issue which is essentially irrelevant, and therefore we should not follow the error of the district court in pronouncing upon an issue which "need not be decided to dispose of this case."

[¶ 62,227] McWhirter v. Monroe Calculating Machine Company, Incorporated.

In the United States District Court for the Western District of Missouri, Western Division. No. 2203. February 16, 1948.

Robinson-Patman Price Discrimination Act

Discriminatory Discounts—Status of Manager of Company to Maintain Suit Against Competing Company.—The manager of a district office of a calculating machine company is entitled to maintain an action against a competing company for treble damages for granting discriminatory discounts in violation of the Robinson-Patman Act.

See the Clayton Act annotations, Vol. 1, ¶ 2024.19, and the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.770.

Commodities of Like Grade and Quality—Lessening of Competition.—Calculating machines, manufactured by different companies, which perform the same functions, are constructed on the same basic principles, and in the selling price of which there is a comparatively small difference, are of "like grade or quality" within the meaning of the Robinson-Patman Act. Even if the machines were not of like grade or quality, inasmuch as the two companies are competitors, if the defendant discriminated between purchasers of its commodities of like grade and quality, and thereby tended to create a monopoly or to lessen or destroy competition, there was a violation of the statute.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.335.

Secret Agreement to Grant Discounts—Destroying Competition.—The granting of discounts under a secret arrangement whereby purchasers were purported to be subsidiaries of a parent organization in order to come within the terms of a multiple purchase discount plan, for the purpose of destroying competition, and not for the purpose of meeting competition, is an unfair trade practice within the meaning of the Robinson-Patman Act.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.630.

Injury to Plaintiff—Burden of Proof—No Proof of Actual Loss.—Plaintiff fails to show with that degree of positiveness which the law requires, that any purchaser of a machine manufactured and sold by defendant purchased it because of the granting of a discount by defendant. Plaintiff must show by the fair preponderance of the evidence that he has suffered loss. It is not sufficient for him to show that defendant committed unfair trade practices. The fact of damage itself is not subject to speculation.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.789.

For plaintiff: Terrence W. Imes, Kansas City, Missouri.

For defendant: Paul Stinson, Kansas City, Missouri.

Memorandum Opinion

Plaintiff, a resident of Kansas City, Missouri, and former local district manager of Marchant Calculating Machine Company, brought this suit under Sec. 15, Title 15, U. S. C. A., against the defendant, a resident and citizen of New Jersey, to recover damages alleged to have been sustained by him as a result of the unfair trade practice of the defendant in the sale of Monroe Calculating Machines in the Kansas City territory, in violation of Sec. 13, Title 15, U. S. C. A.

Marchant and Monroe are old and well known manufacturers and distributors of calculating machines. Plaintiff, as manager of the local district of the Marchant, operated on a commission basis, receiving 35 per cent of the sale price of each sale made. Out of his commission plaintiff bore the expenses of the district office, with the exception of the repair department, for which

he received an allowance from the home office.

Plaintiff employed numerous persons from time to time in his sales organization, some of whom worked on commission and some on straight salary. From the evidence it is impossible to determine accurately who worked on commission and who received salary and for what period of time. Apparently whether a salesman received commissions or salary depended on his volume of sales. During a certain training period new salesmen were on salary, or if their sales were not adequate to enable them to live, they were placed on salary. There is no substantial evidence in the case from which the Court can determine how much salary was paid and to whom it was paid by plaintiff. Some salesmen were on a salary part of the time and received commissions at other times during their employment.

Those who were on a commission basis received 20 per cent of the total commission. The salesmen who worked outside of Kansas City received 25 per cent commission, and for this extra five per cent they paid their own expenses. The sales methods of all competing manufacturers of this type of equipment are pretty much the same. The evidence indicates that certain schedules of prices and discounts and trade-in allowances were formulated; and discounts were not supposed to be allowed to purchasers of single machines or, generally, to purchasers of less than ten machines yearly. Purchasers of ten or more machines a year were allowed a discount of ten per cent. This practice was known as a deductible quantity discount. Another practice was known as the cumulative discount plan. Under this plan a potential purchaser of ten machines a year was promised a refund of ten per cent if at the end of the year such purchaser had purchased ten or more machines. During the year the purchase price was the regular price without discount, but if at the end of the year the number had amounted to ten or more, ten per cent was refunded.

Still another plan was designed for multiple purchasers or purchasing organizations where a number of persons had associated themselves together and set up a central or common purchasing authority. To such organizations a discount was allowed, and also to contractors engaged in the manufacture of war materials for the Government under a cost plus contract where the Government paid for equipment. Discounts were also allowable to a subsidiary of a parent organization which purchased ten or more machines yearly. These trade practices were in effect in Kansas City during the period of this controversy.

[*Unfair Practices Charged*]

Plaintiff insists that defendant was guilty of unfair trade practices in that it sold to one customer more cheaply than to another customer for the purpose of destroying competition and establishing a monopoly which resulted in damage to plaintiff.

Almost immediately upon plaintiff's taking over the offices in Kansas City, controversy arose between the two sales organizations. Competition seemed to be quite spirited. Each accused the other of granting discounts to purchasers who were not included within the plans or systems heretofore described. To sustain his contention, plaintiff, among other things, proved that on April 11, 1939, defendant through its local manager entered into an agreement with one Logan W. Wilson, an assistant cashier of the First National Bank of Kansas City, Missouri, under the terms of which discounts might be received by purchasers of Monroe machines on the theory that they were subsidiaries of the First National Bank. This agreement was in the form of a letter addressed to the local manager of Monroe by Wilson.[1]

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[1] THE FIRST NATIONAL BANK
of Kansas City, Mo.

April 11, 1939

Monroe Calculating Machine Company, Inc.
Orange
New Jersey

Gentlemen:

It is mutually understood and agreed between your Company and ours that on all purchases of new Monroe Adding-Calculators, Listing, Bookkeeping, and Check Writing and Signing Machines, we shall receive a discount of 10% deductible at the time of billing.

This arrangement is effective from April 15, 1939, and shall continue from year to year so long as we shall have purchased an average of not less than ten machines for each preceding yearly period.

It is further understood and agreed that the machines eligible to the discount under this arrangement shall be of any new model or models regularly sold and listed by you, and that you will deliver such machines, charges

Under one of the existing discount plans it was proper to allow a discount to a purchaser who was a subsidiary of another purchaser if the parent organization, together with its subsidiaries, purchased sufficient machines within a year to be entitled to a discount. It was for the purpose of bringing purchasers, not otherwise eligible for a discount, within this particular classification that the contract with Wilson was entered into. The First National Bank was made a party to this suit, but at the close of plaintiff's case a motion to dismiss as to the bank was sustained on the ground that the contract was unauthorized by the bank, that it had no knowledge or information concerning its execution and received no benefit from any sales that were made pursuant to it, and that it was outside the scope of the authority of the assistant cashier to enter into the contract.

Under the contract discounts were allowed on the sale of 40 machines. When the sales representative of the Monroe Company found it necessary or desirable in his opinion for the purpose of making a sale, a discount of 10 per cent was offered under the terms of the contract. In some cases, but not all, the prospective purchaser was advised that a discount could be obtained through the First National Bank by claiming to be a subsidiary of such bank. When the sale was finally made, the application or the order was submitted to Wilson and authority was received from him by the Monroe representative to allow the discount to the purchaser as a subsidiary of the bank. None of these purchasers was in fact a subsidiary of the First National Bank. Many of them were not even depositors in the bank. This practice was continued during the period in controversy in this suit, that is, from April 11, 1939, through 1942. Finally, being unable to stop the practice, plaintiff brought this suit and seeks to recover damages in the sum of $35,000 for loss of profits from his business, time and money lost in training and paying salesmen unable to compete "with said unlawful practices", inability to maintain a sales force in the face of such practices, and loss of a more profitable agency through inability to show a sufficient sales volume to justify a contract with Marchant for a more profitable agency. Since Sec. 15, Title 15, U. S. C. A., authorizes the recovery of treble damages and a reasonable attorney's fee, plaintiff seeks to recover total damages of $105,000 and an attorney's fee of $25,000, and his costs.

[*Violations Denied*]

Defendant insists that the acts complained of are not in violation of Sec. 13, Title 15, U. S. C. A., and for that reason plaintiff cannot maintain his action under Sec. 15, Title 15, U. S. C. A. It denies that it was guilty of any unfair trade practices and that whatever deviation there was from the established sales practices was for the purpose of meeting competition and the discounts offered by plaintiff in the sale of the Marchant machines. It also contends that the calculating machines of the two manufacturers are not competitive in that they are not of like grade and quality. Defendant also contends that plaintiff has failed to show any damage resulting from the alleged unfair trade practices.

[*Statutory Provisions*]

The first contention of defendant, that is, that plaintiff is not authorized to maintain the action, must be resolved against it. Section 13, Title 15, U. S. C. A., provides that:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or

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prepaid, (to any point in the United States) as and when ordered by us within the year.

A list of our qualified branches and subsidiaries entitled to participate in this Agreement will be furnished with the understanding that they will be eligible to the discount under this arrangement, and their purchases will be considered as a part of the quantity, it being a condition that such purchases shall be for the continuous individual use of our Company and its qualified branches and subsidiaries.

It is further understood that all machines purchased under this Agreement will carry your regular one-year guarantee, and that orders will be filled with reasonable promptness, barring any delays due to causes beyond your control.

Signed First National Bank,
Kansas City, Mo.
By /s/ L. W. Wilson,
Assistant Cashier

Approved and accepted:

Monroe Calculating Machine Company, Inc.
By /s/ Hubert W. Ryan
Date May 2, 1939

> any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *".

Section 15 of the same title provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 13 makes it a violation of the law to discriminate in price between different purchasers of commodities of like grade and quality. It is alleged that the defendant discriminated between purchasers of commodities of like grade and quality in that he granted to some who were not entitled thereto a ten per cent discount which was refused to others similarly situated; that it was done for the purpose of preventing competition and creating a monopoly; and that as a result thereof this plaintiff, as manager of a competing company and who received his compensation through commissions, was prevented from making sales and was thereby damaged. I think the plaintiff comes within the provision of the Act and is entitled to maintain his action. *Roseland v. Phister Mfg. Co.,* 125 Fed. (2d) 417; *Midland Oil Co. v. Sinclair Refining Co.,* 41 Fed. Supp. 436.

The next contention of defendant is that the calculating machines of Marchant and of Monroe were not commodities of like grade and quality and that, therefore, there was no violation of the statute. This contention must also be ruled against defendant.

Each of the manufacturers of these machines was an old and reputable manufacturer of highly technical devices. Each of the devices was designed to add, subtract, multiply and divide. Plaintiff testified that the primary functions of any calculating machine are but two, to add and to subtract, but that by repetition of functional processes, the machine performs the functions of multiplication and division.

Each machine had a keyboard upon which were arranged many keys containing numerals and figures, the number of keys depending upon the size of the machine and the purpose for which the particular type of machine was designed. Each of the machines was operated by depressing whatever number of keys was necessary to produce the desired result and by either pressing a bar or pulling a crank. This manipulation produced the correct addition. To obtain the other more complicated results, that is, to subtract, multiply and divide, the same devices and mechanisms were manipulated in a different manner which was familiar to the skilled operator. Each manufacturer sells numerous models, Marchant six and Monroe 18. The different models were designed to meet the demands and requirements of different types of businesses and of different types of calculations.

The salesmen, in paving the way for the sale of their machines where a machine had not already been placed, ordinarily surveyed the nature of the prospective purchaser's business. From that survey he determined the type of machine that would be most suitable for the particular business and attempted to sell that particular type of machine. In appearance the so-called comparable types of machines of the two companies may vary. One may be larger than the other, but they are generally designed to perform the same general functions in their respective classifications. It is true, as alleged by defendant, that the price or original cost of the two makes of machines varies. The cost of the Marchant machine is higher than that of the Monroe, this excess ranging from $25.00 to $50.00 in the smaller and cheaper models to several times that amount in the larger models. The machines range in price from around $300.00 to more than $1,000.00. To this contention plaintiff answers that Marchant machines are more valuable to the user because of certain refinements not found in the Monroe machines and are, therefore, worth the dollars and cents difference, even though performing the same functions. Calculating

machines are designed to last many years, and the original cost is spread over that period of time. The person who is able to buy a calculating machine, be it small or large, having in mind the probable life of the machine, likely would not be greatly influenced by a comparatively small difference in the cost of the two makes of machines. Purchasers of calculating machines are undoubtedly like the purchasers of other types of rather expensive equipment in this modern and highly developed mechanical age.

In the purchase of typewriters, adding machines, automobiles and other forms of equipment and conveniences, many persons have their preferences. One person may have a preference for a particular model or make of typewriter simply because he or she has used that make or model and will purchase it at a greater price in preference to another make or model of equal value or utility. Many of the machines involved in this controversy were sold to persons or to businesses where the operators were accustomed to using that particular make or model, be it one or the other make. One of the strongest arguments that the machines were competitive was the strong competition itself which the sales organizations of the two companies engaged in to sell their respective machines to the same prospective purchasers for the same kind of work.

Furthermore, it was admitted that Marchant and Monroe are competitors, so that whether or not their machines were of like grade and quality, if Monroe discriminated between purchasers of its commodities of like grade and quality and the effect of such discrimination was to tend to create a monopoly or to lessen or destroy competition, there was a violation of the statute. If plaintiff was injured thereby in his property or business, he may recover.

Thus having determined the two legal obstacles to plaintiff's recovery, we may proceed to the factual questions. Those questions may to a considerable degree be grouped for determination, that is, whether defendant was guilty of any unfair trade practices or whether the granting of discounts was for the purpose of meeting competition and whether plaintiff sustained any damage.

Defendant charged that plaintiff cast the first stone; that he inaugurated the practice of violating the trade practices of the respective parties by granting excessive trade-in allowances. I doubt that either party ever lost a sale through failure to grant a discount or a trade-in allowance if he thought he could get by with it. One cannot escape the conclusion that there were numerous exceptions to the established trade practices of the parties; and that the matter of granting discounts was so full of loopholes and exceptions that it had little practical value except as to obscure purchasers who had no business connections to whom they could attach themselves for the purpose of coming under some recognized exception. The multiple purchasing group, the discount arrangements, the annual purchasing power, the subsidiaries, the nationally known organizations and some other groups were exceptions to the rule, so that when a sale was being negotiated it would be as much a problem to determine if a discount should not be allowed as it would be to determine if a discount should be allowed. In the matter of sales to Government agencies—for example, to Government contractors—I fail to find anywhere in the evidence that a sale was lost by either party because of the failure to determine whether or not to allow a discount. The doubt was always resolved in favor of the discount.

It is a well established principle of law that notwithstanding what the established trade practices and customs between competitors may be, competitors may always allow such discounts and reductions in price as may be necessary to meet competition. Sec. 13 (b), Title 15, U. S. C. A.; *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F. (2) 907; *General Shale Products Corp. v. Struck Construction Co.*, 132 F. (2) 425. That kind of competition may be what is commonly known in the language of the street as "cut throat" competition. But it is the kind of competition that may be met by a competitor by like practices. When he knows what his competitor is going to do in the way of making discounts, he may formulate his policy in such a manner as to meet that competitive situation. In this case, however, we have a different situation. The defendant inaugurated a system of competition that was far more reprehensible than "cut throat" competition. It was a subtle and underhanded kind of competition.

[*Secret Agreement*]

The agreement was secretly entered into with the officer of the First National Bank;

and I say secretly because that agreement was not known to the Board of Directors of the bank and was apparently done solely for the purpose of permitting Monroe to make discounts to purchasers who had not the slightest claim or right to a discount under any of the regulations. The contract with Wilson and the allowance of discounts thereunder to purchasers not subsidiaries of the bank clearly was an unfair trade practice; and the conclusion is inescapable that it was entered into for the purpose of stifling and destroying competition and not for the purpose of meeting competition.

But while the Wilson contract and the practices thereunder are to be condemned in no uncertain terms as an unfair trade practice, plaintiff must show by positive proof that he suffered damage as a result thereof. Plaintiff claims that he lost every sale where he was in competition with defendant and a discount was allowed under the Wilson contract, and he claims damages in the amount of the commissions such sales would have earned. If he had any of his machines on demonstration and he failed to make the sale, he has attributed such failure solely to the allowance of the discount which the customer received.

Plaintiff testified that many of such prospective purchasers, during the period of negotiation or demonstration, asked him what discount he would allow or informed him that they could get a discount from defendant; that upon being so informed he advised such persons that if they would write on his sales agreement that they could obtain a discount from defendant, he, too, would make such an allowance, but that in each instance such purchasers refused to do so. He said that he could not give a discount and receive credit therefor from his company without such a written notation on the order or a letter to the same effect; that otherwise the discount would have been deducted by his company form his commission, and for that reason he refused to allow a discount.

In view of the nature of the unfair trade practice arising out of the Wilson contract, I have carefully reviewed the record and my own recollection of the evidence, and I fail to find a single instance where the evidence shows with that degree of positiveness which the law requires that any purchaser of a Monroe machine purchased it because of the refusal of plaintiff to grant a discount, or, to put it another way, because of the granting of a discount by defendant.

During the period in controversy 40 machines were sold by defendant and discounts improperly allowed under the Wilson contract. How many, if any, were sold by plaintiff notwithstanding the offer of a discount by defendant is not shown by the evidence. Twenty-two witnesses who had purchased machines under the "Wilson Plan" testified that their purchases of Monroe machines were not actuated by the discount, and that other considerations such as previous use of Monroe machines or some other reason entered into their selections of that machine.

Some of the witnesses said that all things being equal the price as reflected by a discount would be a matter for serious consideration in making a purchase, but even those witnesses refused to say that the discount had been the deciding factor. These 22 witnesses represented the purchasers of most of the machines sold under the "Wilson Plan". If they are to be believed, it cannot be said that plaintiff lost any of those sales because of the unlawful discount. But plaintiff insists that their testimony should not be accepted because they, too, were guilty of violating the law and were equally guilty with defendant in knowingly accepting an unauthorized discount. Their credibility was not otherwise attacked; they were reputable persons as far as the record shows, and at the time of the trial the statute of limitations had run against any possible action that might have been taken against them. Apparently they were disinterested witnesses who had no motive for not telling the truth. I cannot agree with the plaintiff that such witnesses are unworthy of belief.

While the number of unit sales and the gross value thereof may not be determinative of the question of damages, in this case it may be and, I think, is persuasive of the fact. The business of plaintiff as well as that of defendant steadily grew during the period in controversy. During this period Marchant sold 413 machines and Monroe sold 402. The following is a record of the annual sales of the two companies in the Kansas City area: [1]

[1] Compiled from plaintiff's exhibit #185 and defendant's exhibit #A-4.

MARCHANT

Year	Units	Gross Sales	Discounts	Allowances	*Net* Sales
1939	76	$39,872.00	$2,928.00	$ 817.00	$36,127.00
1940	79	36,051.00	2,912.00	1,503.00	31,636.00
1941	138	67,668.00	6,892.00	2,431.00	58,345.00
1942	120	70,586.00	9,143.00	1,138.00	60,305.00

MONROE

(Kansas City Trade Area)

Year	Units	Gross Sales	Discounts	Allowances	*Net* Sales
1939	46	$16,320.00	$1,348.25	$1,520.00	$13,451.75
1940	89	28,247.00	1,979.13	3,687.50	22,580.37
1941	101	36,285.00	3,411.25	1,925.00	30,948.75
1942	133	42,180.00	4,171.25	835.00	37,173.75

MONROE

(Deliveries Outside Kansas City Trade Area)

Year	Units	Gross Sales	Discounts	Allowances	*Net* Sales
1939	10	$3,275.00	$350.00	$150.00	$2,775.00
1940	9	2,950.00	312.50	110.00	2,527.50
1941	5	1,375.00	115.00	85.00	1,175.00
1942	9	2,910.00	261.50	230.00	2,418.50

In 1942 plaintiff's number of sales was 57.4 per cent greater than his number of sales in 1939. The gross value of plaintiff's sales was 77 per cent greater in 1942 than it was in 1939. In 1942 Monroe's number of sales was 189 per cent greater than in 1939;[2] the gross value of its sales in 1942 was 158 per cent greater than it was in 1939. From 1939 through 1942 the percentage of discount allowed by plaintiff on his total sales was 10.2 per cent. During the same period the percentage of discount allowed by defendant on its total sales was 8.8 per cent. Furthermore, plaintiff's commissions increased from $5,915 in 1939 to $19,981 in 1942.

Broken down still further the figures show that plaintiff's number of sales increased 3.9 per cent in 1940 while the gross value of his sales decreased 9.6 per cent. Monroe's sales during 1940 increased 93.5 per cent and the value of its sales increased 73.1 per cent. Of its total of 89 sales only 15 were sold under the "Wilson Plan" so that even excluding these sales, defendant's number of sales increased 60.8 per cent in 1940.

In 1941 the number of plaintiff's sales increased 74.7 per cent and the gross value of his sales increased 87.7 per cent. Monroe on the other hand increased the number of its sales only 13.5 per cent and the gross value of its sales 28.4 per cent; and it sold the same number of machines under the "Wilson Plan" that it had sold in 1940. Excluding those sales defendant suffered a decrease of 3.4 per cent in the number of its sales.

In 1942 plaintiff suffered a decrease of 13.04 per cent in the number of sales, but the value of those sales increased 4.3 per cent. Defendant increased the number of its sales 31.7 per cent although the gross value of those sales increased only 16.2 per cent. Of its total of 133 sales in 1942 only 3 were made under the "Wilson Plan". So that excluding those sales the number of defendant's sales increased 28.7 per cent.

An analysis of the figures for 1942 seems to reflect the higher prices of the Marchant models sold during that year. Plaintiff suffered a loss of 13.04 per cent in number of machines sold but had a gross sales value increase of 4.3 per cent. Defendant, on the other hand, increased its number of sales 31.7 per cent but increased the gross value only 16.2 per cent.

The figures further indicate that the percentage of discounts allowed by plaintiff on his gross sales steadily increased. In 1939 the discounts allowed amounted to 7.36 per cent of the gross sales; in 1940, 8.07 per

[2] All calculations concerning Monroe's sales are based on its sales in the Kansas City Trade Area.

cent; in 1941, 10.18 per cent; and in 1942, 12.95 per cent. This was an increase of 5.59 per cent over the period.

Defendant's percentage of discounts remained more constant. In 1939 the discounts allowed amounted to 8.26 per cent of the gross sales; in 1940, 7.06 per cent; in 1941, 9.4 per cent; and in 1942, 9.88 per cent. This was an increase of 1.62 per cent over the period. Furthermore, the difference between the lowest and highest percentages was 2.82 per cent.

By this time the effect of the war had resulted in priorities being imposed on this type of equipment and the problem of the parties was not in finding buyers but in obtaining the machines and the priorities for their delivery.

The very considerable increase in the number of unit sales by defendant in 1942 and the decrease in unit sales of plaintiff may create some speculation or at least prompt one to wonder about probable causes. As heretofore stated, the war was on and its restrictions had been imposed. Whatever was available could be disposed of. Marchant manufactured about 6 models all priced slightly higher than defendant's comparable models. Defendant manufactured about 18 models ranging from a small portable desk model to the large sizes.

A further explanation may be found in the sales record of plaintiff during the whole period involved. During 1939 plaintiff had 9 salesmen and of the 76 sales made during the year plaintiff made 14, one salesman 19, another 17, and others 7, 6, 4, 4 and 3 respectively. In 1940 plaintiff had 6 salesmen and of the 79 sales made plaintiff made 27, one salesman 17, another 11 and the others 10, 7, 4 and 3, respectively. In 1941 plaintiff had 3 salesmen and of the 133 sales made plaintiff made 97, and his salesmen made 16, 15 and 10 sales respectively. By 1942 his sales force had fallen to two salesmen who made 7 and 6 sales respectively of the 120 sales made. Plaintiff made 107 sales.

Summarized, the record discloses that plaintiff's personal efforts were increasingly productive as the years passed while those of his sales organization were decreasingly productive. Of the 413 machines sold during the period, plaintiff personally sold 245. The last year his salesmen made only 13 sales compared to his 107 while in the previous year his salesmen made 41 sales compared to his 97. In the light of these facts the difference in the number of sales for 1942 is readily understandable.

From all the evidence I am unable to find where plaintiff has shown that he suffered any loss or damage to his business. He insists that the law does not demand of him positive proof of actual loss and that it is sufficient for him to show the unfair trade practices and that the Court may and should speculate as to damages. With this contention I am unable to agree. Plaintiff must show by the fair preponderance of the evidence that he has suffered loss. The fact of damage itself is not subject to speculation. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555; *Roseland v. Phister Mfg. Co.*, 125 Fed. (2d) 417.

However, once the *fact* of damage has been proved, the Court has rather wide latitude in determining the amount of damages.

Plaintiff has not sustained the burden of showing damages through the allowance of discounts. For the Court to find from the available evidence that he was damaged, the Court would have to indulge in pure speculation, and that the Court cannot do. The finding and judgment must be for defendant.

[¶ 62,228] **Wooldridge Manufacturing Co. v. R. G. La Tourneau, Inc., and Gar Wood Industries, Inc.**

In the United States District Court for the Northern District of California, Northern Division. No. 5667. March 8 ,1948.

Sherman, Clayton Antitrust Acts

Declaratory Judgment—Validity of Patent—Motions to Strike and Dismiss.—In an action charging that defendants claim that plaintiff has infringed a certain patent for carrier scrapers, alleging the invalidity of defendants' patent, and seeking an adjudication that plaintiff is a licensee of the patent, motions to strike allegations that the patent was obtained by fraud and that defendants come with unclean hands, and to dismiss the count alleging violation of the antitrust laws, are dismissed. Allegations of fraud and unclean

hands are not so remote to the cause of action as to require that they be stricken. Viewed in the light most favorable to plaintiff, the allegation of antitrust violation is sufficient as a pleading to entitle plaintiff to relief.

See the Sherman Act annotations, Vol. 1, ¶ 1640.614, 1640.619, 1660.201.

For plaintiff: Paul D. Flehr, John F. Swain, San Francisco, California.

For defendants: Webster & Webster, Stockton, California; Leonard S. Lyon, Los Angeles, California; Wm. Edward Hann, Detroit, Michigan.

[*Declaratory Judgment Sought*]

Plaintiff seeks declaratory relief alleging, *inter alia,* that defendants claim that plaintiff has infringed and is infringing a certain patent for carrier scrapers and demand that plaintiff be adjudged to be a licensee of the patent.

[*Antitrust Violations Alleged*]

Plaintiff contends that defendants' patent is invalid and that plaintiff is not answerable to defendants under the facts, and in Count 1, Par. 9a alleges that defendants come with unclean hands and that the reissue patent held by defendants was obtained by fraud (Par. 5g). In Count 2 plaintiff alleges a violation of the Sherman and Clayton Acts. In so alleging the contention is made that the reissue patent concerned in this matter is illegal and was obtained as part of a conspiracy to restrain trade.

[*Motions to Strike and Dismiss*]

The defendants move to strike Paragraphs 9a and 5g of Count 1 and to dismiss all of Count 2. The ground upon which the motion to dismiss Count 2 is based is that "said count fails to state a claim upon which relief can be granted"; while the motion to strike Pars. 9a and 5g of Count 1 is predicated upon the claim "that the matter is redundant, immaterial, impertinent and scandalous."

Defendants' memoranda goes into the allegations of the complaint and argues that the various acts complained of are legal and proper, justified as of right under the monopoly granted by their patent. It is also set forth that plaintiff's allegations of fraud are not sustainable because there was no requirement or duty on defendants' part to inform the Patent Office in applying for the reissue patent that there had been a prior suit or of the court's findings concerning the original patent upon which the reissue was based; and that the statutory duty was imposed solely on the clerk of the court (35 U. S. C. A. 70).

[*Sufficiency of Allegations*]

Of necessity the legal sufficiency of the allegations of Count 2 is to be considered to determine whether the matters contained therein are relevant and constitute a cause of action.

Under the Federal Rules of Civil Procedure on a motion to dismiss, the complaint must be viewed in the light most favorable to the plaintiff, and a complaint should not be dismissed for insufficiency except where it appears to a certainty that the claim for relief could not be sustained under any state of facts which could be proved in support of it. *Ivancik v. Wright Aeronautical Corp.,* 68 Fed. Supp. 270; Federal Rules of Civil Procedure, rule 8 (a), 28 U. S. C. A. following sec. 723c.

[*Propriety of Allegation of Fraud*]

By their motion to strike defendants have raised the question as to the propriety of an allegation of fraud in obtaining a patent by one of the litigants where the suit is by private parties.

[*Scope of Motion to Strike*]

Speaking generally the motion to strike under Rule 12f of the Federal Rules of Civil Procedure is one of limited scope. For example the court in *Radtke Patents Corporation v. C. J. Tagliabue Mfg. Co., Inc.,* 31 Fed. Supp. 226 in denying a motion to strike portions of an answer states: "Such a motion is not favored, and will be granted only when the allegations have no possible relation to the controversy. * * * This is true even though the matter is shown to be false by the moving affidavits, as the motion to strike should not be granted if the court is in any doubt that it cannot avail as a defense, or if under any contingency it may raise an issue."

[*Issue of Fraud in Obtaining Patent*]

The earlier cases in patent matters hold that fraud in obtaining a patent the existence of which is the basis of the suit is collateral

and not a proper issue. This view appears to be losing favor. In the *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, the Supreme Court states in effect that fraud in obtaining a patent is properly presented at any stage of the case. There the court was dealing with active fraud, but the same result should apply if fraud was committed by inaction when and if there is a duty to act.

[*Unclean Hands*]

The defense of unclean hands in patent suits is good. *Radtke Patents Corp. v. Tagliabue Mfg. Co., supra; Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240.

In *Oliver v. City of Shattuck*, 157 Fed. 2d 150 at 153, the court in dismissing relief after judgment said: "Courts have never hesitated to grant equitable relief against a judgment, if to execute it would give the judgment creditor an unconscientious advantage procured through his own fraud or some excusable mistake, or unavoidable accident on the part of judgment debtor." and cites as authority (among other) the *Hazel-Atlas Co. v. Hartford* case.

Again the *Hazel-Atlas Co. v. Hartford* decision is cited with approval by a court discussing the setting aside of a judgment obtained by fraud in *Griffith v. Bank of N. Y.*, 147 Fed. (2d) 899, 901, saying: "And though it was once thought necessary that such fraud be 'extrinsic,' so that it could not have been considered in the original action, * * *, the later cases no longer seem to adhere strictly to even this limitation."

[*Motion to Dismiss Denied*]

The motion to dismiss should be denied since the complaint being considered in a light most favorable to plaintiff is sufficient as a pleading to entitle plaintiff to relief. *Kuhn v. Pac. Mut. Life Ins. Co. of Calif.*, 37 Fed. Supp. 102; *Bowles v. Sauer*, 6 F. R. D. 571.

[*Motion to Strike Denied*]

The words used by Judge Goodman in *Montgomery Ward & Co. v. Schumacher et al.*, 3 F. R. D. 368, 370, aptly express my attitude regarding defendants' motion to strike: "It does not seem to me that the allegations sought to be stricken have such a remote relationship to the cause of action as to require the granting of the motion under Rule 12f."

In the light of the evidence at the trial the attack made by defendants' motions may prove to be well founded. Therefore, defendants' motions to dismiss and to strike are denied, but under the provisions of Rule 12d of the Federal Rules of Procedure, without prejudice to their renewal at the time of trial.

[¶ 62,229] Tivoli Realty, Inc. v. Interstate Circuit, Inc., et al.

In the United States Circuit Court of Appeals for the Fifth Circuit. No. 12226. March 18, 1948.

Sherman Antitrust Act

Appeal—Temporary Injunction—Proper Forum.—The issuance by a federal district court in Texas of a temporary injunction to prohibit maintenance of an action brought under the antitrust laws in the district court in Delaware, under the doctrine of *forum non conveniens,* is held erroneous, where it is shown that the venue of the Delaware action was laid pursuant to a special statute, and was in the only forum where jurisdiction and venue could be obtained as to all of the several defendants. The doctrine of *forum non conveniens* is inapplicable where there are not two forums in which the entire group of defendants is answerable to process.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291.

Venue Requirements—Suit Not Vexatious or Oppressive.—It is not *prima facie* vexatious or oppressive, within the doctrine of *forum non conveniens,* to sue a corporation within the judicial district which meets the three venue requirements that the corporation be found in the district, transact business therein, and be an inhabitant thereof.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291.

Clayton Antitrust Act

***Forum Non Conveniens*—Interference with Suit in Another District.**—Under the doctrine of *forum non conveniens*, a court having jurisdiction may decline to exercise it, in a suit that in justice should be tried elsewhere. It is erroneous, as a matter of comity, for a district court in which no antitrust action against the defendants is pending, to enjoin such an action in another district court.

See the Clayton Act annotations, Vol. 1, ¶ 2032.10.

Reversing the decision of the United States District Court for the Northern District of Texas, 75 Fed. Supp. 93, reported at ¶ 62,211.

For appellant: Abe Fostas, Thurman Arnold, both of Washington, D. C.; Irving L. Goldberg, Dallas, Texas.

For appellees: Joe A. Worsham, Joseph Irion Worsham, George S. Wright, all of Dallas, Texas.

[*Nature of Action*]

HOLMES, Circuit Judge: This appeal is from an interlocutory order of the district court that temporarily enjoined the appellees from prosecuting a certain civil action now pending in the United States District Court for the District of Delaware, and from proceeding any further therein except to dismiss the complaint. The appeal is authorized by Section 129 of the Judicial Code, 28 U. S. C. 227. The temporary injunction was issued, under the doctrine of *forum non conveniens*, in the exercise of the equity powers of the court. Whether said doctrine was correctly applied is the decisive question on this appeal.[1]

[*The Delaware Action*]

The Delaware action alleged a conspiracy in restraint of trade in the execution of which the defendants assigned to themselves and their affiliates a monopolistic position for the exhibition of motion pictures in various cities throughout the United States. It was brought under the authority of Sections 1, 2, and 7 of the Act of July 2, 1890, known as the Sherman Anti-Trust Act; and Sections 4, 12, and 16 of the Act of October 15, 1914, known as the Clayton Act.[2] It was filed by the Tivoli Realty, Inc., a Texas corporation, against fourteen defendants, twelve of whom are the principal producers and distributors of motion pictures, and two of whom operate a chain of motion-picture theatres in Texas and New Mexico. All of the defendants were incorporated under the laws of Delaware, except four that were incorporated under the laws of New York. The appellant, Tivoli Realty, Inc., alleged that the defendants had collusively assigned to its theatre in Dallas, Texas, an inferior playing position and had denied it an opportunity to compete for feature pictures. It sought damages and an injunction in the Delaware federal court.

[*Temporary Injunction*]

Before answering in the Delaware action, two of the defendants, Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., both Delaware corporations, filed the present suit in the court below praying that Tivoli Realty be enjoined from prosecuting the Delaware action. Seven of the remaining twelve defendants in the Delaware action intervened in the court below and joined in the prayer for an injunction. The court below issued an order to show cause why a temporary injunction should not be granted. On the hearing five defendants in the Delaware suit, which had not intervened below, filed a paper denying that the Texas court had jurisdiction over them, but voluntarily offering to submit to its venue if the Delaware complaint were brought in Texas; but they filed no intervention, offered no evidence, and asked for no relief. At the conclusion of the hearing, the judge entered an order granting the temporary injunction from which this appeal was taken.

[*Forum Non Conveniens*]

Under the doctrine of *forum non conveniens*, a court having jurisdiction may decline to exercise it in a suit that in justice should be tried elsewhere.[3] This doctrine involves the use of discretion on the part of the court in which the suit is brought. The United States district courts are not inclined to interfere by injunction with suits in other federal districts where the inequity alleged is based solely on inconvenience;[4] but in this

[1] The opinion of the district court is reported in 75 Fed. Supp. 93.

[2] 22 Stat. 209, 38 Stat. 731, 15 U. S. C. A. 1, 2, 15, 22, and 26.

[3] *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501; *Koster v. Lumbermen's Mutual Co.*, 330 U. S. 518; both diversity of citizenship cases.

[4] *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 53.

case the parties failed to present the issue of inconvenience to the Delaware court, and sought an injunction from the Texas court in which no anti-trust action against them was pending. State courts have enjoined parties from litigating in another state in order to evade the laws of the first state;[5] but federal district courts are within a single judicial system in which the error of one may be corrected by the ordinary processes of appeal to the United States Supreme Court. Therefore, as a matter of comity, we think the court below erred in granting the injunction.

On the merits, it appears that the venue of the Delaware action was laid pursuant to a special statute,[6] and was in the only forum where jurisdiction and venue could be obtained as to all of the several defendants. The doctrine of *forum non conveniens* furnishes the criteria for choice between two or more forums in which the defendant is amenable to process.[7] At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law.

[*Doctrine Held Inapplicable*]

The five defendants who did not intervene in the Texas court are alleged to be the principal conspirators in the Delaware action. Nevertheless, the court below enjoined Tivoli from prosecuting its action against them as well as against the plaintiffs and interveners. Tivoli was not left free to require these five alleged conspirators to answer or otherwise plead in the Delaware action; nor was it left free to proceed against them by taking depositions, filing interrogatories, or otherwise. The failure of these five to intervene, and their written statements that they were not subject to the venue of the court below, evidence that this case is not one in which the doctrine of *forum non conveniens* applies, because, as stated to be necessary by Mr. Justice Jackson, there are not two forums in which the entire group of defendants is answerable to process.[8]

[*Venue Requirements*]

It is a fair inference that ordinarily one's domicile is not an inconvenient place for one to be sued. Every federal venue statute within our contemplation embraces the defendant's residence or domicile as one of the places for suits to be brought against him. The Clayton Act, *supra*, specially provides that any action under it against a corporation may be brought in any judicial district where it is an inhabitant, or wherein it may be found, or transacts business. *Prima facie*, therefore, it is not vexatious or oppressive, within the doctrine under consideration, to sue a corporation within the judicial district that meets not only one but all three of these several requirements as to venue. The Delaware action meets all three, since the appellees may be found in Delaware, transact business there, and a corporation is deemed to be an inhabitant of the state of its creation.[9]

[*Only Available Forum*]

In addition, the District of Delaware seems to contain the only forum available to the plaintiff in an action against all of the alleged conspirators. We are told that the only reason the appellant did not file its anti-trust action in New York was that venue could not be secured there against two of the conspirators: Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc. We agree with Tivoli that the trial in Texas would be more costly than in either Delaware or New York, because the alleged conspiracy is nationwide and the necessary witnesses, in the main, would have to be brought to Texas from New York, which is much closer to Delaware than is Texas. Moreover, jurisdiction in this case does not depend upon diversity of citizenship; it arises entirely from a federal statute, which specially states the venue of actions under it, and gives more freedom to the plaintiff's choice of forums than is afforded in the federal courts by the general statute as to venue.[10]

[*Cases Cited*]

In numerous cases under the Federal Employers' Liability Act, the applicability of the doctrine of *forum non conveniens* has been

[5] *Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269.

[6] 15 U. S. C. A 22.

[7] *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 506, 507.

[8] *Gulf Oil Corp. v. Gilbert, supra.*

[9] *Shaw v. Quincy Mining Company*, 145 U. S. 444; *Galveston, etc. v. Gonzales*, 151 U. S. 496; *In re Keasbey & Mattison*, 160 U. S. 221; *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501.

[10] For special statute as to revenue, see 15 U. S. C. A. 22. For general statute, see 28 U. S. C. A. 112; Sec. 51, Judicial Code, as amended.

denied.[11] The leading case is *Baltimore & Ohio R. Co. v. Kepner, supra,* wherein the Supreme Court held that the special venue provisions of the Act could not be frustrated for reasons of convenience or expense. If deemed unjust the remedy is legislative, the court said. Such provisions are substantially the same as those under the anti-trust act, since a corporation may be found in any judicial district where it is doing business;[12] but the Federal Employers' Liability Act gives concurrent jurisdiction to state and federal courts of actions under it and forbids removal to the United States Courts of any such action brought in a state court of competent jurisdiction.[13] The denial of the right of removal, however, of actions brought in a state court, although in the same paragraph, is not a part of the venue provisions as to actions in the federal courts. Therefore, the anti-trust and the employers' liability acts, having substantially identical provisions as to venue, cannot be distinguished in principle.

In the *Kepner* case, *supra,* the court said that the importance of unhampered commerce was as great as that of the carrier's freedom from harassing litigation, and did not outweigh the plain grant of a legal privilege as to venue. This applies with greater force when legal venue is weighed against a claim of vexatious litigation where a nationwide conspiracy in restraint of commerce is alleged. The general rule is that a court possessing jurisdiction must exercise it if the venue is properly laid.[14] The venue being properly laid here and the doctrine of *forum non conveniens* being inapplicable, the order appealed from is reversed, the temporary injunction dissolved, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[11] *Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44; *Miles v. Illinois Central R. Co.,* 315 U. S. 698; *Trapp v. Baltimore & Ohio R. Co.,* 283 Fed. 655; *Schendel v. McGee,* 300 Fed. 273; *Norris v. Illinois Central R. Co.,* 18 F. (2) 584; *Beem v. Illinois Central R. Co.,* 55 F. (2) 708; *Wood v. Delaware & Hudson R. Corp.,* 63 F. (2) 235; *Chesapeake & Ohio Ry. Co. v. Vigor,* 90 F. (2) 7, cert. den. 302 U. S. 705; *Baltimore & Ohio R. Co. v. Clem,* 36 Fed. Supp. 703; *Sacco v. Baltimore & Ohio R. Co.,* 56 Fed. Supp. 959.

[12] *Ex parte Schollenberger,* 96 U. S. 369; *International Shoe Co. v. State of Washington, et al.,* 326 U. S. 310; *Mississippi Publishing Corporation v. Murphree,* 326 U. S. 438.

[13] 45 U. S. C. A. 56.

In the absence of a special statute as to venue, where jurisdiction depends upon a federal question, no civil suit may be brought in any other district than that whereof the defendant is an inhabitant, 28 U. S. C. A. 112. Therefore, but for the special venue provisions in anti-trust and F. E. L. A. cases, suits in the federal courts under these two acts against a corporation might be brought only in a district in the state that granted the charter or in a state in which the corporation had consented to be sued. *Neirbo Co. v. Bethlehem Corp.,* 308 U. S. 165.

[14] *Williams v. Green Bay & W. R. Co.,* 326 U. S. 549, was a stockholders' suit, with jurisdiction dependent solely on diversity of citizenship. In this case the court said, pp. 554 to 557:

"We mention this phase of the matter to put the rule of forum non conveniens in proper perspective. It was designed as an 'instrument of justice.' Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive. An adventitious circumstance might land a case in one court when in fairness it should be tried in another. . . . But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it. The same may be true even where an injunction is sought. We give these merely as illustrations. Each case turns on its facts. There are no special circumstances here, however, which should lead the District Court in New York to decline to exercise the jurisdiction which it has."

In the same opinion from which the Supreme Court has just quoted, Mr. Justice Cardozo stated further: "Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer." 288 U. S. 151.

A fortiori, in equity, one federal district court ought not to enjoin the parties in another federal district court from seeking an injunction to stop further overt acts, which it is averred are being committed every day in every state of the Union, in a nationwide criminal conspiracy to restrain commerce.

[¶ 62,230] United States v. Automatic Sprinkler Company of America, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 46 C 1289. March 22, 1948.

Sherman Antitrust Act

Consent Judgment—Device and System Patents—Practices Enjoined.—A consent judgment entered in an action charging ten corporations with combining and conspiring to monopolize the manufacture and sale of automatic sprinkler systems using rate-of-rise release devices requires a defendant, which owns all current rate-of-rise patents involved, to license all applicants on an unconditional, reasonable royalty basis under all patents which it now has or may acquire up to December 31, 1952, and to sell rate-of-rise devices to all applicants without discrimination. Agreements on the part of the other defendants not to manufacture rate-of-rise devices, and to purchase them only from the patentee defendant, and agreements on the part of the patentee defendant to prevent competitors of the other defendants from obtaining such equipment, are cancelled and enjoined.

See the Sherman Act annotations, Vol. 1, ¶ 1270, 1590.

For plaintiff: John F. Sonnett, Assistant Attorney General; Sigmund Timberg, Special Assistant to the Attorney General; W. P. Epes, Special Attorney; Otto Kerner, Jr., United States Attorney; J. Albert Woll, United States Attorney; Melville C. Williams, G. B. Haddock, Ewart Harris, Special Assistants to the Attorney General.

For defendants: John A. Duncan, H. H. Johnson, Brooks W. Maccrackin, H. McKnight, Alan J. Altheimer, Joseph Strasburger, J. Bernhard Theiss, Arthur A. Olson, John J. Dooling, Ira Jeffreys, Howard Neitzert, William H. Avery, Jr., Sidley Austin Burgess & Harper.

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on July 11, 1946; all the defendants having appeared and severally filed their answers to such complaint denying any violation of law; and all parties by their respective attorneys herein having severally consented to the entry of this final judgment without trial or adjudication of any issue of fact or of law and without admission of any party herein in respect of any such issue;

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of issues of fact or law herein, and upon consent of all parties hereto, it is hereby

Ordered, Adjudged, and Decreed, as follows:

I

[*Jurisdiction*]

That this Court has jurisdiction of the subject matter hereof and of all parties hereto; that the complaint states a cause of action against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and acts amendatory thereof and supplemental thereto.

II

[*Terms Defined*]

As used in this judgment:

(a) "Defendants" refers to each and all of the defendants and each and all of their officers, directors, agents, employees, successors, subsidiaries, and assigns, and each person acting or claiming to act under, through, or for them or any of them;

(b) "Defendant Automatic" refers to Automatic Sprinkler Company of America, Automatic Sprinkler Corporation of America and their officers, directors, agents, employees, successors, subsidiaries, and assigns, and each person acting or claiming to act under, through, or for them, or any of them;

(c) "Person" means any individual, partnership, firm, corporation, association, trustee, or any other business or legal entity;

(d) "Rate-of-rise system" means any automatic sprinkler system for automatically distributing water upon a fire, which is operated by means of heat actuated devices used in conjunction with an adjustable releasing mechanism, and which is designed to

operate when the rate of increase of temperature in the protected area exceeds a predetermined rate;

(e) "Rate-of-rise devices" means any of the heat actuated devices and adjustable releasing mechanisms by the means of which a rate-of-rise system is operated and any auxiliary devices specially designed for supervising a rate-of-rise system;

(f) "Rate-of-rise equipment" means any part, apparatus or accessories comprising or used in connection with a rate-of-rise system, with the exception of rate-of-rise devices;

(g) "Device patents" means all United States letters patent, and all applications for such letters patent listed in Appendix A hereof; all divisions, continuations, renewals, extensions or reissues of the foregoing patents and patent applications; all patents issued upon such applications; all patents covering any rate-of-rise devices or any process for the manufacture of rate-of-rise devices which may be issued to or acquired by defendants on or before December 31, 1952; and all such patents of which any defendant on or before that date becomes the licensee with the power to sub-license; provided that in so far as any claims of any of said patents cover combinations or systems (instead of devices) said patents with respect to such claims shall be treated as "system patents" hereunder and not "device patents";

(h) "System patents" means all United States letters patent, and all applications for such letters patent, listed in Appendix B hereof; all divisions, continuations, renewals, extensions, or reissues of the foregoing patents and patent applications; all patents covering any rate-of-rise system which may be issued to or acquired by defendants on or before December 31, 1952; and all such patents of which any defendant on or before that date becomes the licensee with the power to sublicense; provided that in so far as any claims of any of said patents cover devices (instead of combinations or systems) said patents with respect to such claims shall be treated as "device patents" hereunder and not "system patents";

(i) "1927-28 Agreements" means the following contracts and agreements:

The first agreement dated October 3, 1927, between Defendant Automatic and General Fire Extinguisher Company (now Grinnell Corporation), further identified as containing five numbered paragraphs.

The second agreement dated October 3, 1927, between Defendant Automatic and General Fire Extinguisher Company (now Grinnell Corporation, further identified as containing seventeen numbered paragraphs.

The agreement dated October 6, 1927, between Defendant Automatic and Globe Automatic Sprinkler Company of Pennsylvania.

The agreement dated January 14, 1928, between Defendant Automatic and H. G. Vogel Company.

The agreement dated March 8, 1928, between Defendant Automatic and Rockwood Sprinkler Company of Massachusetts.

The agreement dated March 3, 1928, between Defendant Automatic and Rhode Island Supply & Sprinkler Company (subsequently assigned to Rhode Island Supply & Engineering Company).

(j) "Necessary technical information" means the know-how and technical knowledge which are necessary for or useful to a licensee in the manufacture, installation, maintenance and operation of any rate-of-rise device or rate-of-rise system under patents licensed pursuant to the terms of this judgment.

III

[*Agreements Cancelled*]

The 1927-28 Agreements, as defined in this judgment, and each of them are hereby cancelled; and the defendants and each of them are hereby enjoined and restrained (1) from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto, and (2) from entering into, adhering to, maintaining or furthering, directly or indirectly, among themselves or with any other person, or claiming any rights under any contract, agreements, understanding, plan, program or course of conduct for the purpose or with the effect of continuing, reviving, or renewing any of said agreements.

IV

[*Licensing Required*]

(a) The defendant Automatic is hereby ordered and directed, with respect to patents referred to in Section II hereof under its ownership or control, to grant to each applicant therefor at his option a non-exclusive license (1) to make, use and vend, under any, some or all of its device patents as defined; and/or (2) to install, use and vend, under any, some or all of its system

patents as defined in this judgment. Defendant Automatic is hereby enjoined and restrained from making any assignment, sale or other disposition of any of said patents which would deprive it of the power or authority to grant such licenses, unless it requires, as a condition of such assignment, sale or other disposition, that the purchaser, transferee, or assignee shall observe the requirements of Sections IV, VI, VII, VIII and X of this judgment and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of said Sections IV, VI, VII, VIII and X of the judgment.

(b) If at any time or times hereafter any of the defendants shall grant to any other defendant a license to make, install, use or vend under any system patent or patents or any device patent or patents as herein defined, then at each such time and in each such event the defendant so licensing another defendant is hereby ordered and directed to grant to each applicant therefor a similar non-exclusive license (1) to make, use and vend under the device patent or patents so licensed to another defendant and/or (2) to install, use and vend under the system patent or patents so licensed to another defendant.

(c) Defendants are hereby enjoined and restrained from including any restriction or condition whatsoever in any license granted by them pursuant to the provisions of this Section except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) a reasonable provision may be made for inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty (30) days notice in writing to the licensor; (6) the license shall provide that the licensee shall immediately have the benefit of any more favorable terms granted other licensees.

(d) Upon receipt of written request for a license under the provisions of this section, the defendant receiving such request shall advise the license applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by the defendant, the license applicant may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing of such court application, promptly give notice thereof to the Attorney General. In any such court proceeding, the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the license applicant and all other licensees under the same patent or patents. For said sixty (60) day period and pending the completion of any such court proceeding, the applicant shall have the right to make, use and vend under the patent or patents to which his application pertains without payment of royalty or other compensation, but subject to the final judgment and order of the Court in such proceeding, and further subject to the following provisions: The defendant may apply to the Court to fix an interim royalty rate, pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, the defendant shall then issue and the court applicant shall accept a license, or as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such court application by the applicant. If the court applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application and for the rescission of any and all of the applicant's rights under this subsection. Where an interim license or sublicense has been issued pursuant to this subsection, or where the applicant has exercised a right to make, use and vend hereunder, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant files his application with the Court.

(e) Nothing herein shall prevent any applicant from attacking at any time the validity or scope of any of said patents nor

shall this judgment be construed as importing any validity or value to any of said patents

V

[*Infringement Suits Enjoined*]

Defendants are enjoined and restrained from instituting or threatening to institute, or maintaining, or continuing any action, suit or proceeding for acts of infringement of any device or system patent occurring prior to the date of this judgment.

VI

[*Furnishing of Information*]

The defendants are hereby ordered and directed to furnish with all licenses issued under their respective patents pursuant to Section IV of this judgment, to all licensees making application therefor, and at any time with the term of such licenses, necessary technical information as defined in this judgment, in the possession of the defendant licensor, without charge, except that the cost of furnishing such necessary technical information may be recovered from the licensee. Such cost shall not include any overhead or general charges.

VII

[*Non-Discriminatory Sale*]

Defendant Automatic is hereby ordered and directed, as long as it shall manufacture, sell or deal in rate-of-rise devices, to offer to sell, and to sell such rate-of-rise devices, in such quantities as may be reasonably reqired and to the extent that it has such devices currently available, to any prospective purchaser or user, without discrimination among such prospective purchasers or users as to availability of such devices or as to the prices, terms and conditions of their sale.

VIII

[*Tying Agreements Prohibited*]

Defendants are hereby enjoined and restrained from conditioning, or requiring or inducing any other person to condition any license or grant of immunity issued by them under a device or system patent, or any sale, offer to sell, distribution or use of any rate-of-rise device or rate-of-rise equipment (1) upon the purchase, securement or use of any other product, article or service from or through any defendant or from or through any particular or designated source or sources; (2) by requiring the purchaser, licensee or grantee to refrain from reselling or distributing such rate-of-rise devices or equipment; (3) by requiring the purchaser, licensee or grantee to resell such a device at a price or on other terms or conditions fixed by the defendants; (4) by requiring the purchaser, licensee or grantee to use, install or deal, exclusively or in any determined amounts or quotas, in rate-of-rise devices or equipment made by one or more specified manufacturers, or to refrain from using, selling, installing or dealing in any rate-of-rise devices or equipment; or (5) by requiring the purchaser, licensee or grantee to purchase rate-of-rise devices or equipment exclusively or in any determinate amount or quotas from one or more specified sellers thereof.

IX

[*Agreements Enjoined*]

The defendants herein are hereby severally and jointly enjoined and restrained, either when acting alone or pursuant to any agreement, contract, understanding, combination or conspiracy among themselves or with any other person, from requiring or inducing any person (including but not limited to other defendants, and the licensees and distributors of any defendant), (1) to sell or to purchase any rate-of-rise device subject to any condition or restriction whatsoever with respect to the use, installation or resale of such device; (2) to sell or to purchase any rate-of-rise equipment, subject to any condition or restriction whatsoever with respect to the use, installation or resale of such equipment; (3) to give or receive any license or grant of immunity under a system or device patent, subject to any condition or restriction whatsoever with respect to the use, installation or resale of such equipment, system or device; or (4) to agree not to buy, sell, use, install or otherwise deal in any rate-of-rise devices, equipment, or systems outside a specified geographical area.

X

[*Compliance*]

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to any defendant, be permitted, subject to any legally recognized privilege,

(a) access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any of the matters contained in this judgment; and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; provided, however, that no information obtained by the means permitted in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained by this Court for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification thereof, the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 62,231] Ira J. McCullough v. Kammerer Corporation and Baash-Ross Tool Company.

In the United States Court of Appeals for the Ninth Circuit. No. 11,122. February 26, 1948.

Infringement Suit—Use of Patent to Suppress Competition—Restrictions Against Public Interest.—Upon appeal from an interlocutory decree holding that the patentee of devices for cutting pipe in oil wells is entitled to damages for patent infringement, it is held that a license agreement between the patentee and a licensee providing that neither the licensor nor the licensee shall acquire or use any other pipe cutter is contrary to public interest, inasmuch as it operated to stifle new competitive invention and to suppress competitive forces which stimulate newer and better products. The judgment for damages is reversed.

See the Sherman Act annotations, Vol. 1, ¶ 1660.200.

For appellant: R. Welton Whann, Robert M. McNanigal, both of Los Angeles, California; A. W. Boyken, Boyken, Mohler & Beckley, W. Bruce Beckley, all of San Francisco, California.

For appellee: Frederick S. Lyon, Leonard S. Lyon, Mark Herron, all of Los Angeles, California.

For United States, as *amicus curiae*: William C. Dixon, Wallace Howland, Special Assistants to the Attorney General; Julian Caplan, Special Attorney, San Francisco, California; John F. Sonnett, Assistant Attorney General, Washington, D. C.

Before: DENMAN, BONE and ORR, Circuit Judges.

[*Nature of Action*]

DENMAN, C. J.: McCullough appeals from an interlocutory decree holding that Kammerer Corporation, hereinafter called the patentee, is entitled to damages for McCullough's infringement of patentee's patents for cutting pipe in oil wells and an accounting thereof, and defying McCullough's motion to set aside a prior interlocutory order for the accounting and to dismiss the two complaints (consolidated for trial) brought against him for such infringement by the patentee and Baash-Ross Tool Company, hereinafter called the licensee, on the ground that the licensing contract between the licensor and licensee was against the public interest.[1]

[1] Cf. *McCullough v. Kammerer*, 138 F. 2d 482 (CCA-9), affirming the first interlocutory decree and *id.* 323 U. S. 327, and *id.* 148 F. 2d 525 (CCA-9), respecting the contention of unclean hands urged, but not decided, on appeal but committed to the district court for its consideration.

[*License Contract*]

One of McCullough's contentions respecting the patentee's conduct in the exploitation of its patent is that its licensing contract with the licensee[2] violated the public interest. That contract not only gave the licensee an exclusive license to manufacture and use (but not to sell) the pipe cutter in the United States and its territories but prevented both the licensor and licensee from acquiring or using any other pipe cutter. The challenged provisions of the contract are

> "11. The Licensee covenants and agrees during the term of this license agreement not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement.
>
> "12. The Licensor covenants and agrees that during the term of this agreement, not to manufacture, sell, rent, license, use, or in any way do business with the device or devices covered by this agreement or with devices which will come or be in competition with the device or devices covered by this agreement."

These covenants extend the monopoly of the patent by preventing competition with the patent of any other pipe cutter, patented or unpatented, manufactured, used or sold by the licensee, theretofore engaged in making pipe cutting tools. The licensor to procure such extension of the monopoly area of its patent also *binds itself* to extend the area of the monopoly by a similar restrictive agreement.

In addition it appears that the patentee is a corporation having as its general manager an inventor of pipe cutters as well as two of its officers also such inventors. Its agreement to extend the patent monopoly by eliminating competition is aided by its agreement not to avail itself of the inventive genius of its employees in creating competitive devices which it can "manufacture, sell, rent, license, use or in any way do business with."

[*Matters of Substance*]

It cannot be said that these are matters *de minimis* and not of substance. The patentee appellee describes the licensee as "a very large company" doing a world-wide business. Its operators went from state to state to operate the cutter. The evidence shows licensee's business in the United States alone extended to the oil wells of companies in eleven states. In 1923, the year the challenged contract was made, the income from the rental of the cutter to such oil companies amounted to $212,760. At the rental agreed in the licensing contract of $190 for each cutting, this amount shows that in that year wells were so serviced over these states by 1172 such cuts. The total income from such cuts in 15 years amounted to "something like about" $2,500,000 from "the running by the Baash Tool Company of the Stone and Reilly cutter."

The district court found at the trial on the issue of infringement that the licensee had a monopoly of the field of pipe cutting in the United States, all other cutters being supplanted by the cutter of which it had the patent monopoly.

Nothing could more discourage inventors or manufacturers of better competitive cutters than to take from them the patronage of the only person then using or cutting with the only device used in cutting broken pipe in all the oil fields of the United States. While it is true that this exclusive occupation of cutting in all these fields arose after the making of the challenged contract, what was *aimed* at by the contracting parties was just such success. What they *feared* is shown by the challenged covenants, withdrawing both parties from the field of inventing or using competitive devices.

[*Issue of Public Interest*]

In this situation the contention is entirely irrelevant that neither party was harmed by the agreement. The question is, "Was the public harmed?" We think the district court erred in holding it was not and are in accord with the Third Circuit that these restrictions are against the public interest and warrant a court of equity in refusing the relief here sought. In *National Lockwasher Co. v. George K. Garrett Co.*, 137 F. 2d 255, 257 (CCA-3), that court states:

> "The standard form of contract used by the plaintiff in licensing agreements

[2] The contract was made on October 18, 1923, with the L. F. Baash Perforator Company which manufactured the pipe cutter and serviced oil well companies with it. On November 1, 1924, L. F. Baash Perforator Company assigned the licensing contract to Baash-Ross Tool Company which took over the servicing as well as the manufacture of the cutter. The Perforator Company was then merged with the Baash-Ross Tool Company, the licensee here.

was in evidence. That contract contains a clause that '(g) Licensee agrees that, while this agreement is in force, it will make and sell no form of non-entangling Spring Washers except such as are covered by said patent, and that it will not, either directly or indirectly, make or sell Spring Washers of the kind specifically excluded from this license under the provisions of Paragraph First (a) hereof.' There was no dispute that this provision appeared in the licensing agreements given by the plaintiff to those who sought to make spring washers utilizing the plaintiff's patent.

"We think this is enough; enough to show that the plaintiff was using its patent to suppress competition with it by non-patented articles. To the extent that the policy was successful the supply of competing non-patented washers would, of course, disappear.

"Said Mr. Chief Justice Stone in *United States v. Univis Lens Co., Inc.*, 1942, 316 U. S. 241, 251, 62 S. Ct. 1088, 1094, 86 L. Ed. 1408: 'In construing and applying the patent law so as to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant, *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, 62 S. Ct. 402, 86 L. Ed. 363, the particular form or method by which the monopoly is sought to be extended is immaterial.' This statement of principle covers the situation here. The patentee has disentitled itself to recover at present for infringement by reason of its utilization of its patent monopoly to drive unpatented competing goods from the market." [3]

We agree with that circuit that there is no difference in principle between extending the monopoly of the patent by suppressing the manufacture or use of competitive devices, patented or unpatented, and the extension of the monopoly by prohibiting the use in making the patented article of unpatented articles competing with those made by the licensor's subsidiary, held against the public interest in *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 493. As stated in *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 666:

"The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. *United States v. Masonite Corp., supra*, p. 277. *The method by which the monopoly is sought to be extended is immaterial. United States v. Univis Lens Co., supra*, pp. 251-252." (Italics supplied.)

[*Suppression of Competition*]

The public, in a system of free competition, is entitled to have the competition of other devices with a patented device and here it is against that public's interest to use the patent to suppress such competition. As stated by the Supreme Court in the recent case of *Transparent-Wrap Mach. Corp. v. Stokes & Smith*, 329 U. S. 637, 644:

"Protection from competition in the sale of unpatented materials is not granted by either the patent law or the general law. He who uses his patent to obtain protection from competition in the sale of unpatented materials extends by contract his patent monopoly to articles as respects which the law sanctions neither monopolies nor restraints of trade."

[*Licensee's Contention Rejected*]

We see no merit in the licensee's contention that the *Lockwasher* case is distinguishable because in that case there were several licensees and here there is but one. As seen, the licensee was a "very large company" doing a business abroad and in the United States, with an income of rentals from the cutter of $212,700 in the year the contract was made, and which had acquired mastery of the entire field of pipe cutting. In *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 663, there was a sole licensee and the license denied the use of other devices with the use of that of the patent. There the licensee could sublicense, just as here the licensee could sublicense the use of the pipe cutter.

As well could it be said that the principle here invoked would not apply if a patent for making steel was licensed solely to the Steel Corporation and that very large company in the steel business, as the licensee here is in that of pipe cutting, were required to agree not to manufacture, use or sell competing steel making devices.

With regard to the licensor's agreement with the licensee to make more certain the licensee's profit by extending the monopoly area by excluding itself from making, using, renting or licensing competitive cutters, such a patent monopoly extension by the *agree-*

[3] Cf. *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, 236, 237, where, in part, the agreement held against public policy provided that the licensee during the life of the licensed patents, "agrees never to import, manufacture or sell any machines or devices covered by certain other patents."

ment of the licensor has the same prejudice to the public as the restricting agreement of the licensee. In the recent case of *Scott Paper Co. v. Marcalus,* 326 U. S. 249, 257, it was held, distinguishing prior decisions, that it is against the public interest for an owner of a claimed patent to make an agreement with his licensee by which he binds himself not to contest the validity of the licensed patent. In the public interest the licensor must not bind himself not to make, use and vend articles covered by the terms of the patent and hence cannot bind himself not to defend such creation of goods on the ground that the patent he has purported to license is invalid because anticipated by a valid but expired patent.

[*Restrictions on Invention*]

With regard to the agreement's compulsion on the patentee not to exercise the inventive power of its general manager and other employees in privity with it, in creating competing devices, the purpose of the patent law is to encourage, not to hamper, invention.

There is no merit to the contention, attempted to be based on *U. S. v. General Electric Co.,* 272 U. S. 476, that because the patentee may refrain from making or using competing devices, unpatented or patented, he may bind his licensee so to refrain. In *Morton Salt Co. v. Suppiger, supra,* the Suppiger Co. could have refrained from using any unpatented salt tablets other than its own in its patented machines for the insertion of salt tablets in the process of canning. Yet the court held against public policy the prevention of its licensee, as here, from using tablets competing with Suppiger's. So also in *U. S. v. Masonite Corp.,* 316 U. S. 265, 280, where the lower court relying on the *General Electric* case was reversed. There the Masonite Corporation could have fixed its price on the patented hardboard it sold yet it was held against public policy and a violation of the antitrust laws to fix the price of the persons licensed to vend the hardboard.

Such restricting conditions are not "reasonably within the reward which the patentee by the grant [or licensing] of the patent is entitled to secure" mentioned in *U. S. v. General Electric Co., supra.,* p. 489. "As stated by Mr. Justice Story in *Pennock v. Dialogue,* 2 Pet. 1, 19, the promotion of the progress of science and the useful arts is the 'main object'; reward of inventors is secondary and merely a means to that end. Or, in the words of Mr. Justice Daniel in *Kendall v. Winsor,* 21 How. 322, 329, 'Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these.' And see *Blount Mfg. Co. v. Yale & Towne Mfg. Co.,* 166 F. 555." *U. S. v. Masonite Corporation,* 316 U. S. 265, 278.

The licensor and licensee contend that whether or not such discouragement in invention and such suppression of competition of other devices be otherwise against the public interest, they are not prohibited where, as here, the patentee's royalty income is measured, in part, by the profits the licensee makes from its use of the patent—here by one-half the profits secured by a lien on all the licensed devices manufactured by and belonging to the licensee.

[*Joint Venture*]

We do not agree that the evidence supports the lower court's finding that the licensing agreement created a joint venture. The patentee here is not liable for the licensee's losses in exploiting the products of its license. On the contrary, if the licensee become bankrupt, the patentee, with its lien on the bankrupt's manufactured devices, may purchase them for $300 each, any unpaid royalties to apply on the purchase price. The parties were clearly dealing at arm's length. The transaction does not become a joint venture because the *amount* of the royalty is measured in part by the licensee's profits. If the lower court's holding were correct every licensing agreement yielding a profit measured by the success of the exploitation of the patent would be such a venture.

The prior owners of the patent upon which the pipe cutters were made were one Reilly and one Stone. Reilly's and Stone's invention was made while they were employees of the Baash Perforator Co., which thus had a claim on the patent. One Kammerer had a prior patent for pipe cutting, of which it was claimed the Reilly and Stone patent was an infringement, and litigation was threatened. The several parties came together and agreed it would be more profit-

able not to litigate. In this situation the patentee Kammerer and the patentees Reilly and Stone each could have licensed to the Baash Perforator Co. for a royalty to each and each agreed not to invent or "manufacture, sell or use" etc. any competing device and the Perforator Company likewise agreed not to manufacture, sell, use, etc.

Had this been done a similar result to that in the instant case would have been accomplished with three parties acting against the public interest instead of two. That the patentees obtain their royalties as stockholders in the Kammerer Corporation, to which they transferred their patents and of which they became the controlling officers and directors, does not change the prejudice to the public interest. In both methods the restrictive covenants are a convenient method of protecting each from inter-party competition but, as stated by Chief Justice Stone in *B. B. Chemical Co. v. Ellis,* 314 U. S. 495, 498, "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant."

[*Sharing of Profits*]

Even had this patent licensing contract created a joint venture, the sharing of profits and losses is no ground for protecting them by agreements against the public interest. The case of *Universal Sales Corp. v. Cal. etc. Mfg. Co.,* 20 Cal. (2) 751, cited by appellees, had no agreement restricting the use of competitive materials or in any way affecting the public interest. In the case of *Kinsman v. Parkhurst,* 18 How. 289, 293, also cited by appellees, the Court held no more than that it was "competent for two persons, being joint owners of letters-patent, whether valid or invalid, to enter into a copartnership for the manufacture and sale of the patented machines, and to stipulate that one of them should alone conduct the business." In that case there was no question of the licenses reaching beyond the patented articles and discouraging other patenting or forbidding the use of competitive devices. If the Court's statement "Besides, if the contract to refrain from the manufacture could not be enforced, as being against public policy, this would afford no answer to a claim for an account of profits actually realized by prosecuting the business, there being no connection between the illegal stipulation and the profits of the business," means that the Court will enforce such a contract, as here, affecting the public interest if there is no connection between the public injury and the profits from pipe cutting—it is overruled by many subsequent decisions such as *Morton Salt Co. v. Suppiger & Co., supra,* where it is stated at page 494, "It is the adverse effect upon the public interest of a successful infringement suit in conjunction with the patentee's course of conduct which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent."

McCullough also claims the contract gives the licensee the right only to "manufacture and use" the patented device. Hence, it is contended, the device cannot be rented to others and its use solely by the licensee required the employment of skilled workmen. The license, he claims, fixes the price the licensee may charge the oil drillers it serves at $190 per use, thus controlling not the mere participation price of the value of the tool in making the cut but, as well, the price charged the parties served for the workmen employed.

We do not agree that the contract so provides. At one place it grants "the exclusive right to manufacture and use, but not sell" the cutters. However, it later provides for part of the royalty, one-half the gross earnings from "the *use* of said devices by the licensee" and just after that for the payment of $190 per cut for the *"rental for the use"* of the cutters. It next provides that the licensee shall keep books of account showing "the names of the parties to whom the same [cutters] were *rented or* upon whose property the same are *used."* It then provides for a monthly "statement showing the dates of the use *or* rental thereof and the *number of cuts made* and the parties for whom the device or devices were *used* during the preceding calendar month."

We construe this contract to mean that where there was a rental of the use of the cutter to an oil driller, the $190 received was part of the licensee's gross earnings to be divided equally with the licensor. Where the licensee itself used the device on the property whose oil wells it served, the charges for the services and use were addtions to the gross earnings to be equally divided. We can see no public harm in such an agreement.

[*Public Interest Prejudiced*]

We hold that the evidence establishes that the licensing contract and the operations thereunder substantially prejudiced the public interest in that they stifled new competitive invention and suppressed competitive forces which stimulate newer and better products, and that the contract's covenants strike at the very purpose of the statute and its constitutional basis. Neither the Kammerer Corporation nor the Baash-Ross Tool Company is entitled to damages for McCullough infringement and the interlocutory judgment for damages and an accounting is reversed and the complaints are ordered dismissed.

[*Judgment Reversed*]

Reversed.

[Dissenting Opinion]

BONE, C. J., dissenting: In *United States v. General Electric Co.*, 272 U. S. 478, 489, 490, a unanimous Court announced a basic rule clearly applicable to the license agreement in the case at bar and later cases do not appear to have diluted or modified that rule. The Court there said: "The patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty *or upon any condition the performance of which* [condition] *is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.*" (Italics supplied.)

Also: "The patentee may make and grant a license to another to make *and use* the patented articles, *but withhold his right to sell them.* * * * if he [the licensee] *sells* them, he infringes *the right* of the patentee, and may be held for damages and enjoined." (Italics supplied.) The Court goes even further in this case in declaring that *if* the patentee licenses *the selling* of the articles, he may limit the selling *by limiting the method of sale.* (See also comments of a unanimous Court on powers of a patent licensor set forth in first complete paragraph on page 456, *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436.)

In the *General Electric* case the Court is speaking about, and passing upon, the dominent issue squarely confronting this court in the case at bar; that issue is "the performance" (by a licensee) of a "condition" prescribed in a license agreement. The inescapable logic of its pronouncement upon that aspect of patent law is that *if* the patentee himself may lawfully do the things sanctioned and authorized by our patent laws, he may (within the limits noted by the court, which "limits" were not transcended by the licensee in the instant case) lawfully grant a patent license which confers upon the licensee the lawful right to engage in precisely the same sort of operations. A license agreement, thus conditioned, does not expand or escape the orbit of the patent and/or the rights which inure to the patentee under his patent grant.

If the *General Electric* case is still "good law" why doubt the absolute *right* of Kammerer to do everything the Baash Company was authorized to do under the instant agreement. In my view of the law of this case, these "authorizations" are, in legal contemplation, but a mere recitation of business operations which licensor Kammerer, if operating alone, could lawfully "perform." This view appears to find adequate support in the doctrine announced in the *General Electric* case, and sanction in the very nature of our contract and patent law. If a patent owner prefers to refrain entirely from exploiting his own patent, as for example by doing and performing the very acts and things which Kammerer authorized Baash to do, but elects to confer upon a licensee the exclusive right to do and perform these acts and practices, I am unable to see how such practices by a licensee are thereby translated into legal villainies merely because they are permitted by the license agreement. Furthermore, if Kammerer had preferred to manufacture its own device and not make any patent licenses, and thereafter proceeded to do the very same things this agreement purports to authorize Baash to do, the royalty (or rental) payments collected by Kammerer would be *"reasonably within the reward" which the patent grant entitled Kammerer to secure.*

A license limiting *the use* of a patented wringer and gear mechanism to certain types of washing machines is a valid exercise of the patent monopoly. *Vulcan Mfg. Co. v. Maytag*, 73 F. 2d 136, cert. dismissed, 294 U. S. 734.

To avoid irrelevancies it is well at the outset to point out some of the basic conclusions upon which this court rests its opinion in this case. It says:

(1) "These covenants [paragraphs 11 and 12 of the license agreement] *extend*

the monopoly of the patent *by* preventing competition with the patent of any other pipe cutter * * * used or sold by the *licensee*." (Italics supplied.)

Also:

(2) "The *licensor* to procure such extension of the monopoly area of its patent * * * binds itself to extend the area of the monopoly by a similar restrictive agreement." (Italics supplied.)

Also:

(3) "* * * the patentee [Kammerer] is a corporation having as its general manager an inventor of pipe cutters as well as two of its officers also such inventors. Its agreement to extend the patent monopoly by eliminating competition is aided by its agreement not to avail itself of the inventive genius of its employees in creating competitive devices which it can 'manufacture, sell, rent, license, use or in any way do business with.' "

The first two contentions advanced seem to me to beg the question baldly posed by this case. I prefer to suggest the answer in the general comments in this dissent. As to the third, I think that it finds a satisfactory answer in the very language of the two (cited) paragraphs of the license agreement. Paragraph 12 of the license agreement says in simple English that Kammerer agrees not to "manufacture, sell, rent, license, use or * * * *do business*" (with the covered device) "or with devices which will come or be in competition with the device or devices *covered by the agreement*." The plain purpose of this language was to permit Baash to (thereafter) exclusively *use* the Kammerer device, i.e., to "do business" with *it*. Kammerer simply agreed that it would not "do business" with its own device but preferred to yield the field of *use* to Baash. This is not a suppression of *use*. On the contrary, the agreement called for *free use* by Baash of the patented device in an important field of business activity.

Since this mindless creature of the law (a corporation) can hardly be charged with the offense of violating public policy by agreeing that *it* will not *invent something*, my associates turn to its employees and charge that Kammerer agreed not to avail itself of the inventive genius of its employees in creating competitive devices.

The language I have quoted above fully answers this unnatural construction of the meaning of the plain provision of Paragraph 12. On its face the license agreement shows that all of the individuals connected with the Kammerer and Baash organizations were left free to *invent* anything and *to freely sell their inventions to any one*. The language of the agreement can not be tortured into a "discouragement in invention." Our opinion is literally a holding that Kammerer was party to an agreement which "stifled invention" — but whose invention did it "stifle"? Certainly the patented device of Kammerer was not (thereby) being stifled—it was being put to the freest sort of use in eleven states. Our opinion accents the fact of what it calls "large operations" by Baash in exploiting the Kammerer patent.

Paragraph 11 applying to the *licensee* is equally void of language suggestive of such repression of "invention," or of the "inventive instinct." As indicated, all agents, officers and employees of both licensor and licensee were left entirely free (under the language of the agreement) to invent and give full play to their inventive instincts (and sell their invention or inventions).

Appellant makes certain specific contentions in his brief which aid materially to narrow the legal issue before us. He says: "Our contention *is simply this:* that, * * * the parties to a patent license agreement may not *disable both* of them from *selling* the patented invention. We believe that *such* a restraint, *created by agreement,* * * * is unlawful." (Italics supplied.) This contention is both simple and blunt and permits of no misunderstanding of what we are forced to decide. If our opinion gives sanction to it, we part company with the doctrine of the *General Electric* case, which holds that the patent licensor may "withhold the right to sell." Within the orbit of the patent, the patent owner may lawfully license such *part* of his *rights* as he chooses. Where in the law do we find sanction for the doctrine that the patent licensor loses this *right to withhold some part of his rights,* merely because he exercises a recognized legal right to grant a patent license?

The law does not *compel* a patent owner to *sell* his patent. Aside from entering into *contracts not to use an invention,* which are a restraint of trade, the patent owner may refrain from doing anything at all with his patent—its validity is not affected by his non-use. *Continental Paper Bag Co. v. Eastern Paper Bag Co.,* 210 U. S. 405.

Another contention by appellant is that the *use* of the patented device (by a licensee) may not lawfully be restricted ("conditioned") in the license. The *General Electric* case also answers that contention. Kammerer could lawfully make, *use* and vend its patented device, and exclude all others from such operations. Or it could part company (by a license) with a *part* of these exclusive rights and authorize a licensee to *use* the licensed device "upon *any condition the performance of which* is reasonably within the reward" which Kammerer is entitled to secure. That "reward" would most certainly be a lawful one when it came in the form of "rentals" received for the use of the patented device.[1]

By the license to Baash, the Kammerer corporation simply agreed that its "reward" should be provided in a percentage of the rentals received by Baash for the use of the Kammerer tool. Our opinion makes an unprofitable argument on the issue raised in the case as to whether the agreement established a "joint venture" between appellees. I wholly agree with appellant who states in his Reply Brief that he believes that this particular question "is irrelevant to the fundamental question" in the case. It is. Furthermore, I see nothing illegal in this way of *securing a reward* to the patent owner.

It is a significant and interesting fact that no case has been cited to us which is "on all fours" with the case at bar. So in order to plaster this license agreement with badges of illegality, said to clearly appear on its face, this court turns to and lifts quotations from cases dealing with totally different states of fact. Employing this process of analogy, it concludes that the instant agreement, per se, is legal proof that the parties thereto deliberately contracted and agreed to engage in the activities, and commit the various legal sins, found to be present, and constituting the dominant legal issue in, such cases as *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U. S. 661; *Morton Salt Co. v. Suppiger Co.,* 314 U. S. 488; *National Lockwasher Co. v. Garrett Co.,* 137 F. 2d 255 (CCA-3); *Pope Mfg. Co. v. Gormully,* 144 U. S. 224; *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.,* 329 U. S. 637; *Carbice Corp. v. American Patents Development Corp.,* 283 U. S. 27; *United States v. Masonite Corp.,* 316 U. S. 265.

This oblique process undertakes to prove too much. The facts and the real legal issue in this case are poles apart from those in the cases just referred to, some of which are relied upon in the court's opinion.[2] It does not provide an answer in this case to lift broad statements of general principles from cases dealing directly and specifically with "tie-in" operations and bald attempts to achieve a limited monopoly of unpatented materials, and by analogy make them apply to the limited, peculiar and wholly different facts of this case. The law and the facts in those cases cannot and should not be made into a drag-net which sweeps this case into their various orbits.

I agree with the experienced trial judge in this case whose findings were that the challenged license provisions were lawful ones; that they were not designed and fashioned to accomplish unlawful purposes, and that under them, the parties did not accom-

[1] Another contention further revealing the real basis of appellant's case is as follows: "Where the patent owner, as here, attaches to its license agreement any terms or conditions whereby the licensee is obliged not to do something which it [licensee] would have a free right to do, but for the license, it is evident that the restraint on the licensee is outside the patent monopoly and results from the agreement. The fact [here relying on the *Mercoid* case] that the patentee has the power to refuse a license does not enable him [patentee] to enlarge the monopoly of the patent by the expedient of attaching conditions to its use."

The foregoing argument of appellant cannot be sustained (on the theory that the restraint on Baash "enlarges" the monopoly of the Kammerer patent) unless this court completely ignores the holding in the *General Electric* case which is absolutely to the contrary.

McCullough insists that the license agreement in this case is objectionable, when measured by the *Mercoid* case, even though the royalty in that case was based on an unpatented part.

One of them ajor complaints of appellant in this case is that the license agreement is illegal *because* Kammerer and Baash never *sold* the patented tool. Cases condemning price restrictions and/or resale prices are not applicable here.

The system of renting the use of "fishing tools" when they are needed has long been the recognized method by which oil well drilling operators have economically availed themselves of the use of sundry "fishing tools"—a practice which made it unnecessary for these drillers to purchase a large stock of various sized tools which would probably be very expensive. Appellees maintained a service operation and a corps of expert operators who could take care of emergency requirements of the oil industry at any time, day or night.

[2] *Scott Paper Co. v. Marcalus Co.,* 326 U. S. 249, is cited as supporting the views expressed in the prevailing opinion. Its bearing upon the issue we face is not apparent.

plish, or attempt to accomplish, unlawful purposes. I agree with him that the agreement did not authorize or purport to authorize monopolistic practices which transcend the orbit and scope of the Kammerer patent and the permissible range of "rights" which may lawfully be exercised by the parties to such a patent license.

Other practical matters deserve attention. Kammerer did not "withdraw" from "competition" in its "field." The admitted fact is before us that Kammerer never had a field of operations and it never competed, or attempted to compete with any one. It was apparently a "paper corporation" expressly created for the one and only purpose of holding the Kammerer patent or patents here involved—it was not, and never was, a manufacturing and/or selling company.

Another aspect of this case presents itself. For all this court knows, there may have been dozens of (patented and unpatented) pipe cutting devices on the market all available to oil well operators all over the world. That this is assumed by the court appears from its conclusion that competitors of the Kammerer tool were "discouraged" because the Kammerer tool had supplanted these competitive tools in general use.

Such considerations suggest pertinent inquiries. How does this agreement, *on its face,* purge, or tend to purge, the market of all such competing devices (as in the *Lockwasher* case, supra)? Where in the contract are the provisions, which in themselves, would actually create an unlawful monopoly in a business field? The court postulates the existence of an illegal "monopoly" by an inference arising solely from the face of the agreement—not from the evidence in the case. It has to *assume* the existence of *some* competition which was illegally restrained and/or suppressed by means of the Kammerer-Baash agreement. If actual or potential competition was not restrained or suppressed by the Kammerer-Baash agreement, why strike down the agreement? Actual legal restraint or suppression of competition, as a *fact* in this case, has not been established by evidence. For some reason which I think lacks pertinence, my associates stress the fact that the licensee was described as "a very large company." In one year it did a service business of $212,700 in eleven states, or an average collection of approximately $19,272 from users of its tool in each of these eleven states. If this is thought to be persuasive of anything, the answer is that unless the facts in this case demonstrate that appellees were operating outside the four corners of our patent and antitrust laws in the securing and enjoyment of this service business, the size of their business is without legal significance, as I shall endeavor to demonstrate in this dissent.

In its opinion the court comments on one finding of the trial court in the former injunction hearing in this action where the issue presented was that of patent infringement by appellant with an added claim by appellees for damages and an accounting. Speaking of this finding this court says:

> "The district court found * * * that the licensee had a monopoly of the field of pipe cutting in the United States, all other cutters being supplanted by the cutter of which it had the patent monopoly."

To the foregoing comment this court adds:

> "Nothing could more *discourage inventors or manufacturers of better competitive cutters* than *to take from them* the patronage of the only person then using or cutting with the only device used in cutting broken pipe in all the oil fields * * *." (Italics supplied.)

There is nothing in the foregoing comments of the court which demonstrates in any manner that the *size* of appellees' pipe cutting operations was illegal per se, or was the result of illegal practices of appellees which restrained or suppressed competition. Therefore, I conclude that the court is of the view that appellees, as a matter of law, became authors and operators of an illegal monopoly merely because their superior tool was so popular with users of such a device that they refused to use other cutters.

The court lays emphasis on the fact that *inventors or manufacturers of* (other) *better competitive cutters* became *discouraged* over this competitive situation since it served *to take from them* the patronage of persons using such devices. What is legally or morally wrong in acquiring business *in great volume* if the *process of acquisition* is wholly within the law? Since when has popularity of a product become a crime? In this case, the large volume of business flowing to appellees may have "discouraged" the "inventors or manufacturers of better competitive cutters," but this was the natural and inevitable result of offering a superior tool to users. How does the "discouragement" of these

competitors, arising from their inability to retain trade going to a superior product, become a violation of law or involve any aspect of "public policy"?

There is a queer absence of realism in the court's conclusion despite its reliance on the finding of the district court in the infringement action. In that action the court found:

> "There is nothing in the prior art akin to the manner in which the elements are combined in the patent in suit. The outside cutters of the Reilly and Stone Patent No. 1,625,391 is a tool which has, with great commercial success over a long period of years, produced a better result and has achieved results not attained by any prior device known to the art.
>
> "That since the introduction of the device of the patent in suit to the oil industry by plaintiff, Baash Ross Tool Company, and its predecessor in interest, L. F. Baash Perforating Company, said device has displaced all prior devices in cutting and removing frozen or stuck drill pipe and tubing from wells."

It is in the second of these findings that my associates find such gloomy significance, but all that can possibly be tortured or squeezed out of its language is the conclusion that (despite the "better competitive cutters") the superior Kammerer tool so captured public approval that it supplanted and displaced what the using public must have regarded as inferior devices being offered. On the face of the whole record in this case, that is exactly what happened, and such an achievement does not violate either the letter or the spirit of our patent laws. These laws do not deprive men of the right freely to select the things they prefer to use. If we hold that this is the effect of these laws, the results on business in this circuit would be unpredictable. If national advertisers who spend millions of dollars in various forms of advertising to secure universal use of their products (protected by patents or trademarks) succeeded in securing such use by those lawful methods, we would, under the doctrine we announce, be forced to declare them law violators despite the wish and election of the buying public exclusively to use such products.

For the reason just stated, I am unwilling to translate such a legal and perfectly understandable capture of the pipe cutting business by a superior tool into an illegal operation which threatens "public interest". Is it the view of the court that it possesses the power to *compel* oil well operators to use or prefer an inferior device, or that it should try to force inferior and unwanted devices into a favorable competitive position with a superior product? Does it conclude that it *must* deprive appellees of a legal right to an accounting for damages due to infringement, merely because the infringing appellant or others unnamed could not successfully compete with the superior Kammerer tool? Yet that seems to be the objective of the decision in this case.

Our decision says that "the contention is entirely irrelevant that neither party was harmed by the agreement." For reasons I indicate in this dissent I think that absence of *harm* to appellant from the existence of, and operations under, the license agreement, is a matter of supreme importance in this case. The court passes to an issue which I think is not in this case—the issue of "public interest" and makes the decision turn on that point. It reads into the term "public interest" a new and very astounding meaning. It concludes that the sweeping popularity of the Kammerer tool and its claimed universal and *voluntary* use by oil well men is a form of "monopoly" which, ipso facto, is against "public interest;" because these oil well men refused to use other devices, this free and very normal expression of *their* preference for a superior tool, outrages "public interest." No case is cited which sustains this astounding theory and a sense of humor, if nothing else, should remind us of the truth of the old saw about a pathway being beaten to the door of the man who invents a better mouse trap.

The patented tool of appellees did not deprive either the public or appellant of anything they enjoyed prior to its invention. It gave something of value to the community by adding to the sum of human knowledge. It embodied elements (recognized by courts passing on the validity of the patent) entirely unknown to the prior art. Small wonder that oil well operators immediately put it into general use since it provided a satisfactory solution of their vexing mechanical problems.

But this court sees in this universal popularity and wide use of a new and efficient tool, a sinister attack upon "public interest". It refuses to recognize that this popularity and wide use was a perfectly logical (and legal) reward for inventing a superior and efficient device theretofore unknown in its

field of use. The widespread and *voluntary* use by oil well operators seems to mean nothing to the court—it blinds itself to the obvious fact that the only kind of "public interest" involved in this case was that shown by men seeking a better pipe cutting tool. They found it in the Kammerer tool.

The evidence we face completely fails to demonstrate that (1) the *practices* of appellees contravened public interest, (2) stifled new competitive invention, (3) suppressed competitive forces which stimulate newer and better products. Since appellant demands that we deny to appellees the relief they seek in this court because their damage claim is tainted with illegality, it is in order to demonstrate by the record that appellees did not "stifle" or "discourage" any real inventive genius of appellant. (Reference in the court's opinion to others whose inventive genius may have been "stifled," is too vague to justify comment.) Appellees did not harm him; he was the author of his own business misfortunes and we should not charge them to appellees by a process of indirection.

How appellant worked his own undoing is an interesting story and it is accurately reported in the opinion and findings of the trial court on the original infringement suit. One finding (now binding on this court) reads as follows:

> "Defendant, Ira J. McCullough, acquired his knowledge of outside cutters while in the employ of plaintiff, Baash Ross Tool Company. Defendant left the employ of Baash Ross Tool Company and commenced working on outside cutters and applied for United States Letters Patent thereon. Defendant knew the Reilly and Stone Patent in suit when he designed and made outside pipe cutters like the devices shown in Defendant's Exhibit C., and Defendants' Exhibit D. Both of these devices have all of the elements of the combination in the same cooperative relationship, and accomplish the same result in the same way as does the device of the patent in suit."

In its Opinion in that case the trial court said:

> "* * * The background of the defendant, Ira J. McCullough, shows the acquisition of knowledge in the art in the employ of one of the plaintiffs, the Baash-Ross Tool Company. The device manufactured is, in all respects, similar to the device of the plaintiffs.
>
> * * *
>
> "* * * The defendant, Ira J. McCullough, having learned the art in the employ of one of the plaintiffs, who manufactured this device for many years, both under the patent in suit and the Kammerer patents, cannot escape the penalties of infringement by manufacturing, according to the teachings of the patent, a device which, while containing all the elements of the claims in suit, operates in a manner which, although not used by the plaintiffs in their device, is claimed and taught by the patent."

So it plainly appears that appellant did not exercise his "inventive genius"—he did not stoutly resist wicked efforts of appellees to crush some "competitive force" within him which might have inspired and stimulated him to invent a tool far superior to the Kammerer tool. On the contrary he busied himself in the work of preserving and promoting his own special brand of "free enterprise" by calmly appropriating another man's original and patented idea.

No wonder the court hastens to assure us that the fact that "neither party was harmed" by the Kammerer-Baash license agreement is 'irrelevant." On this record it faced an impossible task in trying to show that appellees had harmed appellant. The shoe was on the other foot. I suggest that "public interest" would have been served in an admirable manner had appellant found in the Kammerer tool a great inspiration to invent a much superior device and then succeeded in doing it. In that event he would surely have placed himself firmly in the favorable business position occupied by appellees. I resist the temptation to speculate on what our attitude might be if that sort of a reversed situation had developed and appellant's present contentions were then presented to us by appellees.

At this point I emphasize the fact that the cases cited in the court's opinion do not justify the conclusion it reaches. One of these is *Pope v. Gormully, supra,* which was characterized by the court as "rare and unique," and difficult to assign to a proper place among legal obligations. Obligations there imposed upon a licensee appear to have been projected beyond the term of the license. The court narrowed the justiciable issue by this language: "* * * the *real issue* is whether the defendant [licensee] can estop himself from disputing patents which may be wholly void, or to which the plaintiff [licensor] may have no shadow of title."

In this case the court was considering *an abuse of the licensee*—a situation not factually or legally comparable to, or even claimed to exist, in the case at bar. While some language is dredged up from the *Pope* case to justify this court's opinion, the Court there was dealing with a license agreement (declared to be) *so oppressive to the licensee* that a court of equity was justified in refusing relief to the licensor plaintiff. The Court indicated that the agreement would probably foreclose the licensee from ability to earn an honest living in his chosen calling. Much of the Court's comment deals with *fundamental rights of a licensee* which, as a matter of public policy, may not lawfully be bartered away. The case did not decide the issue we face and its force as authority is not apparent.

The logic of the *Blount* case, 166 Fed. 555 (1909) does not weaken appellees' case. There two manufacturers, each with a patented invention, agreed not to compete—a factual situation absent in the case at bar. It lacks pertinence in a case such as we face. The issues we confront are within the orbit of the *General Electric* case. See *Daniels v. Brown Shoe Co.*, 77 F. 2d 899 and *Bement & Sons v. National Harrow Co.*, 186 U. S. 70.

The distinction between the *facts* in this case and those in the *Lockwasher* case, *supra*, is very marked. That case involved a contractual combination embracing at least six manufacturing concerns all coldly bent upon the creation of a stifling monopoly in an entire field which (under the facts disclosed at trial) *was deliberately fashioned and designed to purge the entire market of competition.* No such design, purpose, ability or attempt to monopolize and to "purge" the market of *all or any competitors* was shown in this case. Here the findings of the trial court indicate the exact contrary to be true. In fact, the findings and conclusions (supported by the evidence) repel the charge and the conclusion that the business operations of appellees were monopolistic in character, or were designed to, or achieved results of that nature.

It is easy to marshal an imposing array of cases which proclaim the mournful fact that the "monopoly" of the patent grant was abused by business practices shown in those cases. The cases cited by the instant opinion generally fall into this category. I think that they lend no weight to the conclusion we reach since they deal with factual situations not even distantly related to the facts in this case. In the instant case, the facts are shunted into the *de minimis* class. I think that it will be found that in practically all of these cases, the courts immediately came to grips with the facts, and the logic of this sort of approach is apparent. One excellent reason lies in the fact that no rule has yet been devised by the wit of courts which could be applied to all factual situations. Obviously this calls for a careful delineation of the facts against which even a well recognized rule should be applied.

In the instant case appellees first vigorously denied that their agreement reveals an intent to project their business *practices* beyond the lawful orbit of the patent grant, a contention I approve and to which the trial court agreed after a full hearing on the merits. The trial court also inquired into the *practices* of appellees under their agreement and determined that these did not circumvent anti-trust and/or patent laws.

This court says that the language in two or more provisions of the Kammerer-Baash license agreement is sufficient in itself to void the agreement as "contrary to public policy." Our opinion portrays "public policy" as a legal principle which necessarily calls for condemnation of the license agreement despite the absence of proof therein that the business *practices* of appellees harmed the business *practices* of appellant. This sort of condemnation, without any showing of actual injury, resulting from illegal *practices*, is a novel application of a wholesome principle of law designed by society to prevent the doing of legal *injury* to others.

Since reference has been made to the findings of the trial court, I call attention to the fact that our court rules require that specifications of error in findings and conclusions "shall state" wherein they are alleged to be erroneous. Appellant presents no such specifications of error nor does he make reference to the findings in the statement of points he relies upon. All we have from appellant is the (here summarized) assertion that the district court erred: (1) in holding that license agreement does not contain restrictive covenants which are against public policy, in restraint of trade and illegal; (2) in holding that plaintiffs are not barred from using a court of equity to enforce the patent

grant; (3) in holding that plaintiffs are entitled to an accounting and a recovery of profits and damages; and (4) in denying all plaintiff's motions and entering the Order of June 5, 1945 appealed from herein. On the record before us McCullough does not attack the findings as being erroneous or contrary to or not fully supported by the record.

The trial court correctly disposed of the issues presented on the accounting and its judgment should be affirmed.

[¶ 62,232] Abraham Blum, Trading Under the Firm Name of Ben's Cut Rate Drug Store v. Benjamin Engelman and David Engelman, Trading Under the Firm Name of M. Engelman & Sons.

In the Court of Appeals of Maryland. No. 86, October Term, 1947. Filed February 25, 1948.

Maryland Unfair Sales Act

Sales Below Cost — Unfair Competition — Constitutionality of Unfair Sales Act.— On appeal from an order overruling a demurrer to a bill of complaint by a cigarette retailer to enjoin a competitor from selling certain brands of cigarettes at less than cost, it is held that a demurrer to the bill was properly overruled. The Act, which prohibits sales below cost to the retailer with intent to injure a competitor or to destroy competition, and which contains no penal provision, but provides for injunctive relief, promotes a policy within the police power of the state, and does not contravene the Fourteenth Amendment to the Federal Constitution or Article 23 of the Maryland Declaration of Rights. Within the limitations imposed by the requirements that the means adopted must not be unreasonable, arbitrary or capricious, and must have a real and substantial relation to the object sought to be attained, the state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by statutes aimed at monopolies or by curbing harmful competition by fixing minimum prices.

See the Maryland Unfair Sales Act, Vol. 2, ¶ 8368.03.

Affirming the order of the Circuit Court No. 2 of Baltimore City, reported in '44-'47 Court Decisions Supp. at ¶ 57,590.

For appellant: Herbert H. Rosenbaum.

For appellees: Lawrence B. Fenneman.

[*Nature of Action*]

DELAPLAINE, J.: The purpose of this suit is to restrain violation of the Unfair Sales Act of Maryland, and the constitutionality of the Act has been challenged. Laws of 1941, ch. 330, Laws of 1943, ch. 803, Code Supp. 1943, art. 83, secs. 111-115.

The suit was instituted in Circuit Court No. 2 of Baltimore City by Benjamin Engelman and David Engelman trading as M. Engelman & Sons, who have been selling cigarettes at retail at 27 North Howard Street. They alleged in their bill of complaint that Abraham Blum, trading as Ben's Cut Rate Store at 305 North Eutaw Street, has been selling Camel, Chesterfield, Lucky Strike and Old Gold Cigarettes at $1.43 per carton, while the cost of these brands to him was $1.54. They further alleged that he has been selling below cost with intent to injure them and destroy competition. They prayed that he be enjoined from selling cigarettes at less than cost, as defined by the Unfair Sales Act.

Defendant demurred to the bill on the ground that the Act places upon a lawful occupation unusual restrictions which arbitrarily interfere with private business, and hence the Act violates the Fourteenth Amendment of the Constitution of the United States and Article 23 of the Maryland Declaration of Rights. The chancellor overruled the demurrer, and defendant appealed from that order.

[*Unfair Sales Act*]

The Unfair Sales Act, like the Fair Trade Act, is aimed at price-cutting. The Fair Trade Act is said to have grown out of a contest of small retailers and independent wholesalers against a practice of chain stores

and large department stores of cutting prices on nationally advertised products in order to attract customers with the object of selling them other merchandise along with the "loss leaders." In 1939 the constitutionality of the Maryland Fair Trade Act (Laws of 1937, ch. 239, Code 1939, art. 83, secs. 102-110) was challenged, but the Court of Appeals held it constitutional and enforceable. *Goldsmith v. Mead Johnson & Co.,* 176 Md. 682, 7 A. 2d 176, 125 A. L. R. 1339.

The first Unfair Sales Act in Maryland took effect on June 1, 1937. Laws of 1937, ch. 211. The Act was repealed and superseded by another Act two years later. Laws of 1939, ch. 248. The Act of 1939 made an offer to sell or sale of merchandise at less than cost a misdemeanor punishable by a fine not exceeding $500. The Act also gave to any aggrieved dealer the right to obtain an injunction to restrain a violation or threatened violation thereof. In 1940 the Court of Appeals held the Act unconstitutional. *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.,* 178 Md. 38, 52, 12 A. 2d 201.

[*Earlier Law Unconstitutional*]

The 1939 Act was annulled on account of two provisions. One of these provisions was to the effect that sales "at prices which cannot be justified by existing market conditions" should not be used as a basis for computing costs. Laws of 1939, ch. 248, sec. 115 (d). This provision required a dealer to make a survey of "existing market conditions," and thereupon determine whether such conditions justified a certain price, and from that price the cost was to be computed. The dealer's computation was not conclusive, and accordingly if his analysis of "existing market conditions" was not correct, and it was determined in a judicial proceeding that the conditions did not justify the price, then, even though he honestly believed that his survey justified that price, his computation would be rejected, and he would stand as a violator of the law.

The other provision made it unlawful to offer for sale or sell any merchandise at less than cost "with the intent, effect or result of unfairly diverting trade from or otherwise injuring a competitor." Laws of 1939, ch. 248, sec. 116. That provision failed to provide a definite standard by which the dealer could ascertain whether he was complying with the law, because it was impossible to know whether a sale would have the "effect or result" of injuring a competitor somewhere within the State. The Act violated the rule that the application of a penal statute or the right to injunctive relief should not be a matter of uncertainty and conjecture. It is well settled that a statute which prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the constitutional guarantee of due process of law. *State v. Magaha,* 182 Md. 122, 32 A. 2d 477. The Act of 1939 did not provide a reasonably ascertainable standard of guilt, and thus was not sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of certainty what sales it intended to prohibit.

In 1941 the Legislature repealed the 1939 Act and passed the existing Act. Laws of 1941, ch. 330. The 1941 Act corrected both of the defects. In the first place, Section 112 definitely defines "cost to the retailer" as the invoice price of the merchandise or the replacement cost, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added (1) freight charges not otherwise included in the invoice or replacement cost, (2) cartage to the retail outlet if performed or paid for by the retailer, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be 5 per cent of the cost to the retailer, after adding thereto freight charges and cartage, but before adding thereto the mark-up. Section 112 also definitely defines "cost to wholesaler." Section 112 was repealed and reenacted with amendments in 1943, but the definitions of "cost to retailer" and "cost to wholesaler" remain definite. In the second place, the 1941 Act omitted the words "effect or result." Section 113 provides that no dealer shall sell or offer to sell at less than cost "with intent to injure a competitor or destroy any competition."

[*Laws of Other States*]

Various Unfair Sales Acts have been enacted in other States. Some of these Acts have been held void for one reason or another. The Pennsylvania and New Jersey Acts were invalidated for the reason that they did not include intent to injure a competitor as an element of the offense. *Commonwealth v. Zasloff,* 338 Pa. 457, 13 A. 2d 67, 70; *State v. Packard-Bamberger & Co.,* 123 N. J. L. 180, 8 A. 2d 291. But most of the

Acts in other States have been sustained. *Carroll v. Schwartz,* Conn., 14 A. 2d 754; *Moore v. Northern Kentucky Independent Food Dealers Ass'n,* 268 Ky. 24, 149 S. W. 2d 755; *Rust v. Griggs,* 172 Tenn. 565, 113 S. W. 2d 733; *McElhone v. Geror,* Minn. 292 N. W. 414; *Associated Merchants of Montana v. Ormesher,* 107 Mont. 503, 86 P. 2d 1031; *State v. Langley,* 53 Wyo. 332, 84 P. 2d 767; *Dikeou v. Food Distributors Ass'n,* Col., 108 P. 2d 529; *Arizona v. Walgreen,* Ariz., 113 P. 2d 650; *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.,* 11 Cal. 2d 634, 82 P. 2d 3, 118 A. L. R. 486; *Washington v. Sears,* 2 Wash. 2d 200, 103 P. 2d 337.

[*Present Law Upheld*]

The Maryland Act no longer contains a penal provision. Nor does it apply to sales or offers to sell in any of the following cases: (1) where merchandise is sold in *bona fide* clearance sales, if advertised, marked, and sold as such; (2) where merchandise must be sold promptly in order to forestall loss; (3) where merchandise is imperfect or damaged, or is being discontinued, and is advertised, marked and sold as such; (4) where merchandise is sold upon final liquidation of any business; (5) where merchandise is sold for charitable purposes or to relief agencies; (6) where merchandise is sold on contract to governmental institutions; (7) where merchandise is sold by any officer acting under the order or direction of any court; and (8) where the price of the merchandise is made in good faith to meet competition. The Connecticut Act closely resembles the Maryland Act, and the Supreme Court of Errors of Connecticut sustained the constitutionality of the Act in an opinion which is carefully limited to the question now presented and distinguishes different Acts and different questions not actually presented. *Carroll v. Schwartz,* Conn., 14 A. 2d 754.

It is acknowledged that price-cutting is not an evil in itself. On the contrary, the more intense the competition the greater the likelihood of advantage to the buying public. In fact, there is no reason why a merchant under ordinary circumstances should not have the right to make an absolute gift to his customers if he desires to show generosity or advertise his business. It is only when the object of price-cutting is sinister that the sale of goods at less than cost may constitute an economic evil. Freedom of contract is subject to legislative regulation in the interest of public health, safety, morals or welfare. But such legislation must not be unreasonable, arbitrary, or capricious, and the means selected must have a real and substantial relation to the object sought to be attained. Within these limitations the State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by statutes aimed at monopolies or by curbing harmful competition by fixing minimum prices. *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.,* 178 Md. 38, 44, 12 A. 2d 201. It is our conclusion that the Unfair Sales Act, prohibiting sales below cost with intent to injure competitors and to destroy competition, promotes a policy within the police power of the State.

Section 113 of the Act contains a provision that evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him shall be *prima facie* evidence of intent to injure a competitior or destroy competition. No question of the validity of this provision is now before us, as the present appeal is from an order overruling a demurrer. If this provision should be held to deny due process, it would not invalidate the rest of the Act, as the provision is procedural in its nature and is separable from the other provisions.

[*Order Affirmed*]

As we find nothing on this appeal in contravention of the Fourteenth Amendment of the Federal Constitution or Article 23 of the Maryland Declaration of Rights, we affirm the order overruling the demurrer.

Order affirmed and cause remanded, with costs.

[¶ 62,233] United States v. A. B. Dick Company, et al.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 24188. March 25, 1948.

Sherman Antitrust Act

Consent Judgment—Price Fixing—Surrender of Patent Rights Used to Control Industry.—Consent judgments entered in a civil action charging five corporations and six of their officers with conspiring to restrain and monopolize, and monopolization of, the duplicating equipment industry, in violation of the Sherman Act, enjoins the defendants from fixing prices, dividing markets, allocating territories, interfering with imports and exports, or discriminating against any stencil manufacturer. A defendant is required to dedicate its trademark "Mimeograph" to the public, to refrain, for a period of five years, from operating retail sales branches, to refrain, for a period of fifteen years, from acquiring any interest in any concern engaged in the manufacture or sale of stencil duplicating machines or stencil supplies, is enjoined from enforcing any judgment obtained by its patent infringement suits, and is required to disclose a secret process for the manufacture of stencils, and to dedicate a number of patents to the public. Other corporate defendants holding significant patents relating to the manufacture of stencil tissue are enjoined from enforcing those patents.

See the Sherman Act annotations, Vol. 1, ¶ 1270.251, 1590.

For plaintiff: John F. Sonnett, Assistant Attorney General; Donald C. Miller, United States Attorney; Elliott H. Moyer, Sigmund Timberg, J. Francis Hayden, John D. Swartz, Robert A. Nitschke, Manuel M. Gorman, Lester L. Jay, Special Assistants to the Attorney General; William P. Lewis, John T. Kelly, Morris F. Klein, Special Attorneys.

For defendants: C. A. Horsky, H. Thomas Austern, James M. Carlisle, Milton Handler, George Link, Jr.

Final Judgment Against A. B. Dick Company, The Mimeograph Company, Ltd., A. B. Dick, Jr., and Edison Dick

The plaintiff, United States of America, having filed its complaint herein on July 22, 1946; the undersigned defendants having appeared and severally filed their answers to such complaint denying the substantive allegations thereof; the undersigned defendants by their attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue;

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of law or fact herein, and upon consent of the undersigned parties, it is hereby Ordered, adjudged and decreed as follows:

I

[*Jurisdiction*]

That this Court has jurisdiction of the subject matter and of the undersigned parties; and that the complaint states a cause of action against these defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended.

II

A. A. B. Dick Company, an Illinois corporation, shall be sometimes hereinafter referred to as "Dick". The Mimeograph Company, Ltd., a Canadian corporation, shall be sometimes hereinafter referred to as "Mimeograph, Ltd.".

B. The provisions of this judgment applicable to any defendant shall apply to such defendant and each of its officers and directors and subsidiaries, and to each of its or his agents, employees, successors and assigns, and to each person acting, or claiming to act under, through or for them or any of them.

III

[*Agreements and Practices Enjoined*]

The defendants, A. B. Dick Company, The Mimeograph Company, Ltd., A. B. Dick, Jr. and Edison Dick are hereby jointly and severally enjoined and restrained:

1. From entering into, adhering to, maintaining, furthering or enforcing any contract,

agreement, understanding, undertaking, plan or program with any manufacturer or distributor of, or with any person with respect to the manufacture or distribution of, stencil duplicating machines, stencils, or stencil duplicating supplies, providing for, or for the purpose or having the effect of:

(a) dividing sales or manufacturing territories;

(b) allocating markets among manufacturers or for the products of different manufacturers;

(c) limiting or preventing exports or imports;

(d) limiting production through quotas or otherwise;

(e) allowing any third person to sell without competition in any market;

(f) keeping any third party out of any market, or restricting access by any third party to any market;

(g) allocating customers;

(h) allocating sales or purchase quotas among manufacturers or for the products of different manufacturers.

2. From entering into, adhering to, maintaining, furthering or enforcing any contract, agreement, undertaking, plan or program with any manufacturer or distributor of, or with any person with respect to the manufacture or distribution of, stencil duplicating machines, stencils or stencil duplicating supplies, providing for, or for the purpose or having the effect of, fixing, determining, maintaining or adhering to the prices to be charged others for such products, or fixing, determining, maintaining or adhering to any terms of distribution or sale of any such products to or by others, provided that nothing in this clause 2 of Section III shall be deemed to enjoin or restrain said defendants from availing themselves of the benefit of the Act of August 17, 1937, C. 690, 50 Stat. 693 (Miller-Tydings Act).

3. From entering into, adhering to, maintaining, furthering or enforcing any contract, agreement, undertaking or plan or program with any producer or distributor of, or with any person with respect to the production or distribution of, raw materials used or useful in the production of stencil duplicating machines, stencils or stencil duplicating supplies providing for, or for the purpose of (a) fixing, determining, maintaining, or adhering to prices charged to or required of others for such raw materials, or (b) fixing, determining, maintaining or adhering to any terms of distribution or sale to or by others of any such products or materials, or (c) fixing, determining, maintaining, or adhering to the quality of any such products supplied to others, or (d) preventing or hindering manufacturers of stencil duplicating machines, stencils or stencil duplicating supplies from obtaining raw materials.

4. From suppressing or attempting to suppress evidence as to the validity or invalidity of any patent or patent application relating to stencil duplicating machines, stencils, raw materials, or stencil duplicating supplies.

5. From attempting to acquire or acquiring details of the business of other manufacturers of stencil duplicating machines, stencils or stencil duplicating supplies other than in the regular course of business.

6. From selling, leasing, or contracting to sell or lease, any stencil duplicating machines, stencils or stencil duplicating supplies at discriminatory or unreasonably low prices for the purpose of destroying competition or eliminating any competitor.

7. From refusing to sell upon non-discriminatory terms and conditions to any person any repair or replacement parts for Dick stencil duplicating machines, which are available to any distributor or to any user of Dick machines, or to any other person.

8. From (a) discriminating or threatening to discriminate, in any manner, in the availability or furnishing of repair or maintenance services, or in the entering into or performance of repair or maintenance contracts with any stencil duplicating machine owner or user, on the ground that stencils or stencil duplicating supplies manufactured by others than Dick are used on said machines; and from (b) preventing, or attempting to prevent, manufacturers or distributors of stencil duplicating machines, stencils or stencil duplicating supplies from soliciting business through public advertising media; and from (c) conditioning the leasing, selling, contracting to sell or making available of any stencil duplicating machines, stencils, stencil duplicating supplies, machines, or processes for the manufacture thereof, or methods or techniques of operation of such machines or processes, by any provision, express or implied, that the lessee, purchaser or other contracting party shall use any or all other stencil duplicating machines, stencils, stencil duplicating supplies, machines

or processes for the manufacture thereof, or methods or techniques of operation thereof, manufactured or controlled by Dick or by any other designated source.

9. From acquiring, within fifteen years from the date of the entry of this judgment, either in whole or in part, either directly or indirectly, any shares of stock in, or assets of, or any other interest in, any existing or future corporation, partnership or individual business, which is engaged in the manufacture or sale of stencil duplicating machines, stencils or stencil duplicating supplies, provided, that nothing in this clause 9 of Section III shall be deemed to enjoin or restrain any lawful corporate reorganization involving only Dick, or its subsidiaries, or both. The provisions of this paragraph shall not apply to addressing machines and supplies for such machines if, upon notice and hearing, defendants establish to the satisfaction of the Court that their acquisition of such an addressing machine business or any interest therein would not materially lessen competition or tend to create a monopoly.

10. From maintaining, or for a period of seven years from the date of the entry of this judgment from acquiring, obtaining or securing any exclusive license under any patent relating to the manufacture or use of stencil duplicating machines, stencils or stencil duplicating supplies.

11. From instituting, maintaining or furthering, or threatening to institute, maintain or further, any claim, suit or proceeding:

(a) for the purpose of enforcing any existing injunction prohibiting any person other than Dick from engaging in the manufacture or distribution of stencil duplicating machines, stencils or stencil duplicating supplies, or

(b) for the purpose of collecting any royalties, charges, damages or judgment, or for the purpose of enforcing or securing injunctive relief (1) on account of infringement of, or under the designation, "Mimeograph", or (2) on account of infringement of, or under, any patent now or heretofore owned or controlled by Dick relating to stencil duplicating machines, stencils or stencil duplicating supplies.

12. From enforcing, or attempting or threatening to enforce, any rights:

(a) under existing United States or foreign patents owned or controlled by said defendants, or

(b) under any United States or foreign patent supplementary to and dependent on said patents which may issue to or be owned or controlled by said defendants or any of them within a period of ten years from the date of the entry of this judgment, or

(c) under the designation "Mimeograph", to prevent the sale, importation or use of stencil duplicating machines, stencils or stencil duplicating supplies made in any other country in or into the United States, or to prevent the sale, importation or use of stencil duplicating machines, stencils or stencil duplicating supplies made in the United States into any other country.

13. From

(a) cancelling, or threatening to cancel, any dealer or distributor contract or arrangement, or

(b) in any way discriminating against any dealer or distributor, or

(c) using any quota or other system,

for the purpose of preventing or attempting to prevent a dealer or distributor from dealing in stencil duplicating machines, stencils or stencil duplicating supplies manufactured by others than Dick, or coercing or attempting to coerce a dealer or distributor to cease dealing in any such product.

14. From entering into, adhering to, maintaining, furthering or enforcing any contract, agreement, understanding, undertaking or plan or program with any dealer or distributor of Dick stencil duplicating machines, stencils or stencil duplicating supplies, which forecloses any such dealer or distributor from selling or attempting to sell to any purchaser or prospective purchaser.

15. From coercing, or attempting to coerce, directly or indirectly, any user of a stencil duplicating machine to use Dick stencils or Dick stencil duplicating supplies instead of the stencils or stencil duplicating supplies manufactured by others than Dick, by any unfair means including, without limitation, jimmying, tampering with or interfering with the proper operation of any stencil duplicating machine, or making knowingly false statements with respect to any stencil duplicating machines, stencils, stencil duplicating supplies or any manufacturer or distributor thereof.

16. From suggesting to, urging, instructing or coercing any person to jimmy, tamper with or interfere with the proper operation of any stencil duplicating machine, or make

knowingly false statements with respect to any stencil duplicating machines, stencils, stencil duplicating supplies or any manufacturer or distributor thereof.

IV

[*Practices Permitted*]

Nothing in clauses 1 (a) or 1 (f) of Section III shall be deemed to enjoin either Dick or Mimeograph, Ltd., from granting to dealers or distributors of Dick stencil duplicating machines, stencils or stencil duplicating supplies, preferential selling or distribution rights for such products in designated territories, provided, however, that this Section IV shall not be deemed to determine, adjudicate or affect the legality or illegality of any grant of preferential sale or distribution rights, and provided further that such grants do not involve and are not associated with any agreement, arrangement or understanding with a dealer or distributor relating to products or commodities manufactured by or secured from any person other than Dick or Mimeograph, Ltd.

V

[*Dedication of Patents*]

The defendants A. B. Dick Company, The Mimeograph Company, Ltd., A. B. Dick, Jr., and Edison Dick are hereby jointly and severally ordered and directed:

1. Forthwith to take such steps as may be necessary to dedicate, transfer and assign to the public (including defendant A. B. Dick Company) all United States Letters Patent, and applications for Letters Patent owned or controlled by said defendants on the date of the entry of this judgment, reading on or claiming stencil duplicating machines, stencils or stencil duplicating supplies or raw materials or reading on or claiming any processor methods for making stencil duplicating machines, stencils or stencil duplicating supplies, including, but not limited to the following:

United States Letters Patent Nos.:

1,795,461	1,964,499
1,798,371	1,987,923
1,803,033	1,989,911
1,816,720	1,997,594
1,819,078	2,018,501
1,824,995	2,040,916
1,828,766	2,085,384
1,834,686	2,087.082
1,843,118	2,092,241
1,848,241	2,092,242
1,861,209	2,108,549
1,861,260	2,140,482
1,872,727	2,140,483
1,906,374	2,164,549
1,929,596	2,281,869
1,933,712	2,333,624
1,964,498	2,337,012
	2,385,613

United States Design Patent No.:
91,523

Application for United States Letters Patent No.:
611,767

and to furnish to each applicant therefor a non-exclusive, unconditional and unrestricted license without payment of royalty or other compensation on any patent supplementary to and dependent on said patents which may issue to or be owned or controlled by them or any of them within a period of ten years from the date of the entry of this judgment.

2. To furnish to any applicant making written application therefor at any time during the statutory life of any of the patents referred to in clause 1 of this Section V, a written manual describing the methods and processes used by these defendants, or any of them, as of the date of the application, in their commercial practice of the inventions described in said patents in the manufacture of stencil duplicating machines, stencils or stencil duplicating supplies.

VI

[*Specifications to Be Made Available*]

The defendant A. B. Dick Company is hereby ordered and directed to furnish, upon the payment of the reproduction cost of the descriptive material at Chicago, Illinois, to any applicant making written application therefor within five years from the date of the entry of this judgment, the plans and specifications as of the date of the application for all machines for the production of duplicating stencils by the web manufacturing process (known as the Wheel Machines), including any and all drawings and patterns utilized by Dick in the building of such machines or in their operation.

VII

Defendant A. B. Dick Company is hereby ordered and directed:

1. To take within six months such steps as may be necessary in the United States Pat-

ent Office to dedicate, transfer and assign to the public (including defendant A. B. Dick Company) without payment of any compensation whatever therefor the trademark "Mimeograph"; and to take such further steps as may become necessary to dedicate, transfer and assign to the public (including defendant A. B. Dick Company) without payment of any compensation whatever therefor the trademark "Mimeograph" in countries other than the United States.

2. To discontinue and disestablish, within eighteen months from the date of the entry of this judgment, each of its branch offices in the United States now engaged in the sale of stencil duplicating machines, stencils or stencil duplicating supplies, and to open no new or different branch offices for such sales for a period of five years from the date upon which the last such branch office is closed.

3. During the period its branch offices must be discontinued as provided in clause 2, to sell its stencil duplicating machines, stencils and stencil duplicating supplies in the United States only through independent dealers or distributors, except that the sales of such products to governments or government institutions may be made directly by defendant Dick, and sales only of stencils and stencil duplicating supplies to customers who have establishments and may purchase on an annual arrangement for use in three or more states may be made directly by Dick. Sales of repair or replacement parts for Dick machines which are available to any person shall be sold directly by Dick to any other person on request therefor.

4. To require its dealers and distributors to refrain from any of the following practices by reserving expressly in its agreements with each of its dealers and distributors the power, and after due warning exercising the power, to terminate on 30 days' notice the dealership or distributorship of any dealer or distributor who shall:

(a) discriminate, or threaten to discriminate, in any manner, in the repair or maintenance, or in the entering into of repair or maintenance contracts, with any Dick stencil duplicating machine owner or user on the ground that stencils or stencil duplicating supplies manufactured by others than Dick are used on said machines;

(b) coerce, or attempt to coerce any user of a stencil duplicating machine to use Dick stencils or stencil duplicating supplies rather than the stencils or stencil duplicating supplies of other manufacturers, by any unfair means including, without limitation, jimmying, tampering with or interfering with the proper operation of a stencil duplicating machine, or by making knowingly false statements;

(c) suggest to, urge, instruct or coerce any person to jimmy, tamper with or interfere with the proper operation of any stencil duplicating machine, or make knowingly false statements with respect to any stencil duplicating machines, stencils, stencil duplicating supplies or any manufacturer or distributor thereof;

(d) refuse to sell upon non-discriminatory terms and conditions to any person any repair or replacement parts for Dick machines which are available through said dealer or distributor to any distributor or user of Dick machines or to any other person.

5. To state in its advertising literature and otherwise in a manner appropriate to notify the purchaser or prospective purchaser of any Dick stencil duplicating machine, stencil or stencil duplicating supply being sold or offered for sale by Dick or its distributors or dealers at the time of entry of this judgment that said product is not designed primarily for use with other Dick stencil duplicating products; and to make similar statements, to the extent that such is the fact, regarding any Dick stencil duplicating machine, stencil or stencil duplicating supply thereafter being sold or offered for sale by Dick or its distributors or dealers.

6. The provisions of clause 4 of this section VII shall apply to any agreement between Dick and its dealers and distributors hereafter executed, renewed or extended, and Dick shall within six months from the date of the entry of this judgment revise all of its existing agreements with its dealers and distributors to bring them into conformity with the provisions of clause 4 of this section VII.

7. Defendants shall forthwith take such steps as may be necessary and appropriate to bring them into full compliance with clause 5 of this section VII not later than six months from the date of the entry of this judgment.

VIII

[*Terms Defined*]

As used in this judgment, the following words and phrases shall mean:

"Stencil duplicating" means the art of reproducing written, typewritten or other

matter by means of a stencil on which the letters or designs to be reproduced are inscribed by removing portions of the coating, thus exposing the porous base sheet and permitting ink to pass through the stencil to form the letters or designs upon a sheet of blank paper placed in momentary contact with the stencil.

"Stencil" means a porous base sheet coated with chemicals to render it impervious to ink, and shall include the backing sheet and any customary or necessary cushion sheets furnished therewith, in form ready for stencilization.

"Stencil duplicating machine" means the machine upon which the stencil is placed and which affords the means for inking the stencil and mechanically reproducing copies of material inscribed or cut upon the stencil, and shall include parts of such machines and all supplementary devices such as paper feed, interleaving and other attachments to the stencil duplicating machine.

"Stencil duplicating supplies" mean inks, stencil base tissue, correction fluids, hand lettering devices, and all other materials normally and customarily used or intended to be used, now or hereafter, in stencil duplicating.

"Dealer" and "distributor" are used interchangeably herein and mean any person, firm or corporation engaged in the sale at wholesale or retail of stencil duplicating machines, stencils or stencil duplicating supplies.

"Raw materials" shall include ingredients, supplies, machinery and equipment for the manufacture or processing of stencil duplicating machines, stencils or stencil duplicating supplies.

"Web manufacturing process" means the continuous manufacture by machine of stencils from stencil base tissue in roll form.

IX

[*Inspection for Compliance Purposes*]

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendants, be permitted (a) access, during office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of the defendants relating to any of the matters contained in this judgment; and (b) without restraint or interference from the defendants, to interview officers or employees of any defendant, who may have counsel present, regarding any such matters; and (c) upon such request, the defendants shall submit such reports concerning matters directly related to compliance with this judgment as may from time to time be reasonably necessary to check compliance with the provisions of this judgment or which otherwise may be directly related to matters prohibited or required to be done under the terms of this judgment, provided, however, that information obtained by the means permitted in this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to appeal to the Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of this judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of, compliance therewith and for the punishment of violations thereof.

Final Judgment Against C. H. Dexter & Sons, Inc., Aldine Paper Company, Inc., Dexter D. Coffin, Herbert H. Griswold and Harry E. Gould

The plaintiff, the United States of America, having filed its complaint in this action on July 22, 1946; the defendants, C. H. Dexter & Sons, Inc. (hereinafter referred to as "Dexter"), Dexter D. Coffin, Herbert H. Griswold, Aldine Paper Company, Inc.

(hereinafter referred to as "Aldine"), and Harry E. Gould, having appeared and severally filed their answers to said complaint denying the substantive allegations thereof; and the plaintiff and said defendants, by their respective attorneys, having consented to the entry of this final judgment herein:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and without any admission by any party with respect to any such issue, and upon consent of the undersigned parties, it is hereby:

Ordered, adjudged and decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the undersigned parties; the complaint states a cause of action against these defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said Act being commonly known as the "Sherman Act".

II

[*Terms Defined*]

(A) As used in this judgment, "stencil tissue" means any paper, a single sheet of which is, by prevailing standards, commercially usable as a base for a stencil capable of reproducing on a duplicating machine at least 2500 legible and undistorted copies of written and typewritten matter inscribed thereon, but under Section V of this judgment, shall not include tissue manufactured by Dexter solely for experimental purposes or on experimental orders.

(B) The provisions of this judgment applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents and employees and to each of its subsidiaries, affiliates, successors and assigns and to each person acting, or claiming to act under, through or for them or any of them.

III

[*Litigation Enjoined*]

Defendants Dexter, Dexter D. Coffin, and Herbert H. Griswold, be and each of them hereby is perpetually enjoined and restrained from instituting, maintaining or furthering or threatening to institute, maintain or further any action, suit, claim or proceeding for the infringement or the alleged infringement of, or to collect damages or royalties under (1) United States Letters Patent Nos. 2,045,095 or 2,045,096 on account of any manufacture, sale or use of stencil tissue or (2) any foreign patents owned or controlled by said defendants corresponding to either of said United States patents, where such action, suit, claim or proceeding under the foreign patent is based on the use or sale in, or the importation into, the United States of stencil tissue manufactured in a foreign country, or the use or sale in or the importation into a foreign country of stencil tissue manufactured in the United States.

IV

[*Practices Enjoined*]

Each of the defendants, Dexter, Dexter D. Coffin, Herbert H. Griswold, Aldine, and Harry E. Gould be and each of them hereby is perpetually enjoined and restrained from:

(a) Granting or allowing, directly or indirectly, any preferential treatment to defendant A. B. Dick Company (hereinafter referred to as "Dick") over any other manufacturer of stencils or any user of stencil tissue as to the grade, type or quality of any tissue for stencils available for purchase or acquisition, except that Dexter shall not be prohibited from manufacturing stencil tissue for experimental purposes on experimental order for any manufacturer of stencils, provided it accepts on non-discriminatory terms and conditions experimental orders for or from any manufacturer of stencils.

(b) Agreeing with defendant Dick to obtain and transmit, or systematically obtaining and transmitting to defendant Dick information concerning the business operations or activities of competitors of Dick, or transmitting to Dick trade secrets or confidential details concerning the business operations or activities of competitors of defendant Dick.

(c) Granting or acquiring an exclusive patent license for the manufacture, use or sale of stencil tissue during the period of five years after the date of the entry of this judgment.

(d) Inducing any manufacturer, dealer or distributor of stencils to refrain from bidding for government contracts or competing for government orders.

V

[*Products To Be Made Available to All Manufacturers*]

A. Defendants Dexter, Dexter D. Coffin and Herbert H. Griswold be and each of them hereby is directed through any lawful means to make stencil tissue produced by Dexter available to all manufacturers of stencils in the United States at non-discriminatory charges and upon reasonable and non-discriminatory terms and conditions, subject however to normal and usual credit requirements. Compliance herewith shall require that (1) the maximum quantity discount and most favorable current price, terms and conditions of sale for each grade, type or quality of such stencil tissue shall be available to all manufacturers of stencils who purchase or agree to purchase at least 30,000 pounds of stencil tissue in the aggregate in any 12-month period for delivery in shipments of not less than 7,500 pounds, and (2) if quantity discounts or differentials are offered, the price offered or granted for each such grade, type or quality of stencil tissue to any manufacturer of stencils who purchases or agrees to purchase less than 30,000 pounds of stencil tissue in the aggregate in any 12-month period may exceed such most favorable price only to the extent of actual differences in the cost of manufacture, sale and delivery. In any proceeding to enforce or secure compliance with the provisions of this Section V of this judgment, the burden of justifying any differences in prices charged for such lesser quantities, or in the terms or conditions of sale or availability applicable to stencil tissue shall rest upon the defendant Dexter. Without limiting the provisions of Section V hereof, defendant Dexter shall be entitled, upon such conditions as the court determines to be appropriate, to have this Section V of this judgment vacated or modified upon a showing to the Court, upon thirty days' notice to the Attorney General, that substantial competition exists in the manufacture of stencil tissue in the United States, provided that such an application for the purpose of vacating or modifying this Section V hereof shall not be made more often than once in every two years.

B. Defendants Dexter, Dexter D. Coffin and Herbert H. Griswold, shall forthwith take such steps as may be necessary and appropriate to bring them into full compliance with Paragraph A. of this Section V not later than ninety days from the date of the entry of this judgment.

VI

A. Defendants Aldine and Harry E. Gould be and each of them is hereby directed through any lawful means to make stencil tissue sold or distributed by Aldine available to all manufacturers of stencils in the United States at non-discriminatory charges and upon reasonable and non-discriminatory terms and conditions, subject however to normal and usual credit requirements. Compliance herewith shall require that (1) the maximum quantity discount and most favorable current price, terms and conditions of sale for each grade, type or quality of such stencil tissue shall be available to all manufacturers of stencils who purchase or agree to purchase at least 30,000 pounds of stencil tissue in the aggregate in any 12-month period for delivery in shipments of not less than 7,500 pounds, and (2) if quantity discounts or differentials are offered the price offered or granted for each such grade, type or quality of stencil tissue to any manufacturer of stencils who purchases or agrees to purchase less than 30,000 pounds of stencil tissue in the aggregate in any 12-month period may exceed such most favorable price only to the extent of actual differences in the cost of sale and delivery. In any proceeding to enforce or secure compliance with the provisions of this Section VI of this judgment, the burden of justifying any differences in prices charged for such lesser quantities, or in the terms or conditions of sale or availability applicable to stencil tissue shall rest upon the defendant Aldine. Without limiting the provisions of this Section VI hereof, defendant Aldine shall be entitled, upon such conditions as the Court determines to be appropriate, to have this Section VI of this judgment vacated or modified upon a showing to the court, upon thirty days' notice to the Attorney General, that substantial competition exists in the United States in the distribution and sale of stencil tissue, provided that such an application for the vacating or modifying of Section VI hereof shall not be made more often than once in every two years.

B. Defendants Aldine and Harry E. Gould shall forthwith take such steps as may be necessary to bring them into full compliance with Paragraph A of this Section VI not later than ninety days from the date of the entry of this judgment.

VII

[*Unlawful Agreements Enjoined*]

Defendants Dexter, Dexter D. Coffin, Herbert H. Griswold, Aldine and Harry E. Gould be and each of them hereby is perpetually enjoined and restrained from entering into, adhering to, maintaining, furthering, or enforcing any contract, agreement, understanding, plan or program among any of them or with any manufacturer of tissue, or with John A. Manning Paper Company, Inc., Dick or The Mimeograph Company, Ltd., to;

(a) Fix, determine, maintain or adhere to prices or other terms or conditions of sale for stencil tissue or materials for stencil tissue to be charged or submitted to, or required of or by, any other person;

(b) Determine or maintain terms or conditions for the availability of stencil tissue or materials for stencil tissue to be offered to any other person;

(c) Limit the type or quality of stencil tissue or materials for stencil tissue to be available to others;

(d) Limit, restrict or prevent exports or imports or production of materials for stencil tissue, or of stencil tissue;

(e) Exclude any person from, or restrict or limit any person in, the distribution or purchase of stencil tissue or materials for stencil tissue;

(f) Exclude any person from, or restrict or limit any person in, the manufacture or use of stencil tissue or materials for stencil tissue or allocate, divide, restrict or assign territories, customers or markets for the manufacture, distribution, or use of stencil tissue or materials for stencil tissue;

(g) Grant or receive an exclusive patent license under any United States patent for the manufacture, use or sale of stencil tissue for a period of fifteen years after the date of entry of this judgment.

Subsections (a), (b) and (e) of this Section VII shall not be deemed to prohibit sales by any manufacturer of stencil tissue, including Dexter, through Aldine as a bona fide sales agent so long as Aldine is not a manufacturer of stencil tissue.

VIII

[*Applicability of Other Laws*]

Nothing in this judgment shall prevent the defendants from availing themselves of the benefits of (1) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or (2) the Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

IX

[*Inspection for Compliance Purposes*]

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, be permitted: (a) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of such defendant relating to any of the matters contained in this judgment; (b) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; and (c) Upon such request, such defendant shall submit such reports concerning matters directly related to compliance with this judgment as may from time to time be reasonably necessary to check compliance with the provisions of this judgment or which otherwise may be directly related to matters prohibited or required to be done under the terms of this judgment, provided, however, that information obtained by the means permitted in this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions

as may be necessary and appropriate for the construction or carrying out of this judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Final Judgment Against John A. Manning Paper Company, Inc., and James P. Adams

The plaintiff, the United States of America, having filed its complaint in this action on July 22, 1946; the defendants, John A. Manning Paper Company, Inc. (hereinafter referred to as "Manning") and James F. Adams, having appeared and severally filed their answers to said complaint denying the substantive allegations thereof; and the plaintiff and said defendants, by their respective attorneys, having consented to the entry of this final judgment herein:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and without any admission by any party with respect to any such issue, and upon consent of the undersigned parties, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the undersigned parties; the complaint states a cause of action against these defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said Act being commonly known as the "Sherman Act".

II

[*Terms Defined*]

(A) As used in this judgment "stencil tissue" means any paper, a single sheet of which is, by prevailing standards, commercially usable as a base for a stencil capable of reproducing on a duplicating machine at least 2500 legible and undistorted copies of written and typewritten matter inscribed thereon.

(B) The provisions of this judgment applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents and employees and to each of its subsidiaries, affiliates, successors and assigns and to each person acting, or claiming to act under, through or for them or any of them.

III

[*Acts Enjoined*]

Defendants Manning and James F. Adams be and each of them hereby is perpetually enjoined and restrained from:

(a) Instituting, maintaining or furthering or threatening to institute, maintain or further any action, suit, claim or proceeding for the infringement or the alleged infrigement of, (1) United States Letters Patent Nos. 2,069,766 or 2,088,479 on account of any manufacture, sale or use of stencil tissue, or (2) any foreign patents owned or controlled by said defendants corresponding to either of said United States patents, where such action, suit, claim or proceeding under the foreign patent is based on the use or sale in, or the importation into the United States of stencil tissue manufactured in a foreign country, or the use or sale in, or the importation into a foreign country of stencil tissue manuiactured in the United States.

(b) Granting or allowing, directly or indirectly, any preferential treatment to defendant A. B. Dick Company (hereinafter referred to as "Dick") over any other manufacturer of stencils or any user of stencil tissue as to the grade, type or quality of any tissue for stencils available for purchase or acquisition, except that Manning shall not be prohibited from manufacturing stencil tissue for experimental purposes on experimental order for any manufacturer of stencils, provided it accepts on non-discriminatory terms and conditions experimental orders for or from any manufacturer of stencils.

(c) Agreeing with defendant Dick to obtain and transmit, or systematically obtaining and transmitting to defendant Dick information concerning the business operations or activities of competitors of Dick, or transmitting to Dick trade secrets or confidential details concerning the business operations or activities of competitors of defendant Dick.

IV

[*Agreements Prohibited*]

Defendants Manning and James F. Adams be and each of them hereby is perpetually

enjoined and restrained from entering into, adhering to, maintaining, furthering, or enforcing any contract, agreement, understanding, plan or program with any manufacturer of tissue, or with any of the defendants A. B. Dick Company, The Mimeograph Company, Ltd., C. H. Dexter & Sons, Inc. or Aldine Paper Company, Inc. to:

(a) Fix, determine, maintain or adhere to prices or other terms or conditions of sale for stencil tissue or materials for stencil tissue to be charged or submitted to, or required of, or by any other person;

(b) Determine or maintain terms or conditions for the availabiilty of stencil tissue or materials for stencil tissue to be offered to any other person or to limit the type or quality of stencil tissue or materials for stencil tissue to be available to others;

(c) Limit, restrict or prevent exports or imports, or production of materials for stencil tissue, or of stencil tissue;

(d) Exclude any person from, or restrict or limit any person in the manufacture, distribution, purchase or use of stencil tissue or materials for stencil tissue, or allocate, divide, restrict or assign territories, customers or markets for the manufacture, distribution or use of stencil tissue or materials for stencil tissue;

(e) Refrain from competing or bidding for any business, or leave any person free from competition in any territory, or market in the manufacturer, distribution or use of stencil tissue;

(f) Grant or receive an exclusive license under any United States patent for the manufacture, use or sale of stencil tissue for a period of fifteen years after the date of entry of this judgment.

V

[*Applicability of Other Acts*]

Nothing in this judgment shall prevent defendants Manning and James F. Adams from availing themselves of the benefits of (1) The Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or (2) The Act of Congress of 1937, commonly called The Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

VI

[*Inspection for Compliance Purposes*]

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, be permitted: (a) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of such defendant relating to any of the matters contained in this judgment; (b) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; and (c) Upon such request, such defendant shall submit such reports concerning matters directly related to compliance with this judgment as may from time to time be reasonably necessary to check compliance with the provisions of this judgment or which otherwise may be directly related to matters prohibited or required to be done under the terms of this judgment, provided, however, that information obtained by the means permitted in this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of this judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 62,234] B. R. McLendon, Jeannette McLendon, Jeff D. McLendon, Maggie E. McLendon and Gordon B. McLendon v. Loew's, Inc.; Paramount Pictures, Inc.; R. K. O. Pictures; 20th Century-Fox, Inc. of Texas; Warner Brothers Pictures; Warner Brothers Distributing, Inc.; Columbia Pictures, Inc.; Universal Corp.; United Artists, Inc.; Interstate Circuit, Inc.; Robb and Rowley United, Inc.

In the United States District Court for the Northern District of Texas, Dallas Division. Civil No. 2703. March 9, 1948.

Sherman Antitrust Act

Suit for Injunction and Damages—Motion Picture Exhibitor—Failure to Sustain Burden of Proof.—In an action for injunctive relief and damages for an alleged conspiracy in restraint of trade in the distribution and exhibition of motion pictures, it is held that plaintiff fails to sustain the burden of proof of conspiracy. It is found that film rental contracts containing mutual covenants as to availability and clearance, between defendant distributors and exhibitors, were entered into independently and not as a result of a conspiracy among the defendants, and that each exhibitor individually determined the admission price to be charged by his theater.

See the Sherman Act annotations, Vol. 1, ¶ 1640.335.

For plaintiffs: Clark, Coon, Holt & Fisher, Dallas, Texas; Thomas C. McConnell, Norman Korfist, both of Chicago, Illinois.

For defendants: Joe Worsham, Dallas, Texas, for Interstate Circuit, Inc.; L. M. Rice, Dallas, Texas, for Robb & Rowley; George S. Wright, Dallas, Texas, for all other defendants.

[*Nature of Action*]

ATWELL, D. J.: The suit complexioned by the restraint sought under the Anti-trust Acts, and for $1,200,000 damages, was filed on September 15th, 1947.

The damages claimed grow out of a sale by the plaintiffs, B. R. McLendon, at all times acting for all of the plaintiffs, alleged to have been forced, of the Beverly Hills theater to defendants, Robb & Rowley, and to the alleged discrimination that the Beverly Hills theater suffered while operated by the plaintiffs, as well as discriminations suffered by the Casa Linda theater, still owned by the plaintiffs. That such discriminations in both instances were the result of a conspiracy between the defendants in violation of the Trust statutes. (Sherman Anti-trust Act, 15 U. S. Code, Sec. 1 *et seq.;* and Secs. 1, 4 and 16, Clayton Act, in its original and amended form.)

The testimony discloses that prior to the plaintiff's coming to Dallas a few years previous, both Robb & Rowley and the Interstate had been exhibitors of moving pictures in metropolitan Dallas. That area consisted of what is commonly designated as the Oak Cliff portion, which is west of the Trinity River, and that portion, considerably larger, which is composed of a number of suburban districts as well as the downtown section, and included such suburbs as Highland Park, University Park, Lakewood and others.

Metropolitan Dallas has sixty-five theaters. In that part of Dallas east of the Trinity, Interstate, as well as other owners, not necessary to mention, operate, of which Interstate has approximately nineteen theaters. In the part west of the Trinity known as Oak Cliff, Robb & Rowley have six theaters, and there are others unnecessary to mention.

When the plaintiff came to Dallas he was learned in the picture business, was a successful trader, and had been a lawyer for some twenty-seven years. He chose sites for two theaters, one in a very sparsely settled location east of the Trinity, and a similar sparsely settled portion west of the Trinity. The first he named the Casa Linda, and the second, the Beverly Hills.

After the erection and opening of each and enjoying the income therefrom he solicited the sale of the Beverly Hills to Robb & Rowley, and after such profitable sale he solicited the sale of the Casa Linda to the Interstate. In the presentment of his reasons for each of such solicitations there was no complaint of either business or restriction, and, in truth, his profit on the Beverly Hills sale was approximately what he thought he was entitled to.

His string of theaters outside of the two suburban Dallas theaters, is known as the Tri-state. He operates or has operated theaters in Texas, outside of Dallas, Louisiana, Oklahoma and Arkansas.

Among the reasons assigned for the sales of Beverly Hills and Casa Linda was an alleged indebtedness to Dallas banks, and that his son, one of the plaintiffs, needed a large sum of money to go into the radio business.

Prior to the filing of this suit, he had been furnished pictures by certain distributors on what is called "test runs," which means a division of profit between the distributor and the exhibitor. The distributors did not think that he had properly accounted for the proceeds from such pictures and that they had not gotten their appropriate part and they insisted upon an inspection of records and verification of the amounts that he had paid to them. This, he resisted, and, since they still persisted, he filed this suit.

During the taking of testimony, the words, "clearance," "availability," and "admission price," were the crucial points. Great volumes of exhibits were garnered, as were also voluminous depositions and a large record of oral testimony, charts, summaries, etc., so that the hearing of the cause occupied an entire week, including some rather extended sessions and one night session, all calling for deep and careful consideration.

Such consideration includes the thought that the moving picture, as it comes to the public, is short-lived. It consists of a string of small pictures which are so ingeniously connected and operated as to have a fascinating continuity and are thrown upon a screen with accompanying music, words, gestures and colorings. The life of a film is measured by a rather brief number of exhibitions, perhaps, under twenty. These films are produced in California and shipped to the respective key points, or, exchanges, throughout the United States, one of which is Dallas, and another, Camden, New Jersey. Quite frequently they reach Dallas from the New Jersey depot. These films are never sold. They are merely leased to the exhibitor. Such leases are usually printed contracts, inquiring as to the name, location, admission price, and mutual covenants as to availability for exhibition, clearance, return, etc.

[*Contracts Not Result of Conspiracy*]

These contracts, while containing blanks which cover practically the same information as does the ordinary rental contract for real estate, or, warranty deed for such estate, were in no sense, the result of agreement or conspiracy between either the producers or distributors, or any other interested exhibitor. They were information that went to the lessor, practically the same information as goes to all life insurance companies, or, fire insurance companies before policies are issued.

The distributor, vested with a property right, certainly was entitled to enjoy the fruitage of an uncoerced contract between itself and its lessee, and the proper return of its property to it after the lessee's term had been completed.

"Clearance," and "availability," are recognized in the reasonable grounds assigned in *United States v. Paramount*, 66 F. (2d) 323, and in *United States v. Interstate*, 20 F. (2d) 868, affirmed in 306 U. S. 208.

The downtown theaters, Majestic and Palace, of metropolitan Dallas, were, beyond question, entitled to such priority as was given them. The same may be said of the other theaters throughout the city.

The testimony shows that the admission price for all the theaters in Dallas is below that of any other comparable city in the United States. There were three pictures which were shown at a larger price in Dallas than the public in Dallas usually has to pay, though not in excess of the prices which were charged for the same pictures in other cities, but they were what is known as "road shows," and included the effort of the exhibitor and distributor to determine the value of the particular film as an attraction. In such three instances, the distributor divided super advertising costs with the exhibitor and the receipts had ratable and proportionate division.

[*Failure to Meet Burden of Proof*]

Upon the controversial points, the plaintiff has failed to successfully meet the requirement of the burden of proof, and upon the submission of testimony which, for its truthfulness and weight, is the solvent. He is not entitled to any equitable relief, nor to any damages.

A motion which was made by the defendants at the conclusion of the plaintiff's testi-

mony, had there been a jury called for the assistance of the court as to that feature, would have been granted, because it would have been error to have refused it.

Finding of Facts

I.

The films that were sold and displayed at Dallas, Texas, by all of the parties, were interstate commerce.

II.

That the contracts for the same were made independently by the respective distributors with the respective exhibitors, and that neither producers nor distributors made an agreement with reference to availability, admission price, nor any other matter with any other distributor or producer or exhibitor named as a defendant. Each acted independently.

III.

That any and all recognized the propriety of the Majestic and Palace as the best houses in Dallas in all points that should be reasonably considered in passing upon first-run privileges. That "availability" and "clearance," though somewhat synonymous, were not the result of an agreement or conspiracy among the defendants.

IV.

That the exhibitors made their own admission prices and upon such admission prices each of the defendants exercised his own judgment as to the charges that would be made for films that would be exhibited by such exhibitor.

V.

That in determining "availability" and "clearance," whichever is applicable, the standards and determinations that enter into a grading of the exhibitor's location, seating capacity, appointments, and advertising that had been indulged by the first-run houses, and the advantages that accrued to subsequent run distributors by reason of such advertising, were appropriate and reasonable.

Conclusions of Law

It follows from what I have said, that the plaintiffs are not entitled to recover and the decree may go for the defendants.

[¶ 62,235] In the Matter of Motions of Wallace & Tiernan Company, Inc., et al. for Return of Documents.

In the United States District Court for the District of Rhode Island. Indictment No. 6055. February 6, 1948.

Sherman Antitrust Act

Indictment—Grand Jury Illegally Constituted—Motion for Return of Documents.—Motions by defendants for the return of photostatic copies of documents, obtained by the government under *subpoenas duces tecum* issued upon an indictment charging manufacturers of chlorinating equipment with conspiring to monopolize and restrain trade in violation of the Sherman Act, are granted in a case where the indictment was later dismissed because the grand jury was found to be illegally constituted. It is held that the subpoenas amounted to unreasonable search and seizure in violation of the Fourth Amendment, and that the government has no valid basis in law for the intrusion which it committed in making photostatic copies of the documents and in retaining possession of them.

See the Sherman Act annotations, Vol. 1, ¶ 1630.156.

For plaintiff: George F. Troy, United States Attorney, Providence, Rhode Island; Chalmers Hamill, Special Assistant to the Attorney General; Alfred Karsted, Special Attorney; Grant Kelleher, Special Assistant to the Attorney General, all of Washington, D. C.

For defendant: William H. Edwards, Gerald W. Harrington, Edwards & Angell; Harold E. Staples; Chauncey E. Wheeler and S. Everett Wilkins, Jr.; Edward T. Hogan and Laurence J. Hogan, Hogan & Hogan; Aisenberg & Joslin, all of Providence, Rhode Island; Conrad H. Poppenhusen, Edward R. Johnston, Anan Raymond, of Poppenhusen, Johnston, Thompson & Raymond, Chicago, Illinois; James F. Dulligan and Jeremiah F. Cross, New York, N. Y.

[*Nature of Action*]

HARTIGAN, J.: This matter was heard on the motions of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation and on the affidavit of William H. Edwards, Esq., filed May 9, 1947,

"that all photostat copies of documents referred to in the 'Order on Motion for Return of Impounded Documents' entered by this Honorable Court on the 19th day of March, 1947, in Criminal Action number 6055 be returned to the movants forthwith. * * *"

[*Return of Documents Ordered*]

The affidavit of Mr. Edwards sets forth in substance that on December 10, 1946, there was filed in this Court in Indictment No. 6055, two motions for return of impounded documents in behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation, which asked for the return of all documents produced by these companies in compliance with certain subpoenas issued at the instance of the grand jury which had returned Indictment No. 6055, such subpoenas being listed in said motions.

The affidavit further sets forth that on March 19, 1947, an order was entered in Indictment No. 6055 granting said motions and ordered the immediate return of the documents referred to in said motions.

[*Photostat Copies Made*]

The affidavit further alleges that to the affiant's knowledge the attorneys and representatives of the United States of America have made a large number of photostat copies of said documents and still retain them, unlawfully and without justification, in their possession; that on February 7, 1947, the affiant made to Alfred Karsted, Esq., Special Attorney for the United States, an oral request for the return of such photostat copies and again a similar request was made May 2, 1947. The requests so made had not been complied with and, accordingly, on May 5, 1947, letters from the attorneys for the Wallace & Tiernan Companies and Novadel-Agene Corporation were sent to the United States Attorney for this District making formal demand for the immediate return of all photostat copies and that no definite reply, either by way of compliance or refusal, has been received.

The Government has filed no counter-affidavit.

[*Text of Order*]

The "Order on Motion for Return of Impounded Documents" entered March 19, 1947, is as follows:

"This cause came on to be heard on the motions of the defendants, Wallace & Tiernan Company, Inc., et al., and Novadel-Agene Corporation, et al., respectively, for return of impounded documents, etc., and was argued by counsel, and thereupon, upon consideration thereof, it is hereby ORDERED:

"1. That the documents listed in said motions be, and they hereby are, made available to the defendants forthwith for return to them;

"2. That the orders of impounding described in said motions be, and they hereby are, vacated and rescinded."

[*Subpoenas Duces Tecum*]

April 29, 1946, a grand jury was impaneled in this district. On the same date *subpoenas duces tecum* were issued to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation.

Motions to quash all of the subpoenas were filed on the ground, among others, that the subpoenas constituted an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States.

May 22, 1946, after hearing and argument, the motions to quash were denied.

September 6, 1946, *subpoenas duces tecum* were issued to Novadel-Agene Corporation, Industrial Appliance Corporation and the three Wallace & Tiernan Companies. Motions to quash these subpoenas were also filed. However, a satisfactory compliance with the subpoenas was worked out by negotiation between attorneys for the Government and the corporations. Pursuant to the subpoenas, documents were produced by the movants and were impounded by the Court upon application by the Government.

[*Indictment Returned*]

November 18, 1946, the grand jury returned an Indictment, No. 6055, charging eighteen defendants, including the movants,

with violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act.

December 10, 1946, the movants filed a motion for the return of the impounded documents.

[*Motion to Dismiss*]

December 21, 1946, the defendants (except Schutte & Koerting Company) in said indictment moved to dismiss the indictment on the ground, among others, that the grand jury was illegally constituted in that women were intentionally arbitrarily and entirely excluded from the panel from which the grand jury was drawn.

[*Grand Jury Illegally Constituted*]

March 19, 1947, the Court, after hearing argument on the motions to dismiss, held that the grand jury was illegally constituted and that said indictment should be dismissed and an order to that effect was entered April 7, 1947.

April 1, 1947, the Government filed a motion to dismiss the indictment as against Schutte & Koerting Company and the motion was granted.

The Government did not appeal the Court's decision dismissing the indictment and ordering the return of the impounded documents.

[*Objections to Return of Photostats*]

The Government now objects to the return of all photostat copies made by it of the documents referred to in the order of March 19, 1947.

[*Government's Contentions*]

It is the Government's contention that a subpoena being a distinct and separate process of the court, is not rendered illegal by the fact that the grand jury for whose consideration the documents were subpoenaed, was an illegally constituted grand jury.

The Government in its brief states:

> "Since subpoenas constitute but a 'figurative' search and seizure, the question of whether they ever constitute an unreasonable search and seizure under any conditions requires a balancing of the public interest against private security."

In support of this they cite *Okla. Press Pub. Co. v. Walling,* 327 U. S. 186.

It seems to me that the *Okla. Press Pub. Co.* case is not analogous to the instant case. There the Supreme Court said at p. 210:

> "All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it."

The authorized inquiry referred to investigations conducted by the Administrator pursuant to § 11 (a) of the Fair Labor Standards Act, 52 Stat. 1060.

[*Legal Compulsion May Constitute Unreasonable Search and Seizure*]

The *subpoenas duces tecum* in the instant matter commanded the movants to appear before the grand jury on a day certain and bring with them and produce certain records and then and there to testify concerning certain matters under investigation by the grand jury and not depart the court without leave thereof or of the United States.

The appearance of the witness and the production of the records in response to such subpoenas cannot be said to be voluntary when failure to appear would subject him to punishment.

The cases are too numerous to cite that hold that either actual force or legal compulsion may constitute unreasonable search and seizure.

The subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury. It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[*No Waiver of Rights*]

There is nothing in the record that convinces me that the movants in their role as witnesses or defendants waived any of their rights. As witnesses they contested

the subpoenas and contended that they violated the Fourth Amendment and when they became defendants they made timely objection to the legality of the grand jury.

[*No Permission to Photostat*]

I find nothing in the record that indicates that the movants gave permission to the Government's representatives to make photostat copies of the documents which were produced in compliance with the subpoenas.

[*Unreasonable Search and Seizure*]

In *Johnson v. United States,* decided February 2, 1948, (16 L. W. 4133, 4135), the Supreme Court said:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no "valid basis in law for the intrusion," which the Government committed in making the photostats of said documents and retaining possession of them.

[*Motions Granted*]

The motions, therefore, are granted.

Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment.

[¶ 62,236] United States v. The Gamewell Company, Frederick B. Philbrick, Edward J. McCarthy and Grenfell Swim.

In the United States District Court for the District of Massachusetts. Civil Action No. 6150. March 22, 1948.

Sherman Antitrust Act

Consent Judgment—Public Fire Alarm Systems—Practices Enjoined—Catalogue To Be Submitted to Court.—A consent judgment entered in an action charging a manufacturer of public fire alarm systems with using its dominant position in the industry to cause specifications for equipment to be so drawn that only its products could meet them, thus excluding competition, requires the defendant to discontinue collusive and discriminatory bidding practices, including advance framing of specifications to be issued by municipal bodies in connection with bids for fire alarm systems equipment. Defendant is required to submit for approval a catalogue describing in general terms equipment necessary for performance of particularly designated functions, but not describing the methods whereby such functions are performed. Thereafter the defendant may furnish information only in the exact language of the catalogue and only upon written request from a prospective purchaser, and must immediately transmit the same information to all competitors named in the appendix to the judgment. The defendant is further enjoined from continuing to defray entertainment costs and other expenses of persons connected with the buying of such equipment for public bodies, and is required to desist from conducting harassing litigation against competitors, to dedicate trademarks to the public, and to license its patents to all applicants on a reasonable royalty basis.

See the Sherman Act annotations, Vol. 1, ¶ 1220.151, 1270.151, 1590.

For plaintiff: John F. Sonnett, Assistant Attorney General; John Ford Baecher, First Assistant, Antitrust Division; Morton H. Steinberg, Edward R. Kenney, Donald P. McHugh, William D. Kilgore, Jr.; Sigmund Timberg, Special Assistant to the Attorney General; William T. McCarthy, United States Attorney.

For defendants: Charles B. Rugg, Ropes, Gray, Best, Coolidge & Rugg.

Final Judgment

Plaintiff, the United States of America, having filed its complaint in this action on the 14th day of November, 1946; and all the parties hereto by their attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein, and without admission by any party hereto in respect to any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter herein, and of all parties to this judgment and the complaint states a cause of action against the defendants, and each of them, under Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act (15 U. S. C. sec. 2).

II

[*Applicability, Definition*]

A. The provisions of this final judgment applicable to defendant, The Gamewell Company (hereinafter sometimes referred to as "defendant Gamewell"), shall apply to each of its subsidiaries, affiliates, successors, assignees, and nominees, and to each of its officers, directors, agents and employees, and to each person acting or claiming to act under, through or for such defendant, including defendants Frederick B. Philbrick, Edward J. McCarthy, and Grenfell Swim.

B. For the purposes of the complaint herein and of this final judgment, the term "public fire alarm systems" means fire alarm systems owned or operated, directly or indirectly, or intended or designed to be owned or operated, directly or indirectly, by public authorities, organizations or agencies, including, but not limited to, municipalities, other governmental subdivisions or bodies or tax supported institutions.

III

[*Acquisition of Assets*]

Defendant Gamewell is hereby enjoined and restrained from hereafter acquiring, or holding after such acquisition, any interest in the capital stock or assets (except goods or merchandise bought as incidental to the ordinary course of business) of any person engaged in manufacturing, selling, distributing or installing apparatus or equipment (a) useful only in fire alarm systems, or (b) appropriate in connection with fire alarm systems and in the manufacture, distribution or installation of which defendant Gamewell is engaged.

IV

[*Exclusive Licenses Prohibited*]

Defendant Gamewell is hereby enjoined and restrained from acquiring any license, sublicense, or grant of immunity, to make, use, vend or install, under any patents, patent rights or trademarks covering apparatus or equipment appropriate for use in connection with fire alarm systems, unless said license or sublicense or grant of immunity is non-exclusive and requires that throughout its life similar licenses, sublicenses or grants of immunity be given to others requesting same on terms and conditions at least as favorable as those accorded defendant Gamewell.

V

[*Practices Enjoined*]

Defendant Gamewell is hereby enjoined and restrained from:

A. Agreeing with, coercing, inducing or influencing, or attempting to coerce, induce or influence, directly or indirectly, any other manufacturer, distributor or installer of apparatus or equipment appropriate for use in connection with public fire alarm systems not to compete with defendant Gamewell generally, or with respect to any type or variety of such apparatus or equipment, or with respect to any transaction;

B. Arranging for or causing one or more dummy or collusive bids for contracts for apparatus or equipment appropriate for use in connection with public fire alarm systems, or installation or engineering services in connection therewith, to be submitted;

C. Instigating or causing others to bring suits seeking to enjoin or otherwise inter-

fere with the award of any contract for apparatus or equipment appropriate for use in connection with public fire alarm systems, or for installation thereof or engineering services in connection therewith, to a competitor of defendant Gamewell;

D. Threatening to bring or bringing suits to enjoin or restrain any official or agent of a governmental subdivision, authority or agency from awarding any contract for apparatus or equipment appropriate for use in connection with public fire alarm systems, or for installation thereof or engineering services in connection therewith, to a competitor of defendant Gamewell; or threatening to bring or bringing any suit in connection with the award of such contract to third persons, except suits based on fraud, bribery, or wilful negligence;

E. Threatening to bring or bringing suits based on (1) trademarks listed in Appendix A (annexed hereto and hereby made a part hereof), *provided,* however, that defendant Gamewell may, consistently with this subsection, take steps necessary to insure that other users of such trademarks indicate the source of origin of the trademarked product, or (2) any patent infringement occurring prior to the date of this final judgment;

F. Offering, paying or granting, or causing to be offered, paid or granted, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, to an agent, representative, or other intermediary in the sale or purchase of apparatus or equipment appropriate for use in connection with public fire alarm systems, or for installation or engineering services in connection therewith, or who is subject to the direct or indirect control of any party to such transaction other than defendant Gamewell;

G. Offering to furnish or sell, or furnishing or selling, apparatus or equipment appropriate for use in connection with public fire alarm systems, or installation or engineering services in connection therewith, to a prospective purchaser, without cost or below the cost of doing business. However, where the prospective purchaser does not purchase from Gamewell apparatus or equipment appropriate for use in connection with public fire alarm systems, defendant Gamewell may, at its option, consistently with this subsection, furnish such engineering services on any charge or donation basis, if lawful, *provided* it makes an otherwise completely unrestricted and unconditional grant of such services to such prospective purchaser. In all bids submitted by defendant Gamewell for any contract for the furnishing or selling of apparatus or equipment appropriate for use in connection with public fire alarm systems, the cost of all relevant engineering services furnished or sold, or to be furnished or sold, shall be separately and specifically stated. No installation or engineering services furnished pursuant to the provisions of this subsection shall contain any information concerning the product of any specific manufacturer or distributor (including defendant Gamewell) of apparatus or equipment appropriate for use in connection with public fire alarm systems;

H. For the purpose of destroying a competitor in the manufacture, distribution or installation of apparatus or equipment appropriate for use in connection with public fire alarm systems, price cutting or price discrimination;

I. Engaging in any other unfair trade practice in connection with the manufacture, sale, distribution or installation of apparatus or equipment appropriate for use in connection with public fire alarm systems.

VI

[*Practices Permitted*]

Defendant Gamewell is hereby enjoined and restrained from initiating or participating in any manner in any program, plan, arrangement, understanding or undertaking with prospective purchasers of apparatus or equipment or installation or engineering services, appropriate for use in public fire alarm systems, or with their agents, employees, or representatives, regarding terms and conditions under which prospective suppliers thereof shall be awarded contracts for such apparatus, equipment or installation or engineering services, except that:

A. Defendant Gamewell may disseminate general information concerning such apparatus or equipment manufactured, sold or installed by it, in a catalogue or manual prepared by defendant Gamewell, but only in compliance with the following terms and conditions:

1. Defendant Gamewell shall submit its proposed catalogue or manual to this Court for its approval prior to use, with thirty days' notice of such submission and

a copy of the proposed catalogue or manual to the Attorney General, within six months from the date of this final judgment;

2. Said catalogue or manual shall be confined to a general description of what types and arrangements of apparatus or equipment appropriate for use in connection with public fire alarm systems are necessary for the performance of particularly designated functions, but may not describe the methods whereby such functions are performed;

3. Defendant Gamewell is to furnish to prospective purchasers of such apparatus or equipment or installation or engineering services only such information concerning such apparatus or equipment as is contained in said catalogue or manual, after approval thereof by this Court, and only in the exact language thereof;

4. Defendant Gamewell, prior to the furnishing of such information, has received written request therefor from a prospective purchaser independently initiated by that purchaser; and

5. Defendant Gamewell simultaneously address copies of all information furnished to a prospective purchaser pursuant to the provisions of subsections 3 and 4 of this Section VI-A, with respect to the request and the purchaser (except such information as relates exclusively to installation or engineering services furnished pursuant to the provisions of Section V-G of this judgment), to the persons named in Appendix B (annexed hereto and hereby made a part of this judgment), and promptly upon written or telegraphic request therefor to any other person, stating the name of the prospective purchaser to whom such information has been furnished;

and

B. Pending approval of the catalogue or manual to be submitted to this Court by defendant Gamewell as required in subsection A-1 of this Section VI, defendant Gamewell may disseminate general information concerning such apparatus or equipment manufactured, sold, distributed or installed by it, upon the following terms and conditions:

1. Such general information shall be of the character described in subsection A-2 of this Section VI; and

2. Such general information may be furnished by defendant Gamewell only under the conditions prescribed in subsections A-3, 4 and 5 of this Section VI.

VII

[*Catalogue Subject to Revision*]

A. The catalogue or manual provided for in subsection A of Section VI of this judgment shall be subject from time to time to such revision or revisions as may be agreed upon by the parties hereto and approved by the Court.

B. In the event defendant Gamewell, upon receipt of an inquiry independently initiated by a particular prospective purchaser, determines that the descriptions contained in the catalogue or manual are not adequate to describe the types and arrangements of fire alarm apparatus or equipment necessary to meet the then requirements of that purchaser, and that the catalogue or manual cannot be revised under the provisions of subsection A of this Section VII in time to answer the inquiry, it may furnish to such purchaser general information concerning such apparatus or equipment without following the exact language of the catalogue or manual, but only after the following conditions have been satisfied:

1. Defendant Gamewell shall have furnished in writing to the Department of Justice (a) the name and address of the prospective purchaser, (b) the general information which Gamewell proposes to furnish such purchaser, and (c) an explanation why the catalogue or manual cannot adequately convey the information to the purchaser and cannot be revised in accordance with subsection A of this Section VII in time to answer the prospective purchaser;

2. The Department of Justice shall not have notified defendant Gamewell of its disapproval of the proposed description of such apparatus or equipment or the furnishing thereof, within ten days after receipt by the Department of all the statements referred to in the preceding subsection B-1;

3. Defendant Gamewell shall follow as closely as possible in furnishing the information the language of the catalogue or manual;

4. The information furnished shall comply with the requirements of subsection A-2 of Section VI, and shall, except as specifically modified by this subsection B of Section VII, be supplied under the conditions set forth in subsections A-3, 4 and 5 of Section VI.

Failure of the Department of Justice to take action under subsection B-2 of this Section VII within the said ten day period shall not

estop the plaintiff herein from seeking enforcement of or compliance with this final judgment, or the punishment of violations thereof, except that in such case the furnishing of such general description to the particular prospective purchaser shall not be received as evidence of violation of this final judgment.

VIII

Defendant Gamewell is hereby enjoined and restrained from:

A. Participating in any manner in the preparation of any part or parts of plans or specifications or any other document or documents issued or to be issued by a prospective purchaser of apparatus, equipment, or installation or engineering services appropriate for use in connection with public fire alarm systems; or

B. Influencing or inducing prospective purchasers of such apparatus, equipment, or installation or engineering services to (1) disqualify or discourage others than defendant Gamewell from bidding for award of contracts therefor, (2) limit the issuance of invitations to bid for such contracts to defendant Gamewell, or provide for the issuance of such invitations or of notices in connection therewith in a manner more favorable to defendant Gamewell than to others, or (3) reject all bids submitted for such contracts and readvertise for new bids for such contracts.

IX

[*Contributions Enjoined*]

Defendant Gamewell is hereby enjoined and restrained from:

A. Making any contribution to or underwriting, in whole or in part, directly or indirectly, the expenses of any organization or association, or the officers, directors, agents or employees thereof, whose principal membership consists of individuals, business firms, or other organized groups whose principal activities are related to or concern primarily (1) fire prevention, (2) apparatus or equipment in fire alarm systems or installation or engineering services in connection therewith, or (3) purchasing or recommending the purchase of such apparatus, equipment, or services, *provided* that defendant Gamewell may pay only regular or sustaining membership dues in, or hire space for use in exhibiting such apparatus or equipment at conventions of, such organizations or associations, and may contribute not to exceed $250 annually for scientific research by any one such organization or association, but not to exceed an aggregate of $1000 annually for scientific research by all such organizations or associations; or

B. Defraying in whole or in part the expenses of any persons (other than persons employed by defendant Gamewell and acting solely in the interests of defendant Gamewell) in connection with meetings or conventions of organizations or associations of the character described in subsection A of this Section IX, and paying any expenses incurred in connection with entertainment of said persons attending said meetings or conventions.

X

[*Licensing Required*]

A. Defendant Gamewell is hereby ordered and directed to grant to each applicant therefor a non-exclusive license to make, use and vend under any United States patent covering inventions used in public fire alarm systems (1) listed in Appendix C (annexed hereto and hereby made a part of this final judgment); and (2) hereafter issued to or acquired by defendant Gamewell or in which defendant Gamewell acquires any interest, except such patents hereafter issued or acquired as meet the following three criteria; (a) the patent is issued on a patent application filed subsequent to the entry of this final judgment; (b) application for the patent is made by an employee of defendant Gamewell and is based on an invention or discovery of said employee while in Gamewell's employ; and (c) the patent does not cover an improvement on an invention covered by a patent or patent application existing or pending on the date of entry of this final judgment.

B. Defendant Gamewell is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this Section X, except that (1) a uniform reasonable royalty may be charged; (2) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable, (3) reasonable provision may be made

for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided (4) the license must provide that the licensee may cancel the license at any time by giving thirty days' notice in writing to the licensor; and (5) the license must provide that the licensee shall immediately have the benefit of any more favorable terms granted other licensees.

C. Upon application for a license in accordance with the provisions of subsection A of this Section X, defendant Gamewell shall advise the applicant of the royalty it deems reasonable for the patents to which the application pertains. If the parties are unable to agree upon what constitutes a reasonable royalty within sixty (60) days from the date application for the license was received by defendant Gamewell, the applicant for a license may apply forthwith to this Court for a determination of a reasonable royalty, and defendant Gamewell shall, upon receipt of notice of filing such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be upon defendant Gamewell, or its assignee, vendee, or transferee to establish the reasonableness of the royalty requested by it; and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and to the holders of all other licenses issued under the same patent or patents. Pending the completion of negotiations or of any such Court proceeding, the applicant shall have the right to make, use and vend under the patents to which its application pertains, without payment of royalty or other compensation, but subject to the following provisions: Defendant Gamewell, its assignee, vendee, or transferee may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, a license shall then issue and defendant Gamewell shall then issue and the applicant shall accept such license providing for the periodic payment of royalties at such interim rate from the date of the making of such application. If the applicant fails to accept such license or to pay the interim royalty therein provided, such action shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to these provisions, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under substantially the same patents to the date the applicant filed his application with the Court for the fixing of a reasonable royalty.

XI

Defendant Gamewell is hereby ordered and directed:

A. To instruct, in writing, within 60 days from the date of this judgment, those of its agents, solicitors, salesmen, engineers and other employees or persons engaged in the sale of apparatus or equipment or the installation or engineering services appropriate in connection with public fire alarm systems (1) that the practices described in Sections V and VIII of this final judgment are enjoined and that each and every such employee and person is enjoined by this final judgment from engaging in said practices; and (2) of the contents of Sections VI and VII hereof, and the necessity for compliance therewith; and

B. To maintain for a period of ten years complete and intact, in an orderly classification and not in storage, permitting prompt and selective examination of particular documents or categories of documents, all its books and records, correspondence, memoranda, reports and other writings relating to its business of manufacturing, selling, distributing or installing, or attempts to manufacture, sell, distribute, or install apparatus and equipment appropriate for use in connection with public fire alarm systems.

XII

Defendant Gamewell is hereby ordered and directed to furnish promptly upon written or telegraphic request:

A. A copy of this final judgment to any person, including any governmental subdivision, body or agency, making such request; and

B. The requested number of copies of this final judgment, if not unreasonable, to any association or organization (other than competitors of defendant Gamewell) whose members are interested in the purchase or installation of apparatus or equipment for use in connection with fire alarm systems.

XIII

[*Inspection for Compliance Purposes*]

For the purpose of securing compliance with this judgment and for no other pur-

pose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, on reasonable notice to the defendant, The Gamewell Company, made to its principal offices, be permitted (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment; and (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding such matters. Upon request said defendant shall submit such reports as might from time to time be reasonably necessary to the enforcement of this judgment, *provided,* however, that no information obtained by the means provided in this section shall be divulged by the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

XIV

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained by this Court for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for, and for the Court to make, such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification thereof, or for the enforcement of compliance therewith, and for the punishment of violations thereof.

APPENDIX A

Trademark	Registration Number
Dualarm	243,861
	258,008 (Diagrams)
Sprinkler Watchman	305,390
Three-Fold	305,413
3-Fold	296,622
Vigilarm	404,649
Vitaguard	347,387
Vocalarm	372,004
Arrestolarm	338,346
Peerless	182,897
F. I. P.	326,160
Multifold	314,598
Vitalarm	311,756
White Stripe (Design)	294,417
White Stripe (Words)	292,616
Codewell	294,978
Herculite	275,605

APPENDIX B

Acme Fire Alarm Co.,; A F S Trust Company; American District Telegraph Company; Autocall Company; Auth Electric Company; Brown Bros. Mfg. Co.; Cover Dual Signal Co.; Edwards & Co., Inc.; Faraday Electric Company; Foote-Pierson & Co., Inc.; General Signal Co.; Harrington Signal Company; J. H. Bunnell & Co.; J. H. Scharff, Inc.; Louis W. Bills Co.; Morse Signal Services; North Electric Company; Potter Electric Signal & Manufacturing Co.; S. H. Couch Co., Inc.; Southern Switch & Signal Company; Universal Tool & Mfg. Co.

There shall be added to this list from time to time the names of such other companies as the Court may so order, on motion of the plaintiff, with due notice to defendant Gamewell.

APPENDIX C

1,799,438	2,184,163
1,825,978	2,186,163
1,884,735	2,199,279
1,986,026	2,201,712
2,040,288	2,217,797
2,050,404	2,236,891
2,050,632	2,250,922
2,054,827	2,250,923
2,056,345	2,250,924
2,056,709	2,250,928
2,114,324	2,264,866
2,116,372	2,270,925
2,123,220	2,355,934
2,128,578	19,447 (Reissue)
2,137,760	19,775 (Reissue)
2,159,920	22,514 (Reissue)
2,165,174	100,139 (Design)
2,167,964	

[¶ 62,237] **Federal Trade Commission, Petitioner v. The Cement Institute et al. (No. 23).**

Federal Trade Commission, Petitioner v. Aetna Portland Cement Company et al. (No. 24).

Federal Trade Commission, Petitioner v. Marquette Cement Manufacturing Company (No. 25).

Federal Trade Commission, Petitioner v. Calaveras Cement Company et al. (No. 26).

Federal Trade Commission, Petitioner v. Huron Portland Cement Company (No. 27).

Federal Trade Commission, Petitioner v. Superior Portland Cement Inc. (No. 28).

Federal Trade Commission, Petitioner v. Northwestern Portland Cement Company (No. 29).

Federal Trade Commission, Petitioner v. Riverside Cement Company (No. 30).

Federal Trade Commission, Petitioner v. Universal Atlas Cement Company (No. 31).

Federal Trade Commission, Petitioner v. California Portland Cement Company (No. 32).

Federal Trade Commission, Petitioner v. Monolith Portland Cement Company (No. 33).

Federal Trade Commission, Petitioner v. Smith et al. (No. 34).

In the Supreme Court of the United States. April 26, 1948.

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

Sherman Antitrust Act and Federal Trade Commission Act

Jurisdiction of Federal Trade Commission—Violation of Sherman Act as Unfair Method of Competition—Simultaneous Antitrust and Commission Proceedings.—The Federal Trade Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act. The filing of a Sherman Act suit by the Attorney General does not require the termination of Federal Trade Commission proceedings involving the same practices. Both the legislative history of the Federal Trade Commission Act and its specific language indicate a congressional purpose to permit the simultaneous use of both types of proceedings.

See the Sherman Act annotations, Vol. 1, ¶ 1610.222, and the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.122.

Federal Trade Commission Act

Jurisdiction of Federal Trade Commission—Respondent Engaged in Intrastate Commerce.—The fact that one or two of the numerous participants in an alleged combination in restraint of trade happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all of the parties to the combination is essential in order to make wholly effective the restraint of commerce among the states.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.414.

Jurisdiction of Federal Trade Commission—Disqualification Because of Prior Opinion as to Unfairness of Practice.—The Commission properly refused to disqualify itself in a proceeding involving the basing point system of pricing because of the fact that members of the Commission had, prior to the proceedings, formed an opinion that the basing point system of pricing was illegal.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.402.

Evidence.—Although the Federal Trade Commission complaint alleged that respondents engaged in an illegal combination in 1929, the Commission properly admitted evidence as to respondents' activities many years previously, some in compliance with the National Recovery Act. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason is barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by rigid rules of evidence.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.422.

Unfair Methods of Competition—Concerted Maintenance of the Basing Point Delivered Price System.—The Commission's holding that concerted maintenance of the basing point delivered price system is an unfair method of competition is sustained. The Court cannot say that the Commission was wrong in concluding that the delivered-price system as here used provided an effective instrument which, if left free for use of the respondents, would result in complete destruction of competition and the establishment of monopoly in the cement industry.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6380.60.

Robinson-Patman Price Discrimination Act

Basing Point System as Price Discrimination.—The Federal Trade Commission properly concluded that respondents' multiple basing point delivered price system resulted in price discriminations which substantially lessened competition. The varying mill nets received by respondents on sales between customers in different localities constituted a discrimination in price between different purchasers within the prohibition of Section 2(a).

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.592.

Dissenting Opinion—Insufficiency of Evidence—Issue of Individual and Independent Absorptions of Freight Charges.—A dissenting opinion upholds the decision of the court below that the evidence does not support the Commission's finding of the existence of a combination among respondents to restrain competition. The failure of the Commission and the majority of the Supreme Court to reach the question of individual and independent absorptions of freight charges to meet lower prices of competitors, in the course of bona fide competition, requires the setting aside of the order of the Commission. The judgment of the Court of Appeals should have been affirmed.

Reversing 157 Fed. (2d) 533, reported at ¶ 57,490 of the '44-'47 Court Decisions Supplement, and remanding the cause to the court with directions to enforce the Federal Trade Commission's order in Dkt. 3167.

For petitioners: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Charles H. Weston, Robert G. Seaks and Philip Elman, Special Assistants to Attorney General; W. T. Kelley, General Counsel, and Walter B. Wooden, Associate General Counsel, of the Federal Trade Commission.

For respondents: William J. Donovan, George S. Leisure, and Nathan L. Miller of New York City; Alex W. Davis, Robert B. Murphey, Louis W. Myers, Pierce Works, and Edward D. Lyman of Los Angeles; Roger M. Blough of Pittsburgh; John H. Hershberger of Knapp, Cushing, Hershberger & Stevenson, and Edward A. Zimmerman of Zimmerman & Norman of Chicago; S. Harold Shefelman of Seattle; Charles Wright, Jr. and Laurence A. Masselink of Detroit; Walter C. Fox, Jr., Marshall P. Madison, Herbert W. Clark, Chafee E. Hall, and Robert H. Gerdes of San Francisco; A. W. Witherspoon of Spokane; Herbert S. Little; F. A. LeSourd (Donovan, Leisure, Newton & Irvine; Breck P. McAllister; James R. Withrow, Jr.; Henry Herrick Bond; Ira C. Werle; Murphy & Davis; O'Melveny & Myers; Beaumont, Smith & Harris; H. W. Norman; W. R. Englehardt, of counsel).

MR. JUSTICE BLACK delivered the opinion of the court.

We granted certiorari to review the decree of the Circuit Court of Appeals which, with one judge dissenting, vacated and set aside a cease and desist order issued by the Federal Trade Commission against the respondents. 157 F. 2d 533. Those respondents are: The Cement Institute, an unincorporated trade association composed of 74 corporations [1] which manufacture, sell and distribute cement; the 74 corporate members of the Institute;[2] and 21 individuals who are associated with the Institute. It took three years for a trial examiner to hear the evidence which consists of about 49,000 pages of oral testimony and 50,000 pages of exhibits. Even the findings and conclusions of the Commission cover 176 pages. The briefs with accompanying appendixes submitted by the parties contain more than 4,000 pages. The legal questions raised by the Commission and by the different respondents are many and varied. Some contentions are urged by all respondents and can be jointly considered. Others require separate treatment. In order to keep our opinion within reasonable limits, we must restrict our record references to the minimum consistent with an adequate consideration of the legal questions we discuss.

The proceedings were begun by a Commission complaint of two counts. The first charged that certain alleged conduct set out at length constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. 38 Stat. 719, 15 U. S. C. § 45. The core of the charge was that the respondents had restrained and hindered competition in the sale and distribution of cement by means of a combination among themselves made effective through mutual understanding or agreement to employ a multiple basing point system of pricing. It was alleged that this system resulted in the quotation of identical terms of sale and identical prices for cement by the respondents at any given point in the United States. This system had worked so successfully, it was further charged, that for many years prior to the filing of the complaint, all cement buyers throughout the nation, with rare exceptions, had been unable to purchase cement for delivery in any given locality from any one of the respondents at a lower price or on more favorable terms than from any of the other respondents.

The second count of the complaint, resting chiefly on the same allegations of fact set out in Count I, charged that the multiple basing point system of sales resulted in systematic price discriminations between the customers of each respondent. These discriminations were made, it was alleged, with the purpose of destroying competition in price between the various respondents in violation of § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526. That section, with certain conditions which need not here be set out, makes it "unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. . . ." 15 U. S. C. § 13.

Resting upon its findings, the Commission ordered that respondents cease and desist from "carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to do a number of things, 37 F. T. C. 87, 258-262, all of which things, the Commission argues, had to be restrained in order effectively to restore individual freedom of action among the separate units in the cement industry. Certain contentions with reference to the order will later require a more detailed discussion of its terms. For the present it is sufficient to say that, if the order stands, its terms are broad enough to bar respondents from acting in concert to sell cement on a basing point delivered price plan which

[1] The Commission dismissed the proceedings without prejudice against respondent Castalia Portland Cement Co., which went into bankruptcy.

[2] Respondent Valley Forge Cement Co. is associated with the Institute only by reason of its affiliation with a member company.

so eliminates competition that respondents' prices are always identical at any given point in the United States.

We shall not now detail the numerous contentions urged against the order's validity. A statement of these contentions can best await the separate consideration we give them.

Jurisdiction

At the very beginning we are met with a challenge to the Commission's jurisdiction to entertain the complaint and to act on it. This contention is pressed by respondent Marquette Cement Manufacturing Co. and is relied upon by other respondents. Count I of the complaint is drawn under the provision in § 5 of the Federal Trade Commission Act which declares that "Unfair methods of competition . . . are hereby declared unlawful." Marquette contends that the facts alleged in Count I do not constitute "an unfair method of competition" within the meaning of § 5. Its argument runs this way: Count I in reality charges a combination to restrain trade. Such a combination constitutes an offense under § 1 of the Sherman Act which outlaws "Every . . . combination . . . in restraint of trade." 26 Stat. 209, 15 U. S. C. § 1. Section 4 of the Sherman Act provides that the attorney general shall institute suits under the Act on behalf of the United States, and that the federal district courts shall have exclusive jurisdiction of such suits. Hence, continue respondents, the Commission, whose jurisdiction is limited to "unfair methods of competition," is without power to institute proceedings or to issue an order with regard to the combination in restraint of trade charged in Count I. Marquette then argues that since the fact allegations of Count I are the chief reliance for the charge in Count II, this latter count also must be interpreted as charging a violation of the Sherman Act. Assuming, without deciding, that the conduct charged in each count constitutes a violation of the Sherman Act, we hold that the Commission does have jurisdiction to conclude that such conduct may also be an unfair method of competition and hence constitute a violation of § 5 of the Federal Trade Commission Act.

As early as 1920 this Court considered it an "unfair method of competition" to engage in practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Federal Trade Comm'n v. Gratz*, 253 U. S. 421, 427. In 1922, the Court in *Federal Trade Comm'n v. Beech-Nut Packing Co.*, 257 U. S. 441, sustained a cease and desist order against a resale price maintenance plan because such a plan "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain." *Id.* at 454. The Court, in holding that the scheme before it constituted an unfair method of competition, noted that the conduct in question was practically identical with that previously declared unlawful in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and *United States v. Schrader's Son, Inc.*, 252 U. S. 85, the latter a suit brought under § 1 of the Sherman Act. Again in 1926 this Court sustained a Commission unfair-method-of-competition order against defendants who had engaged in a price-fixing combination, a plain violation of § 1 of the Sherman Act. *Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52. In 1941 we reiterated that certain conduct of a combination found to conflict with the policy of the Sherman Act could be suppressed by the Commission as an unfair method of competition. *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457, 465. The Commission's order was sustained in the *Fashion Originators'* case not only because the prohibited conduct violated the Clayton Act but also because the Commission's findings brought the "combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself." In other cases this Court has pointed out many reasons which support interpretation of the language "unfair methods of competition" in § 5 of the Federal Trade Commission Act as including violations of the Sherman Act.[8] Thus it appears that soon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also

[8] *Federal Trade Comm'n v. R. F. Keppel & Bro.*, 291 U. S. 304, 310; *Federal Trade Comm'n v. Raladam Co.*, 283 U. S. 643, 649-650; see also *United States Alkali Assn. v. United States*, 325 U. S. 196 and see *Eugene Dietzgen Co. v. Federal Trade Comm'n*, 142 F. 2d 321, 326-327, and cases there cited, among the numerous Circuit Courts of Appeals cases on the same subject.

were outlawed by the Sherman Act,[4] and that this Court has consistently approved that interpretation of the Act.

Despite this long and consistent administrative and judicial construction of § 5, we are urged to hold that these prior interpretations were wrong and that the term "unfair methods of competition" should not be construed as embracing any conduct within the ambit of the Sherman Act. In support of this contention, Marquette chiefly relies upon its reading of the legislative history of the Commission Act. We have given careful consideration to this contention because of the earnestness with which it is pressed. Marquette points to particular statements of some of the Act's sponsors which, taken out of their context, might lend faint support to its contention that Congress did not intend the Commission to concern itself with conduct then punishable under the Sherman Act. But on the whole the Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the Federal District Courts but also to supplement that enforcement through the administrative process of the new Trade Commission. Far from being regarded as a rival of the Justice Department and the District Courts in dissolving combinations in restraint of trade, the new Commission was envisioned as an aid to them and was specifically authorized to assist them in the drafting of appropriate decrees in antitrust litigation.[5] All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages. These congressional purposes are revealed in the legislative history cited below, most of which is referred to in respondents' briefs.[6] We can conceive of no greater obstacle this Court could create to the fulfillment of these congressional purposes than to inject into every Trade Commission proceeding brought under § 5 and into every Sherman Act suit brought by the Justice Department a possible jurisdictional question.

We adhere to our former rulings. The Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act.

There is a related jurisdictional argument pressed by Marquette which may be disposed of at this time. While review of the Commission's order was pending in the Circuit Court of Appeals, the Attorney General filed a civil action in the Federal District Court for Denver, Colorado, to restrain the Cement Institute, Marquette and 88 other cement companies, including all of the present respondents, from violating § 1 of the Sherman Act. Much of the evidence before the Commission in this proceeding might also be relevant in that case, which, we are informed, has not thus far been brought to trial. Marquette urges that the Commission proceeding should now be dismissed because it is contrary to the public interest to force respondents to defend both a Commission proceeding and a Sherman Act suit based largely on the same alleged misconduct.

We find nothing to justify a holding that the filing of a Sherman Act suit by the Attorney General requires the termination of these Federal Trade Commission proceedings. In the first place, although all conduct

[4] "The Commission had issued up to October, 1939, a total of 267 orders to cease and desist in cases involving cooperation, conspiracy, or combination." Beer, *Federal Trade Law and Practice*, 94 (1942). Other writers have also commented on the recognition by the Commission and courts that unfair methods of competition include violations of the Sherman Act. Handler, Unfair Competition and the Federal Trade Commission, 8 G. W. L. Rev., 399, 416-417, 419. Montague, The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-scale Method of Mass Enforcement of the Antitrust Laws, 8 G. W. L. Rev. 365; Miller, Unfair Competition, Chapter XI (1941); Henderson, *The Federal Trade Commission, a Study in Administrative Law and Procedure*, 22-28 (1924); Beer, *Federal Trade Law and Practice*, 93 *et seq.* (1942).

[5] Section 7 of the Act empowered the Commission, upon the request of the district courts, to serve as a master in chancery in framing appropriate decrees in antitrust suits brought by the attorney general. Section 6 (c) authorized the Commission to investigate compliance with antitrust decrees upon application of the Attorney General and to report its findings and recommendations to him. 38 Stat. 722, 15 U. S. C. §§ 47, 46.

[6] 51 Cong. Rec. 11083, 11104, 11528-11533, 12146, 12622-12623, 12733-12734, 12787, 13311-13312, 14251, 14460, 14926, 14929; H. R. Rep. No. 533, 63d Cong., 2d Sess. 1, 6, (1914); H. R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914); Sen. Rep. No. 597, 63d Cong., 2d Sess. 12-13 (1914).

violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. *Federal Trade Comm'n v. R. F. Keppel & Bro.*, 291 U. S. 304; *Federal Trade Comm'n v. Gratz*, 253 U. S. 421, 427. Hence a conclusion that respondents' conduct constituted an unfair method of competition does not necessarily mean that their same activities would also be found to violate § 1 of the Sherman Act. In the second place, the fact that the same conduct may constitute a violation of both acts in nowise requires us to dismiss this Commission proceeding. Just as the Sherman Act itself permits the Attorney General to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition. Both the legislative history of the Trade Commission Act and its specific language indicate a congressional purpose, not to confine each of these proceedings within narrow, mutually exclusive limits, but rather to permit the simultaneous use of both types of proceedings. Marquette's objections to the Commission's jurisdiction are overruled.

Objections to Commission's Jurisdiction by Certain Respondents on Ground That They Were Not Engaged in Interstate Commerce

One other challenge to the Commission's jurisdiction is specially raised by Northwestern Portland and Superior Portland. The Commission found that "Northwestern Portland makes no sales or shipments outside the State of Washington," and that "Superior Portland, with few exceptions, makes sales and shipments outside the State of Washington only to Alaska." These two respondents contend that, since they did not engage in interstate commerce and since § 5 of the Trade Commission Act applies only to unfair methods of competition in interstate commerce, that the Commission was without jurisdiction to enter an order against them under Count I of the complaint. For this contention they chiefly rely on *Federal Trade Comm'n v. Bunte Bros.*, 312 U. S. 349. They also argue that for the same reason the Commission lacked jurisdiction to enforce against them the price discrimination charge in Count II of the complaint.

We cannot sustain this contention. The charge against these respondents was not that they, apart from the other respondents, had engaged in unfair methods of competition and price discriminations simply by making intrastate sales. Instead, the charge was, as supported by the Commission's findings, that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce. The combination, as found, includes the Institute and cement companies located in many different states. The Commission has further found that "In general, said corporate respondents have maintained, and now maintain, a constant course of trade and commerce in cement among and between the several States of the United States." The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all of the parties to the combination is essential in order to make wholly effective the restraint of commerce among the states.[7] The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. We hold that the Commission did have jurisdiction to make an order against Superior Portland and Northwestern Portland.

The Multiple Basing Point Delivered Price System

Since the multiple basing point delivered price system of fixing prices and terms of cement sales is the nub of this controversy, it will be helpful at this preliminary stage to point out in general what it is and how it works. A brief reference to the distinctive characteristics of "factory" or "mill prices" and "delivered prices" is of importance to an understanding of the basing point delivered price system here involved.

[7] See *Ramsay Co. v. Bill Posters Assn.*, 260 U. S. 501, 511; *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 260-261; *United States v. Frankfort Distilleries*, 324 U. S. 293, 297-298.

Goods may be sold and delivered to customers at the seller's mill or warehouse door or may be sold free on board (f. o. b.) trucks or railroad cars immediately adjacent to the seller's mill or warehouse. In either event the actual cost of the goods to the purchaser is, broadly speaking, the seller's "mill price" plus the purchaser's cost of transportation. However, if the seller fixes a price at which he undertakes to deliver goods to the purchaser where they are to be used, the cost to the purchaser is the "delivered price." A seller who makes the "mill price" identical for all purchasers of like amount and quality simply delivers his goods at the same place (his mill) and for the same price (price at the mill). He thus receives for all f. o. b. mill sales an identical net amount of money for like goods from all customers. But a "delivered price" system creates complications which may result in a seller's receiving different net returns from the sale of like goods. The cost of transporting 500 miles is almost always more than the cost of transporting 100 miles. Consequently if customers 100 and 500 miles away pay the same "delivered price," the seller's net return is less from the more distant customer. This difference in the producer's net return from sales to customers in different localities under a "delivered price" system is an important element in the charge under Count I of the complaint and is the crux of Gount II.

The best known early example of a basing point price system was called "Pittsburgh plus." It related to the price of steel. The Pittsburgh price was the base price, Pittsburgh being therefore called a price basing point. In order for the system to work, sales had to be made only at delivered prices. Under this system the delivered price of steel from anywhere in the United States to a point of delivery anywhere in the United States was in general the Pittsburgh price plus the railroad freight rate from Pittsburgh to the point of delivery.[8] Take Chicago, Illinois, as an illustration of the operation and consequences of the system. A Chicago steel producer was not free to sell his steel at cost plus a reasonable profit. He must sell it at the Pittsburgh price plus the railroad freight rate from Pittsburgh to the point of delivery. Chicago steel customers were by this pricing plan thus arbitrarily required to pay for Chicago produced steel the Pittsburgh base price plus what it would have cost to ship the steel by rail from Pittsburgh to Chicago had it been shipped. The theoretical cost of this fictitious shipment became known as "phantom freight." But had it been economically possible under this plan for a Chicago producer to ship his steel to Pittsburgh, his "delivered price" would have been merely the Pittsburgh price, although he actually would have been required to pay the freight from Chicago to Pittsburgh. Thus the "delivered price" under these latter circumstances required a Chicago (non-basing point) producer to "absorb" freight costs. That is, such a seller's net returns became smaller and smaller as his deliveries approached closer and closer to the basing point.

Several results obviously flow from use of a single basing point system such as "Pittsburgh plus" originally was. One is that the "delivered prices" of all producers in every locality where deliveries are made are always the same regardless of the producers' different freight costs. Another is that sales made by a non-base mill for delivery at different localities result in net receipts to the seller which vary in amounts equivalent to the "phantom freight" included in, or the "freight absorption" taken from the "delivered price."

As commonly employed by respondents, the basing point system is not single but multiple. That is, instead of one basing point, like that in "Pittsburgh plus," a number of basing point localities are used. In the multiple basing point system, just as in the single basing point system, freight absorption or phantom freight is an element of the delivered price on all sales not governed by a basing point actually located at the seller's mill.[9] And all sellers quote identical delivered prices in any given locality regardless of their different costs of pro-

[8] This was not true as to steel produced and shipped from Birmingham, Alabama. Under the system Birmingham steel had to be sold at the Pittsburgh price plus an arbitrary addition of $5 per ton. There were also other minor variations from the system as here described. See *United States Steel Corp. et al.*, 8 F. T. C. 1.

[9] A base mill selling cement for delivery at a point outside the area in which its base price governs, and inside the area where another base mill's lower delivered price governs, adopts the latter's lower delivered price. The first base mill thus absorbs freight and becomes as to such sales a non-base mill.

duction and their different freight expenses. Thus the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns.[10] Such differences as there are in matters here pertinent are therefore differences of degree only.

Alleged Bias of the Commission

One year after the taking of testimony had been concluded and while these proceedings were still pending before the Commission, the respondent Marquette asked the Commission to disqualify itself from passing upon the issues involved. Marquette charged that the Commission had previously prejudged the issues, was "prejudiced and biased against the Portland cement industry generally," and that the industry and Marquette in particular could not receive a fair hearing from the Commission. After hearing oral argument the Commission refused to disqualify itself. This contention, repeated here, was also urged and rejected in the Circuit Court of Appeals one year before that court reviewed the merits of the Commission's order. *Marquette Cement Mfg. Co. v. Federal Trade Comm'n,* 147 F. 2d 589.

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by § 6 of the Trade Commission Act. 15 U. S. C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has

[10] The Commission in its findings explained how the multiple basing point system affects a seller's net return on sales in different localities and how the delivered price is determined at any particular point. "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser. In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of base price plus all-rail freight. Thus, if Mill A has a base price of $1.50 per barrel, its delivered price at each location where it sells cement will be $1.50 per barrel plus the all-rail freight from its mill to the point of delivery, except that when a sale is made for delivery at a location at which the combination of the base price plus all-rail freight from another mill is a lower figure, Mill A uses this lower combination so that its delivered price at such location will be the same as the delivered price of the other mill. At all locations where the base price of Mill A plus freight is the lowest combination, Mill A recovers $1.50 net at the mill, and at locations where the combination of base price plus freight of another mill is lower, Mill A shrinks its mill net sufficiently to equal that price. Under these conditions it is obvious that the highest mill net which can be recovered by Mill A is $1.50 per barrel, and on sales where it has been necessary to shrink its mill net in order to match the delivered price of another mill, its net recovery at the mill is less than $1.50." 37 F. T. C. at 147-148.

not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices.[11] Yet if Marquette is right, the Commission by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceedings would similarly disqualify them from ever passing on another. See *Morgan v. United States,* 313 U. S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey v. Ohio,* 273 U. S. 510, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* at 523.

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.[12]

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

Alleged Errors in re Introduction of Evidence

The complaint before the Commission, filed July 2, 1937, alleged that respondents had maintained an illegal combination for "more than eight years last past." In the Circuit Court of Appeals and in this Court the Government treated its case on the basis that the combination began in August, 1929, when the respondent Cement Institute was organized. The Government introduced much evidence over respondents' objections, however, which showed the activities of the cement industry for many years prior to 1929, some of it as far back as 1902. It also introduced evidence as to respondents' activities from 1933 to May 27, 1935, much of which related to the preparation and administration of the NRA Code for the cement industry pursuant to the National Industrial Recovery Act, 48 Stat. 195, held invalid by this Court May 27, 1935, in *Schechter Poultry Corp. v. United States,* 295 U. S. 495. All of the testimony to which objection was made re-

[11] Marquette in support of its motion to disqualify the Commission urged that the Department of Justice and the Commission had concurrent power or jurisdiction to enforce the prohibitions of the Sherman Act. 147 F. 2d at 593.

[12] "Section Five of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." The Commission is not a court. It can render no judgment, civil or criminal. *Federal Trade Comm'n, v. Klesner,* 280 U. S. 19, 25; and see *Humphrey's Executor v. United States,* 295 U. S. 602, 628; *Louisville & N. R. Co. v. Garrett,* 231 U. S. 298, 307.

lated to the initiation, development, and carrying on of the basing point practices.

Respondents contend that the pre-1929 evidence, especially that prior to 1919, is patently inadmissible with reference to a 1929 combination, many of whose alleged members were non-existent in 1919. They also urge that evidence of activities during the NRA period was improperly admitted because § 5 of Title I of the NRA provided that any action taken in compliance with the code provisions of an industry should be "exempt from the provisions of the antitrust laws of the United States." And some of the NRA period testimony relating to basing point practices did involve references to code provisions. The Government contends that evidence of both the pre-1929 and the NRA period activities of members of the cement industry tends to show a continuous course of concerted efforts on the part of the industry, or at least most of it, to utilize the basing point system as a means to fix uniform terms and prices at which cement would be sold, and that the Commission had properly so regarded this evidence. The Circuit Court of Appeals agreed with respondents that the Commission had erroneously considsidered both the NRA period evidence and the pre-1929 evidence in making its findings of the existence of a combination among respondents.

We conclude that both types of evidence were admissible for the purpose of showing the existence of a continuing combination among respondents to utilize the basing point pricing system.[13]

The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that any of respondents' pre-1929 or NRA code activities were illegal. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. *Standard Oil Co. v. United States,* 221 U. S. 1, 46-47; *United States v. Reading Co.,* 253 U. S. 26, 43-44. Here the trade practices of an entire industry were under consideration. Respondents, on the one hand, insisted that the multiple basing point delivered price system represented a natural evolution of business practices adopted by the different cement companies, not in concert, but separately in response to customers' needs and demands. That the separately adopted business practices produced uniform terms and conditions of sale in all localities was, so the respondents contended, nothing but an inevitable result of long-continued competition. On the other hand, the Government contended that, despite shifts in ownership of individual cement companies, what had taken place from 1902 to the date the complaint was filed showed continued concerted action on the part of all cement producers to develop and improve the basing point system so that it would automatically eliminate competition. In the Government's view the Institute when formed in 1929 simply took up the old practices for the old purpose and aided its member companies to carry it straight on through and beyond the NRA period. See *Fort Howard Paper Co. v. Federal Trade Comm'n,* 156 F. 2d 899, 906.

Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. *Interstate Commerce Comm'n v. Baird,* 194 U. S. 25, 44. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.

The foregoing likewise largely answers respondents' contention that there was error in the admission of a letter written by one Treanor in 1934 to the chairman of the NRA code authority for the cement industry. Treanor, who died prior to the filing of the complaint, was at the time president of one of the respondent companies and also an active trustee of the Institute. In the letter he stated among other things that the cement industry was one "above all others that cannot stand free competition, that must systematically restrain competition or be ruined." The statement was made as part of his criticism of the cement industry's pub-

[13] We need not here determine what protection was afforded respondents by the exemption from the antitrust laws conferred by the Act later held unconstitutional. Nor need we decide whether this provision also exempted respondents from the unfair methods of competition provisions of the Trade Commission Act. The Government does not press either contention here.

licity campaign in defense of the basing point system. The relevance of this statement indicating this Institute official's informed judgment is obvious. That it might be only his conclusion does not render the statement inadmissible in this administrative proceeding.

All contentions in regard to the introduction of testimony have been considered. None of them justify refusal to enforce this order.

The Old Cement Case

This Court's opinion in *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588, known as the *Old Cement* case, is relied on by the respondents in almost every contention they present. We think it has little relevance, if any at all, to the issues in this case.

In that case the United States brought an action in the District Court to enjoin an alleged combination to violate § 1 of the Sherman Act. The respondents were the Cement Manufacturers Protective Association, four of its officers, and nineteen cement manufacturers. The District Court held hearings, made findings of fact, and issued an injunction against those respondents. This Court, with three justices dissenting, reversed upon a review of the evidence. It did so because the Government did not charge and the record did not show "any agreement or understanding between the defendants placing limitations on either prices or production," or any agreement to utilize the basing point system as a means of fixing prices. The Court said "But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action." *Id.* at 606. In the *Old Cement* case and in *Maple Flooring Assn. v. United States,* 268 U. S. 563, decided the same day, the Court's attention was focused on the rights of a trade association, despite the Sherman Act, openly to gather and disseminate statistics and information as to production costs, output, past prices, merchandise on hand, specific job contracts, freight rates, etc., so long as the Association did these things without attempts to foster agreements or concerted action with reference to prices, production, or terms of sale. Such associations were declared guiltless of violating the Sherman Act, because "in fact, no prohibited concert of action was found." *Corn Products Co. v. Federal Trade Comm'n,* 324 U. S. 726, 735.

The Court's holding in the *Old Cement* case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day. The issues in the present Commission proceedings are quite different from those in the *Old Cement* case, although many of the trade practices shown here were also shown there. In the first place, unlike the *Old Cement* case the Commission does here specifically charge a combination to utilize the basing point system as a means to bring about uniform prices and terms of sale. And here the Commission has focused attention on this issue, having introduced evidence on the issue which covers thousands of pages. Furthermore, unlike the trial court in the *Old Cement* case, the Commission has specifically found the existence of a combination among respondents to employ the basing point system for the purpose of selling at identical prices.

In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as "unfair" which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an "unfair method of competition." This general language was deliberately left to the "Commission and the courts" for definition because it was thought that "There is no limit to human inventiveness in this field"; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an "endless task."

See *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 310-312, and congressional committee reports there quoted.

These marked differences between what a court must decide in a Sherman Act proceeding and the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition are enough in and of themselves to make the *Old Cement* decision wholly inapplicable to our problem in reviewing the findings in this case. That basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so whether these findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing point system as practiced constitutes an "unfair method of competition," because it either restrains free competition or is an incipient menace to it.

Findings and Evidence

It is strongly urged that the Commission failed to find, as charged in both counts of the complaint, that the respondents had by combination, agreements, or understandings among themselves utilized the multiple basing point delivered price system as a restraint to accomplish uniform prices and terms of sale. A subsidiary contention is that assuming the Commission did so find, there is no substantial evidence to support such a finding. We think that adequate findings of combination were made and that the findings have support in evidence.

The Commission's findings of fact set out at great length and with painstaking detail numerous concerted activities carried on in order to make the multiple basing point system work in such way that competition in quality, price and terms of sale of cement would be nonexistent, and that uniform prices, job contracts, discounts, and terms of sale would be continuously maintained. The Commission found that many of these activities were carried on by the Cement Institute, the industry's unincorporated trade association, and that in other instances the activities were under the immediate control of groups of respondents. Among the collective methods used to accomplish these purposes, according to the findings, were boycotts; discharge of uncooperative employees; organized opposition to the erection of new cement plants; selling cement in a recalcitrant price cutter's sales territory at a price so low that the recalcitrant was forced to adhere to the established basing point prices; discouraging the shipment of cement by truck or barge; and preparing and distributing freight rate books which provided respondents with similar figures to use as actual or "phantom" freight factors, thus guaranteeing that their delivered prices (base prices plus freight factors) would be identical on all sales whether made to individual purchasers under open bids or to governmental agencies under sealed bids. These are but a few of the many activities of respondents which the Commission found to have been done in combination to reduce or destroy price competition in cement. After having made these detailed findings of concerted action, the Commission followed them by a general finding that "the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid is to . . . promote and maintain their multiple basing point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use." [14] The Commission then concluded that "The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under

[14] Paragraph 26 of the Findings is as follows: "The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; to prevent purchasers from utilizing motor trucks or water carriers for the transportation of cement and from obtaining benefits which might accrue from the use of such transportation agencies; to require that purchases of cement be made on a delivered price basis, and to prevent and defeat efforts of purchasers to avoid this requirement; frequently to deprive agencies of the Federal Government of the benefits of all or a part of the lower land-grant rates available to such purchasers; to require certain agencies of the Federal Government to purchase their requirements of cement through dealers at higher prices than are available in direct purchases from manufacturers; to establish and maintain an agreed classification of

the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act." And the Commission's cease and desist order prohibited respondents "from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents . . ." to do certain things there enumerated.

Thus we have a complaint which charged collective action by respondents designed to maintain a sales technique that restrained competition, detailed findings of collective activities by groups of respondents to achieve that end, then a general finding that respondents maintained the combination, and finally an order prohibiting the continuance of the combination. It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents collectively maintained a multiple basing point delivered price system for the purpose of suppressing competition in cement sales. The findings are sufficient. The contention that they were not is without substance.

Disposition of this question brings us to the related contention that there was no substantial evidence to support the findings. We might well dispose of the contention as this Court dismissed a like one with reference to evidence and findings in a civil suit brought under the Sherman Act in *Sugar Institute v. United States,* 297 U. S. 553, 601: "After a hearing of extraordinary length, in which no pertinent fact was permitted to escape consideration, the trial court subjected the evidence to a thorough and acute analysis which has left but slight room for debate over matters of fact. Our examination of the record discloses no reason for overruling the court's findings in any matter essential to our decision." In this case, which involves the evidence and findings of the Federal Trade Commission, we likewise see no reason for upsetting the essential findings of the Commission. Neither do we find it necessary to refer to all the voluminous testimony in this record which tends to support the Commission's findings.

Although there is much more evidence to which reference could be made, we think that the following facts shown by evidence in the record, some of which are in dispute, are sufficient to warrant the Commission's finding of concerted action.

When the Commission rendered its decision there were about 80 cement manufacturing companies in the United States operating about 150 mills. Ten companies controlled more than half of the mills and there were substantial corporate affiliations among many of the others. This concentration of productive capacity made concerted action far less difficult than it would otherwise have been. The belief is prevalent in the industry that because of the standardized nature of cement, among other reasons, price competition is wholly unsuited to it. That belief is historic. It has resulted in concerted activities to devise means and measures to do away with competition in the industry. Out of those activities came the multiple basing point delivered price system. Evidence shows it to be a handy instrument to bring about elimination of any kind of price competition. The use of the multiple basing point delivered price system by the cement producers has been coincident with a situation whereby for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers. Thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny.[15]

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customers who may purchase cement from manufacturers thereof; to maintain uniform terms and conditions of sale; to hinder and obstruct the sale of imported cement through restraints upon those who deal in such cement; and otherwise to promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use." 37 F. T. C. 257-258.

[15] The following is one among many of the Commission's findings as to the identity of sealed bids:

An abstract of the bids for 6,000 barrels of cement to the United States Engineer Office at Tucumcari, New Mexico, opened April 23, 1936, shows the following:

Name of Bidder	*Price per Bbl.*
Monarch	$3.286854
Ash Grove	3.286854
Lehigh	3.286854
Southwestern	3.286854
U. S. Portland Cement Co.	3.286854
Oklahoma	3.286854
Consolidated	3.286854
Trinity	3.286854
Lone Star	3.286854
Universal	3.286854
Colorado	3.286854

All bids subject to 10¢ per barrel discount for payment in 15 days. (Com. Ex. 175-A.) See 157 F. 2d at 175 F. 2d at 576.

Occasionally foreign cement has been imported, and cement dealers have sold it below the delivered price of the domestic product. Dealers who persisted in selling foreign cement were boycotted by the domestic producers. Officers of the Institute took the lead in securing pledges by producers not to permit sales f. o. b. mill to purchasers who furnished their own trucks, a practice regarded as seriously disruptive of the entire delivered price structure of the industry.

During the depression in the 1930's, slow business prompted some producers to deviate from the prices fixed by the delivered price system. Meetings were held by other producers; an effective plan was devised to punish the recalcitrants and bring them into line. The plan was simple but successful. Other producers made the recalcitrant's plant an involuntary base point. The base price was driven down with relatively insignificant losses to the producers who imposed the punitive basing point, but with heavy losses to the recalcitrant who had to make all its sales on this basis. In one instance, where a producer had made a low public bid, a punitive base point price was put on its plant and cement was reduced 10¢ per barrel; further reductions quickly followed until the base price at which this recalcitrant had to sell its cement dropped to 75¢ per barrel, scarcely one-half of its former base price of $1.45. Within six weeks after the base price hit 75¢ capitulation occurred and the recalcitrant joined a portland cement association. Cement in that locality then bounced back to $1.15, later to $1.35, and finally to $1.75.

The foregoing are but illustrations of the practices shown to have been utilized to maintain the basing point price system. Respondents offered testimony that cement is a standardized product, that "cement is cement," that no differences existed in quality or usefulness, and that purchasers demanded delivered price quotations because of the high cost of transportation from mill to dealer. There was evidence, however, that the Institute and its members had, in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements.[16] Respondents introduced the testimony of economists to the effect that competition alone could lead to the evolution of a multiple basing point system of uniform delivered prices and terms of sale for an industry with a standardized product and with relatively high freight costs. These economists testified that for the above reasons no inferences of collusion, agreement, or understanding could be drawn from the admitted fact that cement prices of all United States producers had for many years almost invariably been the same in every given locality in the country. There was also considerable testimony by other economic experts that the multiple basing point system of delivered prices as employed by respondents contravened accepted economic principles and could only have been maintained through collusion.

The Commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The Commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary—that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the Commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices. The Commission was authorized to find understanding, express or implied, from evidence that the industry's Institute actively worked, in cooperation with various of its members, to maintain the multiple basing point delivered

[16] See *Sugar Institute v. United States*, 297 U. S. 553, 600: "The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."

price system; that this pricing system is calculated to produce, and has produced, uniform prices and terms of sale throughout the country; and that all of the respondents have sold their cement substantially in accord with the pattern required by the multiple basing point system.[17]

Some of the respondents contend that particularly as to them crucial findings of participation by them in collective action to eliminate price competition and to bring about uniformity of cement prices are without testimonial support. On this ground they seek to have the proceedings dismissed as to them even though there may be adequate evidence to sustain the Commission's findings and order as to other respondents. The Commission rejected their contentions; the Circuit Court of Appeals did not consider them in its opinion. Those respondents whose individual contentions in this respect deserve special mention are central and southern California cement companies; Superior Portland Cement Company and Northwestern Portland Cement Company, both of the State of Washington; Huron Portland Cement Company, which does business in the Great Lakes region; and Marquette Cement Manufacturing Company with plants in Illinois and Missouri.

These companies support their separate contentions for particularized consideration by pointing out among other things that there was record evidence which showed differences between many of their sales methods and those practiced by other respondents. Each says that there was no direct evidence to connect it with all of the practices found to have been used by the Institute and other respondents to achieve delivered price uniformity.

The record does show such differences as those suggested. It is correct to say, therefore, that the sales practices of these particular respondents, and perhaps of other respondents as well, were not at all times precisely like the sales practices of all or any of the others. For example, the Commission found that in 1929 all of the central California mills became basing points. There was evidence that the Institute's rate books did not extend to the states in which some of the California companies did business. The Commission found that "In Southern California the basing point system of pricing is modified by an elaborate system of zone prices applicable in certain areas," that the California system does not require separate calculations to determine the delivered price at each destination, but that complete price lists were published by the companies showing delivered prices at substantially all delivery points. Northwestern and Superior assert that among other distinctive practices of theirs, they were willing to and did bid for government contracts on a mill price rather than a delivered price basis. Huron points out that it permitted the use of trucks to deliver cement, which practice, far from being consistent with the plan of others to maintain the basing point delivered price formulas, was frowned on by the Institute and others as endangering the success of the plan. Marquette emphasizes that it did not follow all the practices used to carry out the anti-competition plan, and urges that although the Commission rightly found that it had upon occasion undercut its competitors, it erroneously found that its admitted abandonment of price cutting was due to the combined pressure of other respondents, including the Institute.

What these particular respondents emphasize does serve to underscore certain findings which show that some respondents were more active and influential in the combination than were others,[18] and that some companies probably unwillingly abandoned

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[17] It is enough to warrant a finding of a "combination" within the meaning of the Sherman Act, if there is evidence that persons, with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme. *Interstate Circuit v. United States*, 306 U. S. 208, 226-227; *United States v. Masonite Corp.*, 316 U. S. 265, 275; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 722-723; *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 393-394. See *United States Maltsters Assn. v. Federal Trade Comm'n*, 152 F. 2d 161, 164: "We are of the view that the Commission's findings that a price fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself. Especially is this so when it is considered that petitioners' plants are located in four different states and that the barley from which the malt is manufactured is procured from eight or nine different states." See also *Milk & Ice Cream Can Institute v. Federal Trade Comm'n*, 152 F. 2d 478 481; *Fort Howard Paper Co. v. Federal Trade Comm'n*, 156 F. 2d 899, 907.

[18] For example, there was evidence which showed that Huron's officials participated in meetings held in connection with another respondent's practices deemed inimical to the policy of non-competition. As a result of that meeting the offending company agreed that it would "play the game 100%"; that it would not countenance "chiseling"; that it would not knowingly invade territory of its competitors, or "tear down the price structure."

competitive practices and entered into the combination. But none of the distinctions mentioned, or any other differences relied on by these particular respondents, justifies a holding that there was no substantial evidence to support the Commission's findings that they cooperated with all the others to achieve the ultimate objective of all—the elimination of price competition in the sale of cement. These respondents' special contentions only illustrate that the Commission was called upon to resolve factual issues as to each of them in the light of whatever relevant differences in their practices were shown by the evidence. For aside from the testimony indicating the differences in their individual sales practices, there was abundant evidence as to common practices of these respondents and the others on the basis of which the Commission was justified in finding cooperative conduct among all to achieve delivered price uniformity.

The evidence commonly applicable to these and the other respondents showed that all were members of the Institute and that the officers of some of these particular respondents were or had been officers of the Institute. We have already sustained findings that the Institute was organized to maintain the multiple basing point system as one of the "customs and usages" of the industry and that it participated in numerous activities intended to eliminate price competition through the collective efforts of the respondents. Evidence before the Commission also showed that the delivered prices of these respondents, like those of all the other respondents, were, with rare exceptions, identical with the delivered prices of all their competitors. Furthermore, there was evidence that all of these respondents, including those who sold cement on a zone basis in sections of southern California, employed the multiple basing point delivered price system on a portion of their sales.

Our conclusion is that there was evidence to support the Commission's findings that all of the respondents, including the California companies, Northwestern Portland and Superior Portland, Huron and Marquette, cooperated in carrying out the objectives of the basing point delivered price system.

Unfair Methods of Competition

We sustain the Commission's holding that concerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act. In so doing we give great weight to the Commission's conclusion, as this Court has done in other cases. *Federal Trade Comm'n v. R. F. Keppel & Bro.*, 291 U. S. 304, 314; *Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63. In the *Keppel* case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice, which if left alone, "destroys competition and establishes monopoly." *Federal Trade Comm'n v. Raladam Co.*, 283 U. S. 643, 647, 650. And see *Federal Trade Comm'n v. Raladam Co.*, 316 U. S. 149, 152.

We cannot say that the Commission is wrong in concluding that the delivered-price-system as here used provides an effective instrument which, if left free for use of the respondents, would result in complete destruction of competition and the establishment of monopoly in the cement industry. That the basing point price system may lend itself to industry-wide anti-competitive practices is illustrated in the following among other cases: *United States v. United States Gypsum Co.*, 333 U. S. 364, *Sugar Institute v. United States*, 297 U. S. 553. We uphold the Commission's conclusion that the basing point delivered price system employed by respondents is an unfair trade practice which the Trade Commission may suppress.[19]

The Price Discrimination Charge in Count Two

The Commission found that respondents' combination to use the multiple basing point

[19] While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a "combination" is an indispensable ingredient of an "unfair method of competition" under the Trade Commission Act. See *Federal Trade Comm'n v. Beech-Nut Packing Co.*, 257 U. S. 441, 455.

delivered price system had effected systematic price discrimination in violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act. 49 Stat. 1526, 15 U. S. C. § 13. Section 2 (a) of that Act declares it to "be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." Section 2 (b) provides that proof of discrimination in price (selling the same kind of goods cheaper to one purchaser than to another), makes out a prima facie case of violation, but permits the seller to rebut "the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ."

The Commission held that the varying mill nets received by respondents on sales between customers in different localities constituted a "discrimination in price between different purchasers" within the prohibition of § 2 (a), and that the effect of this discrimination was the substantial lessening of competition between respondents. The Circuit Court of Appeals reversed the Commission on this count. It agreed that respondents' prices were unlawful insofar as they involved the collection of phantom freight, but it held that prices involving only freight absorption came within the "good faith" proviso of § 2 (b).

The respondents contend that the differences in their net returns from sales in different localities which result from use of the multiple basing point delivered price system are not price discriminations within the meaning of § 2 (a). It held that these net return differences are price discriminations prohibited by § 2 (a), they contend that the discriminations were justified under § 2 (b) because "made in good faith to meet an equally low price of a competitor." Practically all the arguments presented by respondents in support of their contentions were considered by this Court and rejected in 1945 in *Corn Products Co. v. Federal Trade Comm'n,* 324 U. S. 726, and in the related case of *Federal Trade Comm'n v. Staley Co.,* 324 U. S. 746. As stated in the *Corn Products* opinion at 730, certiorari was granted in those two cases because the "questions involved" were "of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems." For this reason the questions there raised were given thorough consideration. Consequently, we see no reason for again reviewing the questions that were there decided.

In the *Corn Products* case the Court in holding illegal a single basing point system specifically reserved decision upon the legality under the Clayton Act of a multiple basing point price system, but only in view of the "good faith" proviso of § 2 (b), and referred at that point to the companion *Staley* opinion. 324 U. S. at 735. The latter case held that a seller could not justify the adoption of a competitor's basing point price system under § 2 (b) as a good faith attempt to meet the latter's equally low price. Thus the combined effect of the two cases was to forbid the adoption for sales purposes of any basing point pricing system. It is true that the Commission's complaint in the *Corn Products* and *Staley* cases simply charged the individual respondents with discrimination in price through use of a basing point price system, and did not, as here, allege a conspiracy or combination to use that system. But the holdings in those two cases that § 2 forbids a basing point price system are equally controlling here, where the use of such a system is found to have been the result of a combination. Respondents deny, however, that the *Corn Products* and *Staley* cases passed on the questions they here urge.

Corn Products Co. was engaged in the manufacture and sale of glucose. It had two plants, one in Chicago, one in Kansas City. Both plants sold "only at delivered prices, computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory." 324 U. S. at 729. This price system we held resulted in Corn Products Co. receiving from different purchasers different net amounts corresponding to differences in the amounts of phantom freight collected or of actual freight charges absorbed. We further held that "price discriminations are necessarily involved where the price basing point is distant from the point of production," because in such situa-

tions prices "usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by Section 2 (a) whenever they have the defined effect upon competition." *Federal Trade Comm'n v. Staley, supra* at 750-751. This was a direct holding that a pricing system involving both phantom freight and freight absorption violates § 2 (a) if under that system prices are computed for products actually shipped from one locality on the fiction that they were shipped from another. And this Court made the holding despite arguments, which are now repeated here, that in passing the Robinson-Patman Act, Congress manifested its purpose to sanction such pricing systems; that this Court had approved the system in *Maple Flooring Assn. v. United States,* 268 U. S. 563, and in *Cement Mfrs. Assn. v. United States,* 268 U. S. 588; and that there was no discrimination under this system between buyers at the same point of delivery.

Respondents attempt to distinguish their multiple basing point pricing system from those previously held unlawful by pointing out that in some situations their system involves neither phantom freight nor freight absorption; for example, sales by a base mill at its base price plus actual freight from the mill to the point of delivery involve neither phantom freight nor freight absorption. But the Corn Products pricing system which was condemned by this Court related to a base mill, that at Chicago, as well as to a non-base mill, at Kansas City. The Court did not permit this fact to relieve the pricing system from application of § 2, or to require any modification of the Commission's order. So here, we could not require the Commission to attempt to distinguish between sales made by a base mill involving actual freight costs and all other sales made by both base and non-base mills, when all mills adhere to a common pricing system.

Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Comm'n v. Staley, supra* at 753. Each of the respondents, whether all its mills were basing points or not, sold some cement at prices determined by the basing point formula and governed by other base mills. Thus, all respondents to this extent adopted a discriminatory pricing system condemned by § 2. As this in itself was evidence of the employment of the multiple basing point system by the respondents as a practice rather than as a good faith effort to meet "individual competitive situations," we think the Federal Trade Commission correctly concluded that the use of this cement basing point system violated the Act. Nor can we discern under these circumstances any distinction between the "good faith" proviso as applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms.

We hold that the Commission properly concluded that respondents' pricing system results in price discriminations. Its finding that the discriminations substantially lessened competition between respondents and that they were not made in good faith to meet a competitor's price are supported by evidence. Accordingly, the Commission was justified in issuing a cease and desist order against a continuation of the unlawful discriminatory pricing system.

The Order

There are several objections to the Commission's cease and desist order. We consider the objections, having in mind that the language of its prohibitions should be clear and precise in order that they may be understood by those against whom they are directed. See *Illinois Commerce Comm'n v. Thomson,* 318 U. S. 675, 685. But we also have in mind that the Commission has a wide discretion generally in the choice of remedies to cope with trade problems entrusted to it by the Commission Act. *Jacob Siegel Co. v. Federal Trade Comm'n,* 327 U. S. 608, 611-613.

There is a special reason, however, why courts should not lightly modify the Com-

mission's orders made in efforts to safeguard a competitive economy. Congress when it passed the Trade Commission Act felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation. Congress envisioned a commission trained in this type of work by experience in carrying out the functions imposed upon it.[29] To this end it provided in § 7 of the Act, 15 U. S. C. § 47, that courts might, if it should be concluded that the Government was entitled to a decree in an antitrust case, refer that case "to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." The Court could then adopt or reject such a report.

In the present proceeding the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience. The order it has prepared is we think clear and comprehensive. At the same time the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices. Nor do we find merit to the charges of surplusage in the order's terms.

Most of the objections to the order appear to rest on the premise that its terms will bar an individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor. The Commission disclaims that the order can possibly be so understood. Nor do we so understand it. As we read the order, all of its separate prohibiting paragraphs and subparagraphs, which need not here be set out, are modified and limited by a preamble. This preamble directs that all of the respondents "do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things . . . ." Then follow the prohibitory sentences. It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents.

Respondents have objected to the phrase "planned common course of action" in the preamble. The objection is twofold; first, that it adds nothing to the words that immediately follow it; and second, that if it does add anything, "the Commission should be required to state what this novel phrase means in this order and what it adds to the four words." It seems quite clear to us what the phrase means. It is merely an emphatic statement that the Commission is prohibiting concerted action—planned concerted action. The Commission chose a phrase perhaps more readily understood by businessmen than the accompanying legal words of like import.

Then there is objection to that phrase in the preamble which would prevent respondents, or any of them, from doing the prohibited things with "others not parties hereto." We see no merit in this objection. The Commission has found that the cement producers have from time to time secured the aid of others outside the industry who are not parties to this proceeding in carrying out their program for preserving the basing point pricing system as an instrument to suppress competition. Moreover, there will very likely be changes in the present ownership of cement mills, and the construction of new mills in the future may be reasonably anticipated. In view of these facts, the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves.

[29] In speaking of the authority granted the Commission to aid the courts in drafting antitrust decrees, the Senate Committee on Interstate Commerce said:

"These powers, partly administrative and partly quasi-judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

"With the exception of the *Knight* case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law." Sen. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914).

One other specific objection to the order will be noted. Paragraph 1 prohibits respondents from "quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents." This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action. The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices. There is little difference in effect between paragraph 1 to which objection is here raised and paragraph 5 which was sustained as proper in *Federal Trade Comm'n v. Beech-Nut Pkg. Co.,* 257 U. S. 441, 456 (1922), one of the first Trade Commission cases to come before this Court. Paragraph 5 in the *Beech-Nut* case read: ". . . by utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company."

Many other arguments have been presented by respondents. All have been examined, but we find them without merit.

The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

Dissenting Opinion

MR. JUSTICE BURTON, dissenting: While this dissent is written with special reference to case No. 23 against *The Cement Institute, et al.,* its conclusions apply to cases Nos. 23-34, all of which were considered together.

It is important to note that this Court has disagreed with the conclusions of the court below as to the material facts constituting the premise on which that court and this have based their respective conclusions. Accordingly, this Court has neither reversed nor directly passed upon the principal conclusion of law reached by the court below. The court below concluded that there was not sufficient evidence to support a finding by the Federal Trade Commission of the existence of that combination among the respondents to restrain the competition in price that was charged in both counts of the complaint.[1] The court below even doubted that the Commission had clearly stated that it found such a combination existed. However, rather than send the case back to the Commission for clarification of the Commission's findings of fact, the Court of Appeals assumed that those findings did state that such a combination existed. The court then concluded that, even if the Commission had so found, there was not sufficient evidence to support the finding.[2] Accordingly, the court below applied the law of the case to a set of facts that did not include such a combination. On that basis, it held that the Commission's order to cease and desist should be set aside. I agree with the court below in both of these

[1] ". . . For more than eight years last past, respondents have maintained and now have in effect a combination among themselves to hinder, lessen, restrict and restrain competition in price, among producing respondents in the course of their aforesaid commerce among the states. The said combination is made effective by mutual understanding or agreement to employ, and by the actual employment of, the methods and practices set forth in Paragraphs Five to Seven inclusive, of this Count." Count I, Paragraph Four, of complaint.

". . . As Paragraphs One to Five, inclusive, of Count II of this complaint the Commission hereby incorporates Paragraphs One to Five, inclusive, of Count I to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this Count." Count II, Paragraphs One to Five, inclusive, of complaint. 37 F. T. C. at pp. 102, 117.

[2] The Court of Appeals considered it a "highly controverted issue" as to whether the findings as made by the Commission, even if supported by sufficient evidence in the record, would "sustain the charge of combination alleged in the complaint." 157 F. 2d 533, 543. That court then said that if—

"this were an ordinary proceeding we would return it to the Commission for the purpose of revising its findings if it could and so desired in the light of what we have said. However, we are confronted with what might be termed an extraordinary situation. As already observed, it will soon be ten years since this proceeding was initiated. . . . We think the case should be on its way up and not down. For this reason we shall not return it to the Commission but shall proceed to decide the legal issues involved." *Id.* at p. 553.

conclusions.[3] On the other hand, this Court today has held not only that the Commission found the existence of the combination as charged, but that such finding is sufficiently supported by evidence in the record. This Court accordingly has applied the law of the case to a set of facts which includes a combination among the respondents to restrain competition in price as alleged in the complaint. The resulting effect is that, while the court below has held that without such a combination there was not the alleged violation either of § 5 of the Federal Trade Commission Act[4] or of § 2 of the amended Clayton Act,[5] yet on the other hand, this Court has held that, including such a combination, there was a violation of each of those Sections to the extent charged in the several cases. This Court, therefore, has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination of the kind charged by the Commission.[6]

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[3] The law of the case represents a development of the law in relation to delivered-price systems. See especially, *Federal Trade Comm'n v. Staley Mfg. Co.,* 324 U. S. 746; *Corn Products Refining Co. v. Federal Trade Comm'n,* 324 U. S. 726; *Sugar Institute, Inc. v. United States,* 297 U. S. 553; *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1; *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588; *Maple Flooring Manufacturers Assn. v. United States,* 268 U. S. 563; *United States v. American Linseed Oil Co.,* 262 U. S. 371; *Aetna Portland Cement Co. v. Federal Trade Comm'n,* 157 F. 2d 533 (C. C. A. 7th) (this case below); *Fort Howard Paper Co. v. Federal Trade Comm'n,* 156 F. 2d 899 (C. C. A. 7th); *United States Maltsters Assn. v. Federal Trade Comm'n,* 152 F. 2d 161 (C. C. A. 7th).

[4] "Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . ."

52 Stat. 111-112, 15 U. S. C. § 45.

[5] Sec. 2. (a) . . . it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

49 Stat. 1526, 15 U. S. C. § 13.

[6] The final section of the opinion of the Court makes appropriate disclaimers as to the breadth of the Commission's order and of its own decision sustaining that order. Among these is the statement that "the order by its terms is directed solely at concerted, not individual activity on the part of the respondents." These disclaimers are further supported by such statements as the following in the brief filed for the Commission in this Court:

"It is plain that under this order there is a violation of its provisions only in the event that there is a 'planned common course of action, understanding, agreement, combination, or conspiracy' to which a respondent is a party to do something specified in the numbered paragraphs of the order. This is an essential qualification of the prohibitions of these paragraphs. The order therefore leaves each respondent free —provided he acts individually and with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor and a free market—to absorb freight in order to meet a competitor's low price or to sell at a delivered price

The Commission based its conclusion upon its finding of the existence of the combination charged in its complaint.[7] The court below was in a position to, and did, judicially examine the record at length, hear extended argument upon it and pass upon the many inferences to be drawn from the evidence it contained. In the light of that court's recent experience with many cases in this particular field of the law, and of what it has described as its "long and careful study of the situation," it concluded that the evidence was not sufficient to support a finding of the combination charged. Its opinion reviewed the evidence and pointed out many weaknesses in the inferences upon which the Commission had based its finding of the existence of the alleged unlawful combination.[8]

The absence of sufficient evidence to support the conclusions of the Commission was especially impressive in the cases concerning the central California group, the southern California group, the Washington-Oregon group[9] and the Huron

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"What the order does is to bar acting in concert in adopting, continuing, or implementing the multiple basing-point delivered-price system or any similar system which necessarily operates to suppress price competition. The order is aimed at uprooting the pricing system which has flourished by virtue of the agreement among respondents, charged and found, to stifle price competition by selling cement at identical prices.

"The error of the court below is epitomized in its statement that 'this court is now urged to hold that the [multiple basing-point delivered-price] system is illegal *per se*, and to require that cement be sold on an f. o. b. plant basis' . . . . The system as such was not attacked; what was attacked was agreement to maintain and implement the system and to eliminate price competition.

". . . Had the Commission inferred agreement from the system alone, it might loosely be said that the system itself was attacked as illegal *per se*. But this is not what the Commission did. Its searching inquiry disclosed in specific detail the collective action which had been taken to implement and continue the system. And from all these facts, as well as the existence of the system itself, the Commission found combination among respondents to suppress price competition."

The statement by this Court, in its note 19, to the effect that the Court does not hold "that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act" is accompanied by a citation which shows that that statement is one of general application and that it is not intended as a denial that the combination found by the Commission in this case is not a highly material and possibly decisive factor in this particular case.

[7] See paragraph twenty-six of the Commission's "Findings as to Facts and Conclusion":

". . . The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental, of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; . . . ." 37 F. T. C. at p. 257.

The Commission followed this paragraph twenty-six immediately with the following conclusion of law:

"The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by respondents, as hereinabove set out, constitute violations of subsection (a) of Section 2 of an Act of Congress entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (the Clayton Act), as amended by Act approved June 19, 1936 (the Robinson-Patman Act)." Id. at p. 258.

[8] A further review of the insufficiently supported inferences would be of little value here. By way of illustration, however, it may be noted that the Commission and this Court, in its note 15, have emphasized the fact that secret sealed bids for 6,000 barrels of cement were received by a public agency from ten or more of the respondent companies and that the bid of each company was precisely $3.286854 a barrel. Such a fractional identity of price would, on its face, create an inference of collusion. However, the Commission failed to explain, as has the court below, that the highly fractional figure merely reflected the freight charge. The bid, apart from the freight charge, was $2.10 per barrel while "the land grant freight rate to which the government was entitled from the nearest mill of the eleven bidders was $1.1865854 [$1.186854] per barrel." *Aetna Portland Cement Co. v. Federal Trade Comm'n*, 157 F. 2d 533, 567.

[9] The central California group refers to the following respondents:

Calaveras Cement Company,
Pacific Portland Cement Company,
Santa Cruz Portland Cement Company,
Yosemite Portland Cement Corporation.

The southern California group to:

California Portland Cement Company,
Monolith Portland Cement Company,
Riverside Cement Company,
Southwestern Portland Cement Company (Victorville, California, plant).

The Washington-Oregon group to:

Beaver Portland Cement Company,

Portland Cement Company. The decision of the Commission and of this Court even in those cases was made dependent upon the conclusion of the existence of a combination, however attenuated the basis for that conclusion might be.[10] The cease and desist orders in all of these cases are therefore to be regarded as based upon the unique and extended record presented in this case, including what this Court refers to as "abundant evidence as to common practices of these respondents and the others on the basis of which the Commission was justified in finding cooperative conduct among all to achieve delivered price uniformity."

On the view of the evidence taken by the court below and by me, that evidence does not support the Commission's finding of the combination as charged. Unlike the Commission and the majority of this Court, the lower court and I, therefore, have faced the further issue presented by the Commission's charges unsupported by a finding of the alleged combination. This has led us to consider an issue quite different from that decided by this Court today. That issue lies within the long-established and widespread practice by individuals of bona fide competition by freight absorption with which practice Congress has declined to interfere, although asked to do so.[11] This is the field where a producer, for his own purposes and without collusion, often ships his product to a customer who, in terms of freight charges, is located nearer to one or more of the producer's competitors than to the producer himself. In selling to such a customer, this producer is at an obvious freight disadvantage. To meet the lower delivered-price of his competitor, the producer, therefore, reduces his delivered-price in that area by a sum sufficient to absorb his freight disadvantage. He might do this for many reasons. For example, this customer might be such a large customer that the volume of his orders would yield such a return

Lehigh Portland Cement Company (Metaline Falls, Washington, plant),
Northwestern Portland Cement Company,
Oregon Portland Cement Company,
Spokane Portland Cement Company,
Superior Portland Cement, Inc.

[10] In a general finding the Commission indicated that the evidence concerning certain of the respondent companies was less conclusive than that relating to some of the other respondents.

"Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action." Commission's "Findings as to Facts and Conclusion," Paragraph Six (a), 37 F. T. C. at p. 144.

[11] "Furthermore, the basing point price system has been in use by industry for almost a half century. There has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad. Numerous bills have been introduced in Congress seeking to outlaw its use. Countless time has been spent in hearings by Congressional committees, before whom it has been assailed and defended. The pages of the Congressional Record bear mute but indisputable proof of the fact that Congress has repeatedly refused to declare its use illegal. There is no occasion to relate this Congressional history. It is a matter of common and general knowledge. In the *Corn Products* case, the court in commenting upon some of this legislative history stated (324 U. S. at page 737, 65 S. Ct. at page 967, 89 L. Ed. 1320): 'We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.' Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal *per se*, and to require that cement be sold on an f. o. b. plant basis.

"In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain. We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." *Aetna Portland Cement Co. v. Federal Trade Comm'n, supra*, at p. 573.
p. 573.

See §§ 1 and 2, Sherman Antitrust Act, approved July 2, 1890, 26 Stat. 209, 15, U. S. C. §§ 1 and 2; § 5, Federal Trade Commission Act, approved September 26, 1914, 38 Stat. 719; § 2, Clayton Act, approved October 15, 1914, 38 Stat. 730; § 2, Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13; § 5, Federal Trade Commission Act, as amended, March 21, 1938, 52 Stat. 111, 15 U. S. C. § 45. See Bill "To Prevent Unnecessary and Wasteful Cross-Hauling" introduced by Senator Wheeler in 1936 banning basing-point systems by statute, but not reported out of Committee. Hearings before Senate Committee on Interstate Commerce on S. 4055, 74th Cong., 2d Sess. (1936), and see p. 325. See also, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 14 (1936), and debates upon the Robinson-Patman Bill, 80 Cong. Rec. 8102, 8118, 8140, 8223-8224 (1936).

to the producer that the producer, by distributing his fixed charges over the resultingly increased volume of business, could absorb the freight differential without loss of profit to his business as a whole and without raising any charges to his other customers. The securing of this particular business might even enable the producer to reduce his own basic factory price to all his customers. It might make the difference between a profitable and a losing business, resulting in the producer's solvency or bankruptcy. If the advantage to be derived from this customer's business were not sufficient, in itself, thus completely to absorb the freight differential, the producer might absorb all or part of such differential by a reduction in his net earnings without affecting his other customers. Whether or not he would be justified in absorbing any or all of this freight differential by increasing his charges to other customers, in his own freight-advantage area, raises a separate question as to the validity of such an increase. The Commission and the majority of this Court did not reach the question of individual and independent absorptions of freight charges by one or more producers to meet lower prices of competitors in such competitors' respective areas of freight advantage.

I conclude, therefore, that the judgment of the Court of Appeals setting aside the order of the Federal Trade Commission should have been affirmed, but I emphasize what I regard as equally important—that this Court, in sustaining the order of the Commission, has done so on such a different premise that it has not passed upon the validity of freight absorptions made in sales by one or more producers in the course of bona fide competition, where such producers have not acted as part of a combination to hinder, lessen, restrain or suppress competition in the sale or distribution of the products so sold.

[¶ 62,238] United States v. Scophony Corporation of America, General Precision Equipment Corporation, Television Productions, Inc., Paramount Pictures, Inc., Scophony Limited, et al.

In the Supreme Court of the United States. No. 41. April 26, 1948.

On Appeal from the United States District Court for the Southern District of New York.

Clayton Antitrust Act

Venue—Corporation Transacting Business in District.—The acts of a foreign corporation, in shifting from a course of business in pursuit of certain corporate objects, such as manufacturing and selling, to another continuing mode of achieving a basic corporate objective, namely, the exploiting of patents by complex working arrangements partaking of the character of a common enterprise with others, and requiring constant supervision and intervention beyond normal exercise of shareholders' rights by the participating companies' representatives as such, constitute the engaging in business required to render such corporation subject to the venue provision of Section 12 of the Clayton Act. Cessation of manufacturing and selling activities by a corporation, and the subsequent execution by it of agreements amounting to a joint adventure with other companies for the licensing and exploiting of its patents, amounted to such continuing, intensive activities as to constitute "transacting business" within the meaning of the statute.

See the Clayton Act annotations, Vol. 1, ¶ 2032.

Reversing and remanding the decision of the United States District Court for the Southern District of New York, 69 Fed. Supp. 666, reported in '44-'47 Court Decisions Supp. at ¶ 57,506.

For appellant: George T. Washington, Acting Solicitor General.

For appellee: Edwin Foster Blair.

[*Facts*]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The appellee Scophony, Limited is a British corporation which has its offices and principal place of business in London, England. The question is whether that company "transacted business" and was "found" within the Southern District of New York under § 12 of the Clayton Act,[1] so that it could be sued and served there in a civil proceeding charging violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The violations stated were that Scophony and the other defendants[2] had monopolized, attempted to monopolize, and conspired to restrain and monopolize interstate and foreign commerce in products, patents and inventions useful in television and allied industries. The cause is here on direct appeal[3] from an order of the District Court granting Scophony's motion to quash the service of process and dismiss the complaint as to it. 69 F. Supp. 666.

Scophony manufactures and sells television apparatus and is the owner and licensor of inventions and patents covering television reception and transmission.[4] With the outbreak of the European War in 1939, the British Broadcasting Corporation stopped television broadcasting. Consequently it became impossible for Scophony to continue in the commercial development, manufacture and sale of television equipment in England. It therefore sent personnel to the United States, opened an office in New York City, and began demonstrations of its product and other activities preliminary to establishing a manufacturing and selling business in this country.

Late in 1941 Scophony found itself in financial distress, in part because of restrictions imposed by the British Government on the export of currency. It became imperative that new capital from American sources be found for the enterprise. Accordingly, Arthur Levey, a director of Scophony and one of its founders, undertook negotiations in New York with American motion picture and television interests, including Paramount and General Precision. They culminated in the execution of three interlacing contracts, the so-called master agreement of July 31, 1942, and two supplemental agreements of August 11, 1942. Copies of the latter had been attached to the master agreement, which provided for their later execution, and they when executed in effect carried out its terms. The alleged violations of the Sherman Act center around these agreements.

The master agreement was executed by Scophony, William George Elcock, as mortgagee of all of Scophony's assets, General Precision, and Productions, the latter a wholly owned subsidiary of Paramount. It provided for the formation of a new Delaware corporation, American Scophony, with an authorized capital stock of 1,000 Class "A" shares and a like number of Class "B" shares. Scophony and individuals interested in it[5] were to be given the Class "A" shares. Under the agreement, ownership of those shares conferred the right to elect three of American Scophony's five directors and its president, vice president and treasurer. The Class "B" shares were allotted to General Precision and Productions. By virtue of

[1] "Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all processes in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 Stat. 736, 15 U. S. C. § 22.

[2] The suit was instituted against Scophony, Limited (designated in this opinion as "Scophony"), Scophony Corporation of America (designated "American Scophony"), General Precision Equipment Corporation (designated "General Precision"), Television Productions, Inc. (designated "Productions"), Paramount Pictures, Inc. (designated "Paramount"), and three individual defendants, Arthur Levey and the presidents of General Precision and Productions. The corporations, except Scophony, are incorporated in the United States.

[3] Pursuant to § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, 43 Stat. 938, 28 U. S. C. § 345.

[4] The inventions and patents in the main relate to two systems of television transmission and reception, one known as the "supersonic" system and the other as the "skiatron" system. We shall at times refer to the present and future patents, processes, designs, technical data, etc., relating to these two systems as the Scophony inventions.

A third system, the cathode-fluorescent system, was developed early in this century and is the principal method of television transmission and reception used in the United States today.

[5] An agreement of February 4, 1943, amended the original agreement so as to give two-thirds of the "A" shares to Scophony, the remainder to individuals.

such ownership those two corporations were entitled to name the remaining two directors and the secretary and assistant secretary of American Scophony. Levey was named in the agreement as the president and a director of the new corporation.

The master agreement set forth the general desire of the parties to promote the utilization of the Scophony inventions "particularly in the United States of America and generally in the Western Hemisphere." It then stated that American Scophony had been organized "as a means therefor." Scophony agreed to transfer all its television equipment then in the United States to American Scophony and to enter into the first supplemental agreement. Scophony, with the other parties, also undertook to cause American Scophony to enter into both supplemental agreements. For the "B" stock in American Scophony and other rights acquired, General Precision and Productions agreed to enter into the second supplemental agreement and to pay specified sums in cash to Scophony or for its benefit in liquidation of listed obligations.

Pursuant to the master agreement's terms, the first supplemental agreement was executed by Scophony, Elcock, as mortgagee of its assets, and American Scophony; the other, by American Scophony, General Precision, and Productions. For present purposes it is necessary to set forth only the general effect of the agreements taken together. Scophony transferred to American Scophony not only all of its equipment in the United States, but also all patents and other interests in the Scophony inventions within the Western Hemisphere. General Precision and Productions were granted exclusive licenses under American Scophony's patents. They agreed to pay royalties on the products produced under the licenses and American Scophony undertook to transmit fifty per cent of such royalties to Scophony. American Scophony gave Scophony an exclusive sublicense for the Eastern Hemisphere on a royalty basis under all patents licensed to American Scophony by General Precision and Productions. Provision was also made for the interchange of technical data and information respecting the Scophony inventions. Finally, it was agreed that Scophony would not market any product involving the Scophony inventions in the Western Hemisphere and that General Precision and Productions would not export any such product to the Eastern Hemisphere.[6]

This rather complex plan soon fell of its own weight. Starting in 1943, an impasse developed in the affairs of American Scophony. It stemmed from the failure and unwillingness of General Precision and Productions to exploit the Scophony inventions themselves and their refusal to modify the agreements to permit the licensing of other American firms under the inventions. Several manufacturers expressed an interest in obtaining licenses. But in each instance the directors representing the American interests holding the Class "B" shares were unwilling to approve the necessary modifications in the existing arrangements. In July, 1945, the directors representing the "B" interests resigned. This made it impossible for American Scophony to transact business, since charter and by-law provisions adopted pursuant to the master and supplemental agreements required the presence of at least one Class "B" director for a quorum. Adding to the difficulties were American Scophony's shortage of funds and the apparent reluctance of the American interests to cooperate in efforts to place American Scophony on firmer financial footing. American Scophony's affairs were further complicated by the institution of the present antitrust proceeding on December 18, 1945.

Levey kept Scophony advised of developments in the dispute between the "A" and "B" factions and otherwise made progress reports to Scophony on its interests in the United States. As the impasse heightened, other individuals were authorized by Scophony to act in its behalf in the United States.[7] Service of process as to Scophony

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[6] The complaint alleged that the effects of the agreements and understandings were to create a territorial division of the manufacture and sale of television products, assigning the Eastern Hemisphere to Scophony and the Western Hemisphere to General Precision and Productions; to suppress and restrain competition in the manufacture and sale of television equipment, both in the domestic and in the export markets; and to give General Precision and Productions monopoly power over the Scophony inventions which enabled them to suppress their exploitation and deprive others of their use.

[7] These included at various times two American attorneys, a member of the British Parliament, and an English officer.

was made first on Levey in New York City on December 20, 1945.[8]

On April 5, 1946, a summons and a copy of the complaint directed to Scophony were also served on Elcock in New York City. He was a dominant figure in Scophony. He arrived in this country in March, 1946, with the mission of investigating and ending the impasse and disposing of Scophony's interest in American Scophony. Elcock not only was mortgagee of Scophony's assets by virtue of having made a large loan to the company. He was also its financial comptroller and a member of its board. At the time of service on him, he held a comprehensive power of attorney, irrevocable until March, 1947, giving him complete power to act with regard to Scophony's interests in the United States, including those in American Scophony.[9]

The District Court, in granting the motion to quash service and dismiss the complaint as to Scophony, held that it was not "found" in the Southern District of New York within the meaning of § 12. The Court rejected the contention that Scophony was within the jurisdiction by reason of the activities of its agents. It concluded that none of those activities related to Scophony's ordinary business of manufacturing, selling and licensing television apparatus, but all were confined to protecting Scophony's interest in American Scophony. It also found that the conduct of American Scophony did not serve to bring Scophony within the jurisdiction. 69 F. Supp. 666.

[*Venue Under Act*]

I.

Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits aganist corporations; second, to determine where process in such suits may be served. Venue may be had "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business*." And all process may be served "in the district of which it is an inhabitant, or wherever it may be found." (Emphasis added.)

A plain and literal reading of the section's words gives it deceptively simple appearance. The source of trouble lies in the use of verbs descriptive of the behavior of human beings to describe that of entities characterized by Chief Justice Marshall as "artificial . . . , invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 4 Wheat. 518, 636.[10]

The process of translating group or institutional relations in terms of individual ones, and so keeping them distinct from the nongroup relations of the people whose group rights are thus integrated, is perennial, not only because the law's norm is so much the individual man, but also because the continuing evolution of institutions more and more compels fitting them into individualistically conceived legal patterns. Perhaps in no other field have the vagaries of this process been exemplified more or more often than in the determination of matters of jurisdiction, venue and liability to service of process in our federal system.[11] It has

[8] Levey immediately informed Scophony in England of this action and advised it to designate appropriate counsel. On December 21, 1945, he sent a copy of the complaint to Scophony by airmail.

[9] The power of attorney set forth Scophony's desire to appoint Elcock to act "and bind the Company in all or any matters affecting the Company's interests in the United States . . . ." It then authorized Elcock to institute and prosecute all proceedings necessary to conserve Scophony's interests; to defend or compromise any suits brought against Scophony; to settle accounts; to engage or dismiss subagents; to borrow money; to dispose of any and all of Scophony's property and interests in the United States; and "generally to represent the Company in the United States of America in all matters in any way affecting or pertaining to the Company . . . ."

[10] More than once Marshall had difficulty in transferring to corporations or other institutions legal conceptions and relations shaped in nomenclature and in fact from normative evolution in relation to persons of flesh and blood.

See, *e. g.*, *Bank v. Deveaux*, 5 Cranch 61, where he was unable to adapt the concept of corporate "inhabitancy," applied in decisions he cited, for fitting the corporation into the constitutional scheme of diversity jurisdiction. His individualistic solution brought difficulties which lasted for decades. See Henderson, *The Position of Foreign Corporations in American Constitutional Law* 50-76; Harris, A Corporation As a Citizen, 1 Va. L. Rev. 507. Cf. *Baptist Association v. Hart's Executors*, 4 Wheat. 1.

[11] See, *e. g.*, Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory, 30 Harv. L. Rev. 676; Scott, Jurisdiction over Nonresidents Doing Business within a State, 32 Harv. L. Rev. 871; Bullington, Jurisdiction over Foreign Corporations, 6 N. C. L. Rev. 147; Note, What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction, 29 Col. L. Rev. 187.

gone on from *Bank v. Deveaux,* 5 Cranch 61, and *Baptist Association v. Hart's Executors,* 4 Wheat. 1, to *International Shoe Co. v. Washington,* 326 U. S. 310, and now this case.[12]

The translation, or rather the necessity for it, permeates every significant word of § 12, not wholly excluding "or transacts business." If the statutory slate were clean, one might readily conclude that the words "inhabitant" and "found" would have the same meaning for locating both venue and the proper place for serving process. But even so, each of those terms and indeed the term "transacts business" would have to be given specific content actually descriptive of corporate events taking place within specified areas. Because all corporate action must be vicarious, that content could be determined only by an act of judgment which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand.

The statutory slate, however, is neither entirely new nor clean. Both legislative and judicial hands have written upon it. The writing is meandering, unclear in part, and partly erased. But it cannot be disregarded. What is legible must furnish guidance to decision. We deal here with a problem of statutory construction, not one of constitutional import.[13] Nor do we have any question of the exercise of Congress' power to its farthest limit. The issue is simply how far Congress meant to go, and specifically whether it intended to create venue and liability to service of process through the occurrence within a district of the kinds of acts done here on Scophony's behalf.

Section 12 of the Clayton Act is an enlargement of § 7 of the Sherman Anti-Trust Act. *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359. The earlier statute provided for suit in the district in which the defendant "resides or is found." 26 Stat. 210. That wording controlled for both venue and fixing the places for service of process.

We do not stop to review the decisions construing § 7 and similar statutes, cf. *Suttle v. Reich Bros.,* 333 U. S. 163; see *International Shoe Co. v. Washington, supra,* at 317-319, except to refer to *People's Tobacco Co. v. American Tobacco Co.,* 246 U. S. 79. There the foreign corporation was sued in a district in which it did not "reside." Because the Court found that the company had withdrawn from the state in which the district was located and had revoked the authority of its principal agents there, it held that the defendant was not "found" in the district, although certain corporate activities continued.

The conventional rationalization applied equated "found" in sequence to "presence," to "doing business by its agents there," to "of a character warranting inference of subjection to the local jurisdiction."[14] The facts that the company continued to advertise its goods in the state and district, to make interstate sales to jobbers there, to send in drummers who solicited retail orders to be turned over to the jobbers, and finally to own stock in local subsidiaries, were held not to constitute the sort of "doing business" warranting the inference of subjection to the local jurisdiction for the statute's purposes. *International Harvester v. Kentucky,* 234 U. S. 579, was narrowly distinguished. 246 U. S. at 87.

The suit in the *People's Tobacco* case was begun in 1912, but the decision was not rendered until 1918. Meanwhile, in 1914, Congress had enacted the Clayton Act, including § 12. The following year the *Eastman* case, *supra,* was begun in the Northern District of Georgia. Process issued and was served

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[12] The very federalism of our structure magnifies the problem, by multiplying state and other governmental boundaries across which corporate activity runs with the greatest freedom. The problem arises on constitutional as well as statutory and common-law levels. Cf. *International Shoe Co. v. Washington,* 326 U. S. 310; *Puerto Rico v. Russell & Co.,* 288 U. S. 476.

[13] Appellee makes no suggestion of a constitutional issue. The Government, however, suggests that, in view of our recent decision in *International Shoe Co. v. Washington,* 326 U. S. 310, which was concerned with the jurisdiction of a state over a foreign corporation for purposes of suit and service of process, and in view of aspects of similarity between that problem and the one now presented, we extend to this case and to § 12 the criteria there formulated and applied. There is no necessity for doing so. The facts of the two cases are considerably different and, as we have said, we are not concerned here with finding the utmost reach of Congress' power.

[14] The Court said: "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted. *Philadelphia & Reading Ry. Co. v. McKibbin,* 243 U. S. 264; *St. Louis Southwestern Ry. Co. v. Alexander,* 227 U. S. 218, 226." 246 U. S. 79, 87.

under § 12 on the defendant, a New York corporation, at its principal place of business in Rochester. In 1927 this Court sustained both the venue and the service, as against objections that § 12 had not broadened § 7 of the Sherman Act, but merely made explicit what had been decided under it.[15]

The argument was certainly plausible, but for the fact that it made the addition of "or transacts business" to "inhabitant" and "found" in § 12 redundant and meaningless. The Court refused to accept the argument, because doing so would have defeated the plain remedial purpose of § 12.[16] That section was enacted, it held, to enlarge the jurisdiction given by § 7 of the Sherman Act over corporations by adding those words, "so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business'—although neither residing nor 'found' therein—in which case the process may be issued to and served in a district in which the corporation either resides or is 'found.'" 273 U. S. at 372.[17]

This construction gave the words "transacts business" a much broader meaning for establishing venue than the concept of "carrying on business" denoted by "found" under the preexisting statute and decisions. The scope of the addition was indicated by the statement "that a corporation is engaged in transacting business in a district . . . if *in fact, in the ordinary and usual sense,* it 'transacts business' therein *of any substantial character.*" *Id.* at 373. (Italics added.)

In other words, for venue purposes, the Court sloughed off the highly technical distinctions theretofore glossed upon "found" for filling that term with particularized meaning, or emptying it, under the translation of "carrying on business." In their stead it substituted the practical and broader business conception of engaging in any substantial business operations. Cf. *Frene v. Louisville Cement Co.,* 134 F. 2d 511; *International Shoe Co. v. Washington, supra.* Refinements such as previously were made under the "mere solicitation" and "solicitation plus" criteria, cf. *Frene v. Louisville Cement Co., supra,* and like those drawn, *e. g.,* between the *People's Tobacco* and *International Harvester* cases, *supra,* were no longer determinative. The practical, everyday business or commercial concept of doing or carrying on business "of any substantial character" became the test of venue.

Applying it, the Court stated that "manifestly" the Eastman Company was not "present" in the Georgia district under the earlier tests of § 7 of the Sherman Act, either for the purpose of venue or as being amenable to service of process. P. 371. It thus aligned the case under those tests with the *People's Tobacco* decision rather than the *International Harvester* one. But, under the broader room given by § 12, venue was held to have been established.[18]

Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"-"present"-"carrying-on-business" sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it re-

[15] Counsel for the defendant equated the words "inhabitant" and "found" of § 12 to "resides or is found" of § 7 of the Sherman Act. They then went on to argue that the addition of "or transacts business" in the venue clause of § 12 did not broaden the section, but merely made explicit what the Court had already decided under the earlier statute. 273 U. S. at 361. This, because "or transacts business" was said to be nothing more than "carrying on business," which was the content the Court had given to "is found" in § 7, by the *People's Tobacco* case and others.

[16] Rather, the Court said, the section supplements "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—often an insuperable obstacle —and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation *in fact* transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found.'" 273 U. S. 359, 373. (Italics added.)

[17] See also note 16.

[18] The concrete facts held to sustain the venue were that the Eastman Company was engaged "not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales . . . ." 273 U. S. at 374.

The Court also expressly stated that, in contrast to prior limitations, the company was "none the less engaged in transacting business . . . because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district," referring in this connection to *International Harvester v. Kentucky,* 234 U. S. 579, 587, and *Davis v. Farmers Co-operative Co.,* 262 U. S. 312, 316. 273 U. S. 359, 373.

lieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating [19] to its headquarters defeat or delay the retribution due.

With venue established under the new and broader approach, the *Eastman* case presented no problem regarding the service of process, except possibly for the ruling that process might run to another district than the one in which suit was brought. 273 U. S. at 374. For by whatever test, whether of the old § 7 or the new § 12, the service was good. As we have noted, the process had been directed to and served in the district where the Eastman Company was an "inhabitant." [20] There was therefore no necessity for ruling upon the meaning of "found" as relating to any other district. Any such ruling necessarily could be no more than dictum, since no such issue was presented by the facts.

Nevertheless, for service of process § 12 had specified "the district of which it is an inhabitant, or wherever it may be found" without adding "or transacts business," as was done in the venue clause. Accordingly the Court took account of this difference and went on to indicate that for purposes of liability to service the section merely carried forward the preexisting law, so that in some situations service in a district would not be valid, even though venue were clearly established under § 12.[21]

But regardless of the pronouncement's effect, the decision, by resolving the venue problem, substantially removed the serious obstacles and practical immunities to suit which had grown up under § 7 of the Sherman Act, in by far the larger number of antitrust cases, *i. e.*, for those not involving companies incorporated outside the United States. In them the fact that service may be dubious in the district of suit and can be assured only by causing process to run to another district, as in the *Eastman* case, presents no such obstacle to bringing and maintaining the suit as existed prior to § 12. The necessity, if it is that, for directing process to another district, creates at most some slight inconvenience and additional expense.

[*Corporation's Activities*]

II.

In this case, however, we deal with a company incorporated outside the United States. But there can be no question of the existence of "jurisdiction," in the sense of venue under § 12, over Scophony in the Southern District of New York. To say that on the facts presented Scophony transacted no business "of any substantial character" there during the period covered by institution of the suit and the times of serving process would be to disregard the practical, nontechnical, business standard supplied by "or transacts business" in the venue provision. It would be also to ignore the fact that Scophony then and there was carrying on largely, if not exclusively, the only business in which it could engage at the time.

Scophony's operations in New York were a continuous course of business before and throughout the period in question here. They consisted in strenuous efforts not simply to save an American "investment," as is urged, but to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war. As with such efforts generally, changes in method and immediate objective took place as each one tried in turn failed to work out. But those changes brought none in ultimate objective, namely, to find a mode of saving and profitably exploiting the

[19] *I. e.*, by artful arrangement of agents' authority, or of their comings and goings, or of the geography of minute incidents in contracting. Cf. *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79. Such artifice saw its day end for creating substantive liability through a course of dealing contrary to the antitrust statutes, but without thereby also creating venue to enforce it, with the advent of § 12.

[20] As has been stated, the company was incorporated in New York and had its principal office and place of business in Rochester.

[21] Although difference of that sort may appear to be generally incongruous, since ordinarily it would seem that susceptibility to suit in a district should be accompanied by amenability to process there, such things of course are for Congress' determination as matters of policy relating to the scope and correlation, or lack of it, of venue and service provisions. There is certainly no constitutional requirement that the two be coextensive. And to support the dictum, if it were now necessary to rule on the matter, considerations beyond the verbal difference to which the *Eastman* opinion pointed might be stated.

Scophony inventions; and none in the intensity or continuity with which that object was pursued in New York.

First was the phase of attempting to set up in this country as manufacturer and seller of television equipment. When that failed, the company turned to licensing and exploiting its patents by other means. This was done through the complicated arrangements for what practically if not also technically was a joint adventure with other companies. That project was carried out not merely through corporate forms and arrangements but by contracts binding the participating companies to the common enterprise, as well as the special medium of executing it, American Scophony. In this each corporate participant had its special functions, controls and restrictions created in part by share ownership in American Scophony, but also in important respects by contract both beyond the stock controls and dictating their character.[22] Finally, as the affairs of the keystone of the structure, American Scophony, came to and continued in stalemate, the immediate objective shifted once more, to getting out of the trap. Again the shift was in direct and constant pursuit of Scophony's primary and continuing object, to find a way to save and to exploit its patents.

This is a story of business in trouble, even desperate. We may have sympathy for the company's plight. But it does not follow that such continuing, intensive activities to save the business and put it on a normal course, even though shifting as they did in the successive winds that blew, did not constitute "transacting business" of "any substantial character." Nor can we say that any of the major shifts in tacking toward the ultimate end stopped or interrupted the course of the company's business activity. At no time was the drive toward achieving its basic objects suspended.

Appellee would avoid this view and its consequences by taking an entirely different conception of what took place. It emphasizes that Scophony's corporate objects, as stated in its charter, were to manufacture and sell television equipment. Hence it concludes that when all New York activity directly pointing to that end ceased, and was followed by the phase of seeking to exploit the patents through the arrangements centering around American Scophony, the British company ceased to be engaged in promoting its corporate objects and thus in carrying on or doing business in New York for the relevant statutory purposes. From then on, it is claimed, Scophony became concerned solely with creating and protecting an "investment," namely, in American Scophony's shares. Nor did Scophony resume the doing of business when that effort also failed and the final stage of seeking to break the impasse arrived, because manufacturing and sale of equipment were not revived.

To this view of the sequence of events appellee then seeks to apply this Court's decisions interpreting "found" under § 7 and similar requirements in application to manufacturing and selling companies,[23] and also the like *Eastman* dictum concerning § 12. In doing this it seeks especially to invalidate the service by casting up from those decisions a check list of specific and often minor incidents of that sort of business done or not done as relevant to whether business is being carried on, and then matching against the list Scophony's New York activities as of the times of service.[24]

[22] *E. g.*, the hemispheric division of territories between the British and American interests; the exclusive licensing agreements which prevented Scophony from granting licenses to interested American companies; and the arrangements for the interchange of technical information were contractual, not charter limitations on corporate powers. The particular corporate medium used, American Scophony, and the refinements in its charter and by-laws giving General Precision and Productions an effective veto power over its operations were themselves aspects of the contractual undertakings embodied in the master agreement and the two supplemental agreements. The master agreement also designated the persons to become officers and directors of American Scophony, as representatives of both the British and the American interests.

[23] *E. g., Cannon Mfg. Co. v. Cudahy Co.*, 267 U. S. 333; *Consolidated Textile Corp. v. Gregory*, 289 U. S. 85; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79.

[24] The catalogue emphasizes things not being done as of the dates of service, *e. g.*, maintaining an office, warehouse or place of business; owning realty or other physical property; keeping a staff of employees; having agents "other than counsel in this case and . . . Elcock"; keeping a telephone or a listing; making sales; conducting research; soliciting orders. Correspondingly appellee atomizes the things then being done into separate, disconnected events, *viz.*, stock ownership (in American Scophony); contracting with American Scophony and the other corporations for transfer and licensing of patents; activities to protect Scophony's American "interests" by resolving the impasse.

Obviously this view of the facts and of the determinative legal approach is at wide variance from the ones we have taken in dealing with the question of venue. But we do not find it necessary, in order to reject it for purposes of sustaining the service, to consider whether the process clause of § 12 should be given scope beyond that indicated by the *Eastman* dictum. For in any event we think that appellee and the District Court have misconceived the effects of the facts and of the decisions on which they rely, for determining the validity of the service in this case.

Certainly appellee's conclusionary premise cannot be accepted, that its sole authorized or actual business was manufacturing and selling equipment; or therefore the further one that no other activity on its behalf could constitute doing or engaging in business. Indeed it was authorized to take out, hold and exploit television patents, and doing this was certainly as much part of its business as manufacturing and selling the equipment they covered. There is nothing to show that Scophony was restricted by its charter or otherwise to exploiting its patents exclusively by direct manufacture and sale. When therefore, after that method had failed, the company chose another, it was not ceasing to do business. That consequence did not follow merely because it discontinued the activities incident to continuing the discarded method.

The alternative one chosen was not a matter simply of licensing patents to others, for active exploitation by them. Nor was it only a casual act or acts of contracting. The whole framework of this phase of the New York activities was dictated by the master and supplemental agreements. These were not mere licensing arrangements, nor did they make Scophony nothing more than a shareholder for investment purposes, with only such a shareholder's voting rights and control in American Scophony. The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs.[25] We need not decide whether, in view of the agreements' continuing and pervasive effects, they could be considered as sufficing in themselves to make Scophony "found" within the New York district.[26] Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention.

That necessity was shown, among other ways, by the contractual provisions for interchange of data and information, and further by the fact that there was sustained interchange of correspondence between Levey and Scophony devoted to Scophony's affairs and interests in this country. Levey kept Scophony informed fully of all that went on here, and in turn received and carried out its instructions respecting American Scophony's affairs and its own.

In all this he was not acting merely as an officer of American Scophony. Rather he was also Scophony's director and representative, authorized to act in its behalf and interest. Indeed it was as Scophony's representative that he was named as president of American Scophony. His position was a dual one. He was not a mere shareholder's or investor's agent seeking information about that corporation's affairs for purposes of dealing with the stock. His functions and activities were much broader and related to Scophony's interests as much as to American Scophony's. Scophony's New York activities therefore were not confined to negotiation and execution of the agreements. Neither were they concerned only with mere stock ownership or "investment" as is urged, nor were they simply occasional acts of contracting, like those in the decisions appellee cites.

Moreover, other individuals carried on for Scophony in continuing efforts[27] to resolve the impasse. Apart from what was done by others, Elcock came to New York with unrestricted and irrevocable power to act

[25] See note 22 *supra.* Indeed the contracts shaped the nature of the corporate distribution of powers and voting rights, so as to make them conform to the over-all character and objects of the larger common enterprise. The charter and by-law provisions of American Scophony therefore not only were governed by the contractual arrangements but carried them into execution.

[26] Especially in view of the fact that § 12 fixes venue and the places for serving process in antitrust suits, there would seem to be sound basis for differentiating the execution of agreements so all-pervasive and far-reaching in their effects upon the statutory policies from run-of-mine casual or intermittent sales of commodities by a manufacturing or selling company, for the section's purposes.

[27] See note 7.

on Scophony's behalf. Indeed it might almost be said, in view of his triple position as mortgagee, corporate officer and attorney-in-fact, that for all relevant purposes at this phase of Scophony's activity, he was the company. The stalemate put Scophony's affairs in this country at a standstill along with those of American Scophony. And Scophony's efforts to extricate itself were both strenuous and continuous.

Those efforts were not cessation of engaging in business. They were directed entirely to warding off that fate. Their object was not to liquidate, it was to resuscitate the business of Scophony and, as in all previous stages, put it on a normal course again. In doing all this, Scophony was engaging in business constantly and continuously, not retiring from it or interrupting it. Cf. *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Insurance Co. v. Meyer*, 197 U. S. 407; *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218. The interruptions were only in particular phases of its authorized adventure, not in the continuity, intensity or totality of the adventure itself.

In sum, we have no such situation as was presented in the manufacturing and selling cases on which appellee relies. They concerned entirely different facts and enterprises. In none was there a shifting from a course of business in pursuit of one corporate object or objects, *viz.*, manufacturing and selling, to another continuing mode of achieving a basic corporate objective, namely, the exploiting of patents by complex working arrangements partaking practically of the character of a common enterprise with others and requiring constant supervision and intervention beyond normal exercise of shareholders' rights by the participating companies' representatives *qua* such.

We know of no decision which has held or indicated that on such facts the process clause of § 12 is not adequate to confer power to make valid service. Such a continuing and far-reaching enterprise is not to be governed in this respect by rules evolved with reference to the very different businesses and activities of manufacturing and selling. Nor, what comes to the same thing, is the determination to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct, by the process sometimes applied on borderline cases involving manufacturing and selling activities.

For present purposes those decisions may be left untouched for the facts and situations in which they have arisen and to which they have been applied. But there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one, comprehended within neither their rulings nor their effects. More especially would such an extension be inappropriate, when it is recalled that § 12 governs venue and service in antitrust suits against corporations. For, in cases against companies incorporated outside the United States, that extension would bring back all the obstacles to enforcement of antitrust policies and remedies which existed for domestic corporations before § 12 was enacted to give relief from those obstacles. Even though venue were clearly established, as here, the extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are "inhabitants." We are unwilling to construe § 12 in a manner to bring back the evils it abolished, for situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the antitrust laws, so as to make another amendment necessary.

We think that Scophony not only was "transacting business" of a substantial character in the New York district at the times of service, so as to establish venue there, but also on the sum of the facts regarding its activities was "found" there within the meaning of the service-of-process clause of § 12. Of course such a ruling presents no conceivable element of offense to "traditional notions of fair play and substantial justice." See *International Shoe Co. v. Washington, supra,* at 316; cf. *Hutchinson v. Chase & Gilbert,* 45 F. 2d 139, 141.

It remains only to say that we do not stop to consider whether, as is argued, Levey's authority to act for Scophony had expired or been revoked at the time service was made by delivery of process to him. For when service was made by delivery to Elcock, he had unrevoked and irrevocable authority to act in Scophony's behalf in the New York district, and that service was valid to confer personal jurisdiction over Scophony.

Accordingly, the judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON concurs in the result.

[Concurring Opinion]

MR. JUSTICE FRANKFURTER, concurring: I deem it appropriate to state why I concur merely in the Court's result.

The only question in this case is whether Scophony Limited, a British corporation, which has its offices and principal place of business in London, may be made a party defendant in a suit by the United States for violation of the Sherman Law pending in the Southern District of New York. The corporation may be brought into court in that District if its activities there satisfy the requirements of § 12 of the Clayton Act. According to this provision, Scophony Limited is properly a party defendant in this suit only if, by virtue of its activities, it is "found or transacts business" in the Southern District of New York, and it may be served in that District if it is "found" there.

Whether a corporation "transacts business" in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be "found" anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges.

What was done in the Southern District of New York on behalf of Scophony Limited, as detailed in the Court's opinion, establishes that the corporation was there transacting business and was found there in the only sense in which a corporation ever "transacts business" or is "found." Accordingly, Scophony Limited was amenable to suit and service in the District within the requirements of § 12 of the Clayton Act.

To reach this result, however, I do not find it necessary to open up difficult and subtle problems regarding the law's attitude toward corporations. I abstain from joining the Court's opinion not because I am in disagreement with what is said but because I am not prepared to agree. And I am not prepared to agree because I do not wish to forecast, which agreement would entail, the bearing of the Court's discussion upon situations not now before us but as to which such theoretical discussion is bound to be influential. Law, no doubt, is concerned with "practical and substantial rights, not to maintain theories." *Davis v. Mills,* 194 U. S. 451, 457. But theories often determine rights. Since I do not know where the opinion in this case will take me in the future, I prefer to reach its destination by the much shorter route of recognizing that a corporation as such never transacts business and is never found anywhere, but does "transact business" and is "found" somewhere by attribution to the corporation of what human beings do for it. No doubt legal reasoning must be on its guard not to oversimplify. Dangers also lurk in overcomplicating.

From earliest times the law has enforced rights and exacted liabilities by utilizing a corporate concept—by recognizing, that is, juristic persons other than human beings. The theories by which this mode of legal operation has developed, has been justified, qualified, and defined are the subject-matter of a very sizable library. The historic roots of a particular society, economic pressures, philosophic notions, all have had their share in the law's response to the ways of men in carrying on their affairs through what is now the familiar device of the corporation. Law has also responded to religious needs in recognizing juristic persons other than human beings. Thus, in the Hindu law an idol has standing in court to enforce its rights. See, *e. g., Pramatha Nath Mullick v. Pradyumna Kumar Mullick,* 52 L. R. I. A. 245 (1925). Attribution of legal rights and duties to a juristic person other than man is necessarily a metaphorical process. And none the worse for it. No doubt, "metaphors in law are to be narrowly watched," Cardozo, J., in *Berkey v. Third Avenue R. Co.,* 244 N. Y. 84, 94. But all instruments of thought should be narrowly watched lest they be abused and fail in their service to reason.

[¶ 62,239] **State of Kansas on the Relation of Harold H. Malone, County Attorney of Sedgwick County v. The Fleming Company, Inc.**

In the Supreme Court of the State of Kansas. No. 37,113. April 10, 1948.

Appeal from Sedgwick District Court, Division No. 4.

Kansas Unfair Practices Act

Injunction—Proceeding Under Unfair Practices Act—Sufficiency of Petition.—A proceeding for injunction instituted under the provisions of the Kansas Unfair Practices Act is civil in character. Such a proceeding cannot be maintained except upon a petition which fairly apprises the defendant as to the alleged unlawful acts complained of, and which states facts which, if true, entitle the plaintiff to injunctive relief. The sufficiency of the allegations may be tested either by demurrer, or, where a temporary injunction has been granted, *ex parte,* by a motion to vacate or dissolve the injunction. Upon examination of the record it is held that the petition did not allege facts sufficient to state a cause of action for injunctive relief.

See the Kansas Unfair Practices Act, Vol. 2, ¶ 8288.

For appellant: Robert R. Hasty, Wichita, Kansas.

For appellee: Emmett D. Foley, deputy county attorney, John H. Gerety, special prosecutor, both of Wichita, Kansas; Harold H. Malone, county attorney, Sidney L. Foulston, and Henry L. Butler, all of Wichita, Kansas, on the brief.

[*Nature of Action*]

HOCH, J.: The appellant company, defendant below, was enjoined from advertising, offering for sale, and selling cigarettes at less than cost, in violation of the Unfair Practices Act (G. S. 1947 Supp., 50-401 to 50-408, incl.). It appeals from orders overruling its motion to dissolve the temporary injunction, overruling its motion to strike part of the petition and to make the petition definite and certain, and overruling its demurrer to the petition.

The petition, unverified when filed on April 29, 1947, follows:

"Plaintiff for its cause of action against the Defendant states and alleges:

"FIRST: That HAROLD H. MALONE is the duly elected, qualified and acting County Attorney in and for Sedgwick County, State of Kansas.

"SECOND: That the Defendant is a Corporation existing under and by virtue of the Laws of the State of Kansas, and has its principal place of business at 125-127 N. Mosley Street, Wichita, Sedgwick County, Kansas.

"THIRD: That the Defendant herein on or about the 21st Day of April, 1947, advertised, offered to sell and sold cigarettes at less than cost as defined in the Laws of the State of Kansas, and that by so doing diverted trade from a competitor; that by said advertising, offering for sale and sale of said cigarettes the Defendant impaired and prevented fair competition and injured public welfare; and with the intent to deceive any purchaser or prospective purchasers or to substantially lessen competition or to unreasonably restrain trade.

"FOURTH: That by virtue of the violation of Section 50-401 and 50-402 of the laws of the State of Kansas, said Plaintiff is entitled to attorney's fees for the preparation and prosecution of said Plaintiff's cause of action herein.

"WHEREFORE, Plaintiff prays that all the acts of advertising, offering for sale and sale of cigarettes at less than cost be enjoined and restrained in the manner provided by Section 50-404 of the Statutes of the State of Kansas, and that the Defendant, its agent, servants, employers, successors, and assigns, and each of them, and all other persons for or on behalf of said Defendant, be perpetually enjoined and restrained from advertising, offering for sale or selling cigarettes at less than cost in or upon the premises herein before described at the usual place of business of the said Defendant, and within the State of Kansas, or at any place in Sedgwick County, Kansas.

"Plaintiff further prays that an injunction be granted at the commencement of this action, without notice, to be in effect until the final determination of this cause or further order of this Court, and that upon the final determination of this cause the said injunction be made permanent and perpetual.

"Said Plaintiff further prays that he have and receive judgment of a reasonable attorney's fee for the benefit of said Plaintiff's attorneys, together with the

costs of this action and such other relief as he may be in justice and law entitled.

"HAROLD H. MALONE,
"County Attorney.
"FOULSTON, GERETY AND BUTLER,
"By: JOHN GERETY,
"Special Prosecutors.

"Verification filed May 20, 11:44 A. M., 1947.

"State of Kansas,
"County of Sedgwick, ss."

On April 29, the same day, *ex parte* and without notice, a temporary injunction was issued in the district court of Sedgwick county. No bond was required or given. The temporary injunction reads:

"TO THE ABOVE NAMED DEFENDANTS:

"WHEREAS, a *verified* Petition and Application for Injunction was filed in this Court by the State of Kansas on the relation of HAROLD H. MALONE, County Attorney of Sedgwick County, Kansas, on the 29th Day of April, 1947, alleged: That the Defendants named in the above caption advertised, offered for sale and sold cigarettes at below cost for the purpose of eliminating competition and/or injuring a competitor with intent to injure public welfare; *and that said acts all took place in Sedgwick County, Kansas;* and that said acts are in violation of Section 50-402 and 50-403 of the Supplement of the General Statutes of 1945, and are in violation of the laws of the State of Kansas; and that said Defendants, their agents, servants, employees, successors, tenants and assigns and all other persons, and each of them should be perpetually enjoined from advertising, offering for sale or the selling of cigarettes at a price lower than cost.

"AND WHEREAS, the application for Injunction heretofore filed by the Plaintiff, and presented to the Court, has been given careful consideration and the Court has been duly advised in the premises.

"NOW THEREFORE, you the above named defendant and your agents, servants, employees, successors, tenants and assigns, and all other persons, and each of you are hereby enjoined and restrained until the final determination of this cause or further order of this Court from advertising, offering for sale or selling cigarettes at a price lower than cost.

"CLAIR E. ROBB,
"Judge.

"APPROVED:
"HAROLD H. MALONE,
"County Attorney.
"By: JOHN H. GERETY,
"Attorneys for the State."
(Italics supplied.)

It may be noted that the temporary injunction recited that "a verified petition and application for injunction, had been filed." This was a misstatement. The petition had not been verified. It was further recited in the temporary injunction "that said acts all took place in Sedgwick county, Kansas." There was no allegation in the petition upon which to base that statement and since no evidence was taken prior to the issuance of the temporary injunction, no justification appears for asserting therein that the alleged acts took place in Sedgwick county.

Following service of the injunction upon the defendant and on dates not shown by the record, the defendant filed a motion to dissolve the injunction for the reason that it was contrary to law and not based on allegations entitling the plaintiff to injunctive relief. Also a motion to strike paragraph 4 from the petition and to make the petition definite and certain in the following particulars:

> "Defendant moves the Court to require the plaintiff to make its petition more definite and certain by stating where defendant advertised, how it advertised, with whom it advertised, and if by printed matter, to attach a copy thereof to its petition.
>
> "That plaintiff be required to state where and to whom it offered to sell and the price at which it offered to sell.
>
> "That plaintiff be required to state to whom it sold cigarettes, the price at which it sold them, and if an invoice was issued therewith, to attach a copy of said invoice to the petition.
>
> "That plaintiff be required to state the cost price of cigarettes to the defendant as defined in the laws of the State of Kansas, and state the name of the competitor from whom defendant diverted trade.
>
> "That plaintiff be required to separately state and number its several causes of action.
>
> "That plaintiff be required to state whether the defendant advertised, offered to sell, or sold at wholesale or retail."

The motion to dissolve the injunction, together with the motion of defendant objecting to the appearance of Foulston, Gerety, and Butler, for the reason that said firm had not been employed by the county attorney or by the county commissioners, and therefore had no right to appear in the matter, were heard and overruled, and the temporary injunction previously granted

was continued. At this hearing the trial court permitted the plaintiff to amend its petition by adding thereto a verification filed on May 20, three weeks after the temporary injunction had been issued. This verification was as follows:

> "The undersigned John H. Gerety, of lawful age, being first duly sworn, states:
>
> "That he is the Special Prosecutor in the above styled cause. That he has read the Petition and Application for Injunction filed herein on the 29th day of April, 1947. That he knows the contents thereof, and that the allegations, statements and averments contained therein are true and correct.
>
> "John Gerety"

On September 10, 1947, hearing was had on the motion to strike and to make definite and certain, at which time the motion to strike the fourth paragraph was sustained, and the motion to make definite and certain was overruled.

On September 19, 1947, defendant's demurrer to the petition and its objection to the authority of the firm of Foulston, Gerety and Butler, or any member thereof, to appear in the matter, were heard and overruled.

Motion to reconsider the ruling on demurrer was overruled and this appeal followed.

Appellant's principal contentions are that the private attorneys who conducted the case were without authority to represent the state or the county attorney and that the entire proceedings were, therefore, a nullity; that the temporary injunction was invalid because the petition was not verified and no bond was given; and that paragraph three, the heart of the petition, was so indefinite and framed in such general terms that it did not advise the defendant as to the acts complained of and did not state a cause of action.

[*Purpose of Act*]

The expressed purpose of the Unfair Practices Act is to prevent the sale—with certain specified exceptions—of merchandise at below cost, either by the retailer or wholesaler, where such sale or offer to sell is made with the intent and with the result stated in section 50-402, presently to be noted. Section 50-401 defines "cost" and other terms used in the act. The extended and rather complicated definitions need not be recited here. Section 50-402 is as follows:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

Section 50-403 provides that any retailer or wholesaler who sells or offers to sell merchandise in contravention of the act shall be guilty of a misdemeanor and subject to a fine of not more than $500.

Section 50-405 sets out certain exemptions, with the provision that any retailer or wholesaler claiming them shall have the burden of showing that he is entitled thereto.

The instant action was brought under section 50-404, which provides:

> "In addition to the penalties provided in this act, the courts of this state are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several county's attorneys, in the respective counties, *to institute proceedings in equity to prevent and restrain violations.*" (Italics supplied.)

[*Nature of Instant Proceeding*]

We are met, at the outset, with the question whether the instant proceeding is civil or criminal. Appellee argues that it is criminal in character. In support of that view, our attention is called to section 50-403 of the Unfair Practices Act, which makes it a misdemeanor to sell or offer to sell merchandise in contravention of the act, and provides a penalty therefor, and also to the code definition of crimes and criminal offenses. (G. S. 1935, 21-128.) This argument misconceives the question. The question is not whether the Unfair Practices Act has provisions criminal in character, but whether an *injunction* proceeding under section 50-404 is civil or criminal.

Appellee calls attention, further, to the opening words of section 50-404: "In addi-

tion to the penalties provided in this act," etc., and from that argues that it was the legislative intent to make an injunction "an additional punishment" for violation of the act. In support of this construction, appellee contends that the words "in addition to" mean "by way of increase or accession to," citing *In re Daggett's Estate,* 9 N. Y. 652, 2 Conn. Surr. 230, and *Washington Loan & Trust Co. v. Hammond,* 51 App. D. C. 260, 278 Fed. 569, 571. We have examined the two cases cited, but do not find them helpful to appellee's contention. The *Daggett* case involved construction of a statute of descent and distribution, which provided that a widow whose husband had died intestate should be entitled to certain property rights "in addition to any interest" which she should receive under other sections of the act. In the *Washington Loan* case a testator had bequeathed to a legatee a share in the income of a trust and "in addition to the above" certain personal property. Construing those words in connection with other words in the will involved in the controversy, it was held that the bequests were independent of each other, the words meaning "the act or process of adding or uniting." We need not labor the point further. We think that appellee's construction is not only strained but not in line with the act as a whole.

It is noted that section 50-404 does not say that the provision for injunction is made as an "additional penalty," but says that the courts are invested with jurisdiction to enjoin violations of the act, *"in addition to the penalties* provided in the act." (Italics supplied.) Again, section 50-404 specifically refers to the injunction proceeding as one "in equity," and section 50-406 makes the code of *civil procedure* applicable to the Unfair Practices Act as to "the filing and use of affidavits," . . . "the *authority* and *duty* of *officers* as related to any of the above matters, and any and all further acts of civil procedure necessary to the *filing and maintenance of any action* as provided herein" (italics supplied) and as to other matters not pertinent here.

We find nothing in the Unfair Practices Act to justify taking its injunction provision out from under the rule that injunction is a *civil* suit. It is stated in 43 C. J. S. 779:

> "A suit for injunction is a civil suit, governed by rules of procedure applicable to other civil suits; more particularly it is an equitable remedy, and governed by the rules of procedure governing equity proceedings generally. . . ."

Conformably, the general statutory provisions as to injunctions were made a part of *the civil code* (G. S. 1935, 60-1101 to 60-1121, incl.) and not of the criminal code. A proceeding for injunction under section 50-404 being civil in nature, it follows that any statutes which deal only with criminal actions or proceedings are not applicable thereto.

We consider next, appellant's contention that the allegations of paragraph "third," *supra,* of the petition upon which injunction was sought, are general, indefinite, and assert no facts with sufficient particularity to apprise the defendant as to the acts complained of and, therefore, do not state a cause of action for injunctive relief.

A petition for an injunction, like any other petition, must state facts which, if true, will entitle the plaintiff to the relief sought. The general rule is that the petition must make a prima facie case for final relief by alleging facts upon which the injunction is sought. (43 C. J. S. 844-846.)

It is stated in 28 Am. Jur. 457, with supporting cases cited:

> "The well-established rule of equity pleading, as to certainty of averment, must be followed. This requires that the facts relied on for injunctive relief be stated in a *direct and positive manner* and *with certainty and precision.* In most cases, general certainty is all that is required, it being sufficient if the allegations distinctly *apprise the defense of the precise case it is required to meet."* (Italics supplied.)

We are cognizant of the rule that mere indefiniteness, uncertainty, or generality in the allegations of a petition do not ordinarily make it demurrable, the remedy being by motion to make definite and certain. (*Kirwin v. McIntosh,* 151 Kan. 289, and cases cited p. 292, 98 P. 2d 160; cases cited in West's Kansas Digest, Pleading, 122(2); Hatcher's Kansas Digest, Pleading, § 162.) This rule, however, does not protect, as against demurrer, a petition, the allegations of which are framed in general terms, unless the allegations cover facts material and essential to the statement of a cause of action.

Moreover, as heretofore noted, the appellee successfully resisted appellant's motion to make paragraph "third" definite and cer-

tain. It follows under the established rule that the petition is to be strictly construed as against the pleader as to matters covered by the motion. (*Sanik v. Shryock Realty Co.,* 156 Kan. 641, 135 P. 2d 545; *Leeka v. Yount,* 145 Kan. 155, 156, 64 P. 2d 24; *Lofland v. Croman,* 152 Kan. 312, 316, 103 P. 2d 772, and cases there cited.)

Generally, the sufficiency of a bill or a complaint for an injunction may be tested by demurrer or, if the statute so provides, its sufficiency may be attacked by a motion to dissolve the temporary injunction. (43 C. J. S. 871.) Our statute provides for application to vacate or modify either upon the petition and affidavits, upon which the injunction was granted, or upon affidavits on the part of the party enjoined, and provides for orders allowing, dissolving or modifying the injunction. (G. S. 1935, 60-1118.) The appellant here presented the issue of sufficiency of the petition, both by demurrer and by motion to dissolve.

Paragraph "third" need not be repeated. Its allegations are in the most general terms. It does not allege whether defendant sold, or offered to sell below cost as a *wholesaler* or as a *retailer;* nor by what method or in what manner it advertised to sell below cost, and does not even set forth the *county* in which alleged unlawful acts took place. In fact, the paragraph does not even conform with the general language of the statute. Under section 50-402, the sales or offers to sell below cost which are declared to be "unfair competition and contrary to public policy, and the policy of this act" are such sales or offers to sell which are made (1) *"with the intent* of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare," and (2) *"where the result* of such advertising, offer, or sale, is to tend to deceive any purchaser or prospective purchaser or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce." (Italics supplied.) The petition omits entirely the essential element of *intent* to unfairly divert trade from a competitor and to impair and prevent competition and injure public welfare.

In support of its contention that the allegations were sufficient to justify issuance of the temporary injunction, appellee cites *Parkhurst v. Investors Syndicate,* 138 Kan. 7, 23, P. 2d 589; *Breweries Co. v. Kansas City,* 96 Kan. 731, 153 Pac. 523; *Wigton v. Donnelly,* 122 Kan. 796, 253 Pac. 400; *Du Bois v. City of Galena,* 128 Kan. 253, 276 Pac. 802; *K. P. Rly. Co. v. McCormick,* 20 Kan. 107. These cases have been examined and are not found to be persuasive here. The *Parkhurst* case, *supra,* was an action to construe plaintiff's rights as holder of certain certificates and the liability of the defendant which had issued them. Referring to the code provision (Sec. 60-704) that a petition must contain "a statement of facts constituting the cause of action in ordinary and concise language and without repetition," the opinion recites that the petition *did so state* "the rather *peculiar facts constituting the cause of action."* It was noted in the opinion that the plaintiff alleged ownership of the certificates, and that they had been properly assigned to him; that he had tendered the required transfer fee; that the defendant had unlawfully refused to record the assignments, and other facts constituting cause of action, not necessary here to recite. Such definite allegations of fact are not comparable with those in the instant petition.

Similarly, in the *Breweries Co.* case, *supra,* the allegations of fact were far more definite than those we have here. Moreover, in that case there had been no motion to make definite and certain.

In the *Wigton* case, *supra,* it was held that an order of the trial court sustaining a motion to strike out certain letters attached to the petition, on the ground they were redundant and constituted the pleading of evidence, was not an appealable order. Although dismissing the appeal, this court said that the court did not err in striking the letters, the petition not conforming to the requirements of section 60-704, *supra.* The case has little, if any, pertinancy here.

[¶ 62,240] Boris Benjamin, d. b. a. Benjamin's Castle Hill Pharmacy, and Sam M. Horowitz v. Palan Drug Co., Inc.

In the Supreme Court of the State of New York, County of Bronx. Special Term, Part I. N. Y. L. J., March 25, 1948. Decision, April 2, 1948.

New York Fair Trade Act

Fair Trade Act—Minimum Resale Price—Effect of Issuance of Trading Stamps.—The merchandising practice of issuing trading stamps with the sale of merchandise subject to minimum resale prices established under fair trade contracts, which stamps are redeemable in merchandise, constitutes the granting of a cash discount. Such a practice, when not done for the purpose of cutting the price of any merchandise in connection with the resale of which the stamps were offered, but for the purpose of inviting and rewarding purchases for cash, is not unfair competition and is not actionable under the provisions of the Fair Trade Act.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.

Opinion

McGEEHAN, J.: The court views the evidence adduced at the trial as tending to establish two inconsistent and conflicting theories: one, urged by the plaintiff that the trading stamps in litigation were in fact a rebate on the retail selling price of restricted merchandise; and the second theory, the one urged by the defendant, that the trading stamps were in fact a cash discount allowed for cost sales which acted as an inducement for good-will for the business being conducted on the premises. It appears that the trading stamps were issued for all merchandise sold for cash, and they were not limited to those articles specified and restricted by the agreements set forth. The court finds that the plaintiff has not adduced sufficient proof to preponderate in the alleged cause of action set forth in the complaint. The court observes that cash discounts for cash sales in retail sales do not differ in essential respects from the discounts allowed for cash payments in wholesale transactions to which nobody attributes any illegality or impropriety. Accordingly, the court finds as a matter of fact that there is as much proof to establish the defendant's factual contention as there is to establish the plaintiffs' alleged cause of action, and since the plaintiff, as a matter of law, has the burden of proof as to all the issues of fact which he has failed to meet in this litigation, the defendant's motion, made at the end of the entire case, to dismiss the complaint is granted. Settle decision and judgment accordingly.

Decision of April 2, 1948

Findings of Fact

1. That plaintiffs are, respectively, owners of duly licensed pharmacies located in the Borough of Bronx, City and State of New York, where they sell at retail patent medicines, drugs, pharmaceuticals, cosmetics, and other medicinal and toilet products.

2. That the stores owned by the respective plaintiffs are located within a radius of three and one-half city blocks of the store of defendant.

3. That at the times herein mentioned, defendant owned, operated and maintained, and still operates and maintains, a retail drug store, known as "Webster Drug Store", at No. 1457 Unionport Road, in the Borough of Bronx, City and State of New York, where it sells at retail, among other things, patent medicines, drugs, pharmaceuticals and other medicinal and toilet products.

4. That plaintiffs are in free and open competition with defendant and with each other.

5. That prior to the acts of defendant hereinafter described, certain manufacturers, distributors and wholesalers of drugs, patent medicines, pharmaceuticals, cosmetics, and medicinal and toilet products, pursuant to Chapter 976 of the Laws of 1935 (commonly known as the "Fair Trade Law") entered into contracts with retailers in the State of New York, which said contracts provide, among other things, that said retailers would not advertise, offer for sale or sell the respective products of said manufacturers, distributors, and wholesalers at less than the minimum prices stipulated therein by and between said manufacturers, wholesalers and distributors, and the said retailers, respectively.

6. That all of said products with respect to which the aforesaid contracts were made are articles of standard quality, packaged in

standard sizes, and which bear or the contents of which bear the trade-mark and trade-name of the manufacturer, distributor or owner thereof, and are sold in the State of New York in open and fair competition with products of the same general class produced and sold by others.

7. That all of the aforesaid products with respect to which such contracts were made are sold by plaintiffs and defendants in competition with each other.

8. That at the time the acts of defendant hereinafter described were performed and committed and at the time of the commencement of this action and at all times herein mentioned, the aforesaid contracts were and still are in force.

9. That prior to the acts of defendant hereinafter described, said defendant was notified of the existence and terms of the said contracts and of the minimum prices stipulated therein; and at the time of the said acts, defendant had knowledge of the existence and terms of said contracts and of the minimum prices stipulated therein.

10. That pursuant to written agreement entered into between defendant, named therein as "Webster Drug Store", and The Sperry and Hutchinson Company, defendant has ordered and received from said company from time to time pads of "S & H" discount stamps which it has offered and distributed to its customers who have purchased merchandise subject to the aforesaid contracts at the minimum resale prices stipulated therein, in consideration of their making cash payments, at the rate of one stamp for each ten cents paid, and has distributed among its customers "S & H" stamp books within which to paste and accumulate said stamps for redemption, and has redeemed, when presented, each filled stamp book of 1,200 stamps, representing total cash purchases of $120, by delivering in exchange therefor $2.00 worth of defendant's merchandise amounting in value to 1.66 per cent of the cash purchases so represented by each filled stamp book, which filled books have later been redeemed by The Sperry and Hutchinson Company paying to defendant $2.00 in cash for each.

11. That defendant has offered said stamps to its cash customers at said rates indiscriminately as respects the character of the merchandise purchased by them whether or not the merchandise be subject to any contract entered into under the Fair Trade Act.

12. That the said practice of allowing cash discounts in retail merchandising pursuant to the discount stamp system of The Sperry and Hutchinson Company has been long established and widely used in the State of New York and in thirty-eight of the United States.

13. That the offering and issuance of said stamps by defendant was not for the purpose of cutting the resale price of any merchandise in connection with the the resale of which said stamps were offered, nor did it operate to affect the good will or other value of any such merchandise or of any brand or trade-mark thereof in violation of the provisions and purposes of the Fair Trade Act.

14. That the actual purpose of the offering and issuance of said "S & H" stamps in the manner aforesaid was to invite and reward the payment of cash on purchases made in defendant's store.

Conclusions of Law

I. That the offering and issuance of "S & H" discount stamps in the manner aforesaid constitutes a discount in consideration of the payment of cash by defendant's customers.

II. That the evidence does not establish that the defendant has wilfully and knowingly advertised, or offered for sale or sold, any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of said Fair Trade Act.

III. That the merchandising practice, as established by the evidence, of offering stamps in the manner aforesaid is not unfair competition and is not actionable at the suit of the plaintiffs under the provisions and purposes of the Fair Trade Act.

IV. That the defendant is entitled to judgment dismissing plaintiffs' complaint on the merits with costs, and judgment is hereby directed accordingly.

[¶ 62,241] **Federal Broadcasting System, Inc. v. American Broadcasting Company, Inc., and Mutual Broadcasting System, Inc.**

In the United States Circuit Court of Appeals for the Second Circuit. Docket No. 20833. Decided April 8, 1948.

Appeal from the United States District Court for the Southern District of New York.

Sherman Antitrust Act

Preliminary Injunction—Radio Broadcasting Networks—Concert of Action.—An unaffiliated broadcasting station is not entitled, in a suit brought under the Sherman Act, to temporary injunctions requiring national radio networks to continue their existing relationships with the station whereby the latter fixed the advertising rates for the networks' programs and paid them commissions. The cancellation by the networks of the arrangements, when done pursuant to the terms of their agreements with the station, did not constitute a boycott. The simultaneous notice of termination of the agreements is an insufficient basis for the charge of concerted action where it is shown that both networks were in a position where time was of the essence in their competition with each other. A general uniformity in the form of the agreements which results merely from common business solutions to identical problems in a competitive industry is not persuasive evidence of conspiracy.

See the Sherman Act annotations, Vol. 1, ¶ 1640.525.

For appellant: William L. McGovern, Seymour Krieger; Courtney, Krieger and Jorgensen and David Greenbaum, of counsel.

For appellees: Hawkins, Delafield & Wood, for American Broadcasting Co., Inc.; Joseph A. McDonald, Clarence Fried and Franklin S. Wood, of counsel. Lauterstein, Spiller & Brown, for Mutual Broadcasting System, Inc.; Leon Lauterstein and Jacob L. Isaacs, of counsel.

[*Nature of Action*]

AUGUSTUS N. HAND, C. J.: This is an appeal by the plaintiff from an order denying a motion for a preliminary injunction. Such orders are largely within the discretion of the judge hearing the motion and we have no reason to suppose that he abused his discretion in the present case.

The plaintiff is the owner of radio broadcasting station WSAY at Rochester, New York, and brought an action against the four chain broadcasting networks, National Broadcasting Company, Columbia Broadcasting System, Inc., Mutual Broadcasting System, and American Broadcasting Company, Inc., and two of their officers. It sought treble damages and a permanent injunction against all of them for violation of sections 1 and 2 of the Sherman Act. It charged that by their concerted action these networks had unlawfully linked together all important broadcasting stations and national advertisers by a series of mutually exclusive contracts and had used their resulting powers to dictate arbitrarily the price at which all broadcasting facilities would be available, with the purpose and effect of excluding Station WSAY from the network advertising market. The plaintiff moved for a preliminary injunction against American and Mutual to prevent them from withdrawing their programs from its station pursuant to the above alleged conspiracy. This was in effect an application for a mandatory injunction *pendente lite* in order to compel American and Mutual to continue their existing relationships by providing plaintiff's station with programs. Judge Coxe, before whom the application for a preliminary injunction was heard, denied the motion, and granted an application by the Veterans Broadcasting Co., Inc., owner of Station WVET in Rochester, to intervene as a party defendant.

For some time prior to the present action all four networks furnished programs for the three broadcasting stations then existing in Rochester. NBC and CBS each had one of these stations as an exclusive affiliate; WSAY secured programs under special non-affiliate agreements with both American and Mutual. The arrangement with each of these two networks permitted the plaintiff to fix the price to be charged advertisers for the use of its facilities and gave the networks a fifteen per cent selling commission. The agreement with American network could be cancelled by either party on twenty-eight days notice. The one with Mutual was on an informal basis terminable at the will of either party. The two networks sought unsuccessfully to ob-

tain a standard affiliation contract with the plaintiff on terms comparable to those they had with their other stations. Plaintiff refused these offers because they did not give to it the right to fix the rate to be charged an advertiser for the use of its station. The defendants contend that since WSAY was then the only available station in Rochester that was not bound to any network by an affiliation contract it could and did refuse any standard contract and instead demanded exorbitant rates for its facilities. In May and June 1947, the Federal Communications Commission granted licenses for two new stations in Rochester, WARC and WVET. Plaintiff still refused a standard contract with Mutual which was offered, demanding its stated station rate instead. Mutual then entered into an affiliation agreement with WVET, American entered into an affiliation agreement with WARC, and both cancelled their existing arrangements with the plaintiff.

[*No Evidence of Conspiracy*]

In the record now before us there is no persuasive evidence of a conspiracy to boycott or otherwise unlawfully exclude the plaintiff from obtaining defendants' programs, whatever may later be established at a trial. The principal ground urged in support of the charge of a boycott as a basis for the temporary injunction is that by concerted action the American and Mutual networks have cancelled their existing arrangements with the plaintiff. However, each did this pursuant to the terms of its agreement, and it is clear that if these defendants really acted individually and not jointly they were within their rights. A network is not a common carrier and each therefore had the right in the absence of concerted action to make such contracts for the distribution of its programs as it chose. Plaintiff had no inherent right to set its own rate to an advertiser and in all other respects to use the facilities of the radio network, nor does the court have power to compel defendants to deal with the plaintiff on such terms. Plaintiff misconceives the function of a network, which buys time from the stations and sells to the advertisers its facilities and the services of those stations as an aggregate. Not only are the networks not common carriers, but it would be cumbersome if not impractical for them to furnish programs if they did not have authority to deal independently with the advertising concerns instead of leaving the rates to be determined individually by the different stations which they serve. Such control by a network, operating as a single coordinating agency, would seem to be at least desirable in order that it might compete with other networks and advertising media and to assure a more reasonable distribution to every station of the income which the network as a whole may receive. We do not say that it would be impossible for a network to allow each station to set its own rate, but it would seem a less practical course of business and certainly one to which plaintiff can make no claims as of right.

[*No Joint Action Shown*]

The claim is made that defendants acted jointly because they gave notice of termination of their agreements with plaintiff on the same day. However, these cancellations resulted because plaintiff was unwilling to enter into affiliation agreements as each defendant desired and had a right to require as a condition of its contracting to furnish programs. The simultaneous aspect of their notices is an insufficient basis for the charge of concerted action when it is remembered that American and Mutual were both in a position where time was of the essence in their competition with each other to put into operation as soon as possible their new affiliation contracts with WVET and WARC.

[*General Uniformity*]

The further claim that certain business practices of the networks and terms of the affiliation agreements required by them as a condition for furnishing programs showed a conspiracy because of a general uniformity in form and practice is also unpersuasive. We cannot say that such similarity results from anything more than common business solutions to identical problems in a competitive industry, and the forms used may well merely indicate similar business practices or formulations such as we find in insurance policies, bills of lading, warehouse receipts and other commercial documents. Moreover, the similarity of many of the terms in these contracts might be explained by requirements of the Federal Communications Commission governing the stations.

[*Contracts Sanctioned by FCC*]

We think it improper to grant a preliminary injunction upon the charge that

the networks have unlawful "exclusive" contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality. See F. C. C. Report on Chain Broadcasting, Comm. Order No. 37, Docket No. 5061, May, 1941, p. 46; *National Broadcasting Co. v. United States,* 319 U. S. 190, 223.

[*Maintenance of Existing Arrangements*]

We cannot see any reason for requiring the defendants to maintain existing arrangements for providing programs for plaintiff when by the very terms of those agreements they might be cancelled and when a failure to recognize the cancellations as valid might jeopardize the new affiliation contracts made by these defendants with WVET and WARC.

[*Order Affirmed*]

For the foregoing reasons, the order denying a temporary injunction is affirmed.

[¶ 62,242] Florence B. Bigelow, et al. v. RKO Radio Pictures, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 4525. Received by CCH in April, 1948.

Sherman Antitrust Act

Nature of the Contempt—Lack of Wilful Intent—Civil Contempt.—The fact that a petition requests criminal and civil relief is not sufficient to attach to a civil proceeding both civil and criminal characteristics. Failure to comply with the requirements of Rule 42 (b) of the Rules of Criminal Procedure requires that the proceeding be regarded as one of civil and not criminal contempt. It is further held that if a criminal contempt were charged, it was not proved because those violations of the decree which occurred did not involve the requisite wilfulness of intent.

See the Sherman Act annotations, Vol. 1, ¶ 1620.101.

Noncompliance with Decree—Absolute Prohibition of Clearance.—A decree enjoining defendant motion picture distributors and exhibitors from delaying the exhibition of any motion picture in the Chicago exchange territory by creating dead or waiting time between the conclusion of the first run of a picture in any theatre owned by any defendant and the next succeeding run of the same picture is violated by the granting of clearance by defendant distributors after first run exhibitions in the Chicago loop. The decree does not prohibit only uniform or unreasonable clearance, but is an absolute prohibition, reasonably adapted to breaking up a conspiracy which had been found to exist. When it is made clear that the absolute prohibition upon clearance is no longer necessary to preclude the revival of uniform systems of clearance or of arbitrary clearances, the decree may be modified upon appropriate application to the court.

See the Clayton Act annotations, Vol. 1, ¶ 2036.15.

Violations Not Proved by Evidence.—The evidence did not prove or tend to prove the following alleged violations of the decree: that the petitioners could only obtain motion pictures for exhibition in their theatre upon the payment of excessive or discriminatory film rentals; that any one zoning system was set up by three distributor defendants; that the respondents had maintained a uniform system of releasing motion pictures in Chicago; or that the respondents had boycotted producers who licensed their motion pictures for exhibition in petitioners' theatre.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Double Features—Purpose, Intent and Effect—Attempted Compliance with Decree.—The portion of the decree which prohibits the playing of double features for the purpose with the intent, or with the effect of preventing plaintiffs' theatre from obtaining films which have not been theretofore played by competing theatres owned or operated by

defendants is not violated by the playing of double features after plaintiffs had been given an opportunity to negotiate for a first run.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Delaying Exhibition—Two-Week Period.—The prohibition against delaying the exhibition of any motion picture by permitting a run of such picture longer than two weeks in any theatre owned or operated by any defendant is not violated by the playing of a picture at a loop theatre for two weeks, after which duplicate prints thereof are released to outlying theatres, including plaintiffs' theatre, the loop theatre continuing to exhibit the film for a third week.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Failure to Release Pictures—Efforts to Establish Proper System of Release.—The failure of a defendant to release any pictures for first run in Chicago for several weeks after the effective date of the decree, where not shown to have been motivated by any desire to violate the decree, but where shown to be due to efforts to establish a proper system of release, does not violate the decree.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Road-Show Release—Removal from Exhibition—Violation of Decree.—The prohibition against dead or waiting time applies to the release of a motion picture on a road show basis, with subsequent removal from exhibition. The prohibition of clearances did not admit of any exceptions for road shows or any other unusual situations, without specific court authorization.

See the Sherman Act annotations, Vol. 1, ¶ 1220.278.

License Conditioned on Fixed Admission Price—Insufficiency of Evidence—No Contempt Involved.—The evidence fails to establish the charge that a distributor conditioned the licensing of a film upon the maintenance of a certain admission price. In any event, no contempt is involved, since the decree only prohibits the distributors from fixing minimum prices at which petitioners herein must exhibit films. Petitioners' theatre was not affected by the incident complained of.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Zoning—Individual Distributors May Create Zones for Competitive Bidding.—The evidence fails to establish that the defendant distributors have maintained a uniform system of zoning. Nothing in the decree prohibits individual distributors from creating zones for competitive bidding. If the distributors provide plantiffs' theatre an opportunty to bid for the exhibition of films in the established competitive areas and if these zones are devised reasonably and in good faith, the court will not interfere.

See the Sherman Act annotations, Vol. 1, ¶ 1220.283.

Thomas C. McConnell, for petitioners.

Defrees, Fiske, O'Brien & Thomson (by Vincent O'Brien), for Warner Bros. Pictures, Inc. and James C. Coston.

Dwight, Harris, Koegel & Caskey (by Otto E. Koegel, John F. Caskey, and Frederick W. R. Pride), for Twentieth Century-Fox Film Corporation, Spyros P. Skouras, John H. Lorentz, W. C. Gehring, and Joseph Neger.

Jacob I. Grossman and Alfred B. Teton, for Barney Balaban, John Balaban, Louis Phillips, and Walter Immerman.

Mayer, Meyer, Austrian & Platt (by Miles Seeley), for Loew's, Incorporated, Nicholas Schenk, William F. Rodgers, J. E. Flynn, W. E. Banford, RKO Radio Pictures, Inc., and Sam Gorelick.

Poppenhusen, Johnston, Thompson & Raymond (by Edward R. Johnston and Samuel W. Block), for Paramount Pictures, Inc. and Balaban & Katz Corporation.

[*Facts*]

IGOE, D. J.: The litigation out of which this contempt proceeding grows has been previously reported. *Bigelow v. RKO Radio Pictures, Inc. et al.*, 27 U. S. 251, and 150 F. (2d) 520 (CCA-7). Following the opinion of the Supreme Court, this court, on October 16, 1947, entered a decree subjecting the defendant distributors and exhibitors to certain restraints. On appeal, the decree was substantially affirmed and became effective on the 19th day of November, 1947. See *Bigelow v. RKO Radio Pictures, et al.*, 162 F. (2d) 877 cert. den. 68 S. C. 216. Approximately two months later, a petition for a rule to show cause was filed, charging RKO Radio Pictures, Inc., Loew's, Incorporated, Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Balaban & Katz Corporation, Warner Bros. Pictures, Inc., and Warner Bros. Theatres, Inc., as well as several individuals, with being in contempt of this court because of their noncompliance with its decree. The respondents answered, alleging compliance.

[*Nature of the Contempt*]

I.

At the outset we are met with an inquiry as to whether these proceedings involve civil contempt, as contended by respondents, or both civil and criminal, as contended by the petitioners.

The petition for the rule to show cause bears the original equity case number, and was filed by the plaintiffs in the equity case. No reference is made in the first fourteen paragraphs of the petition to the criminal or civil character of the contempt, but in the fifteenth paragraph the court was requested to issue a rule requiring the respondents to show cause why each of them should not be adjudged in civil and criminal contempt and punished in a manner provided by the law applicable thereto.

After the filing of the petition and the issuance of the rule to show cause, the respondents filed answers, which in some instances were quite detailed in their discussion of the facts. Thereafter the cause came to hearing before this court without a jury. During the presentation of the petitioners' case, several respondents were called as witnesses by the petitioners. In the course of the arguments on the motions to dismiss, at the close of petitioners' case, counsel for respondents referred to the proceedings as civil in nature, while counsel for the petitioners referred to them as criminal.

[*Distinction Between Civil and Criminal Contempt*]

The distinction between civil and criminal contempt has been the subject of long and learned discussion. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418; *Lamb v. Cramer*, 285 U. S. 217. The courts, however, did not agree upon an exact formula to be used in determining the character of a contempt proceeding. See *McCann v. New York Stock Exchange*, 80 F. (2d) 211 (CCA-2, 1935). The adoption of Rule 42 of the Rules of Criminal Procedure was intended to establish a simple test by which the character of such proceedings could be readily ascertained. Rule 42(b) in clear language provides that a criminal contempt not requiring summary disposition under Rule 42(a), shall be prosecuted on notice. The notice must state the essential facts constituting the criminal contempt and describe it as such. The notice must be given orally by the judge or on application of the United States Attorney or of an attorney appointed by the Court for that purpose. In such a proceeding, the defendant is entitled to a trial by jury, and to admission to bail. This summary of Rule 42(b) is enough to disclose that Rule 42(b) was not complied with in this case. The notice was not given by this court nor on application of the United States Attorney, nor by any attorney appointed by this court for that purpose. The cause was presented as part of the original equity case by the attorney who represented the plaintiffs in that case. The order issuing the rule to show cause was not intended to be, and was not, an authorization to such counsel to proceed under Rule 42(b). "This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest." *Penfield Co. v. S. E. C.*, 330 U. S. 585.

In my opinion, the objectives of Rule 42(b) can only be achieved by faithful adherence to its requirements. The characteristic confusion concerning contempts which existed before Rule 42(b), would be revived if exception upon exception were to be read into the rule. The Supreme Court has, of course, made it clear that the failure to call a proceeding criminal will not in itself constitute a fatal departure from the rule. *United States v. United Mine Workers of*

America, 330 U. S. 258. In that case, however, not only was the contempt prosecuted by the United States, but the defendants were fully aware that a criminal contempt was charged. Indeed, the rule to show cause ordered the accused to be tried "by the court with an advisory jury." See *Penfield Co. v. S. E. C., supra.*

In this case, neither the United States attorney nor any other governmental agent or agency was a party to these proceedings or had any interest therein. The respondents proceeded upon the assumption that the contempt was civil. At the request of counsel for petitioners, several respondents testified and were cross-examined by him without regard to the rules against self-incrimination. See *Gompers v. Buck Stove & Range Co., supra,* at p. 444. At one point in the trial, counsel for petitioners indicated that he would amend his petition to conform to the proof. See Rule 15(b), Rules of Civil Procedure. The *United Mine Workers* case (*supra*) made it clear that in a single proceeding, where the United States is the complainant, both criminal and civil contempt may be charged. See *U. S. v. Aberbach,* 165 F. (2d) 713 (CCA-2). But the fact that the petition requested criminal and civil relief is not sufficient to attach to a civil proceeding both civil and criminal characteristics. *Norstrom v. Wahl,* 41 F. (2d) 910 (CCA-7). If a criminal contempt is committed, no undue hardship is imposed by exacting compliance with Rule 42(b).

The proceeding not having been conducted in accordance with Rule 42(b), the petitioners having availed themselves of prerogatives foreign to criminal trials and the respondents having proceeded as in a civil contempt, this proceeding must be regarded as one of civil and not criminal contempt. It is also my view that if a criminal contempt were charged, it was not proved because those violations of the decree which occurred did not involve the requisite wilfulness of intent. See *United States v. Kroger Grocery & Baking Co.,* 163 F. (2d) 168, 175 (CCA-7, 1947).

[*Issues Raised by Allegations of Civil Contempt*]

II.

Are these respondents then guilty of the civil contempts alleged in the petition? The basic issues presented by the evidence and petition involve the propriety of: (1) the action of distributors in granting clearance, that is, denying to outlying theatres an opportunity to exhibit motion pictures until a certain period of time has elapsed after their first exhibition in loop theatres, located in the downtown district of Chicago; (2) double featuring in theatres owned and operated by some of the respondents on the south side of Chicago; (3) permitting the exhibition of a motion picture. "Nightmare Alley" in a theatre owned and operated by Balaban & Katz Corporation for longer than two weeks; (4) the action of one distributor, Loew's Incorporated, in failing to release motion pictures for first run in the City of Chicago; (5) the action of Paramount Pictures, Inc., in withdrawing the motion picture "Unconquered" from exhibition in Chicago after it had played two weeks in the loop; (6) the action of Twentieth Century Fox Films Corporation in licensing "Forever Amber" for exhibition at an admission price of $1.25; and (7) the establishment of competitive bidding zones.

[*Violations Not Proved*]

The petition also charges numerous other violations of the decree. None of these alleged violations has been proved and it would serve no useful purpose to discuss them in detail. In particular, I find that the evidence did not prove or tend to prove (1) that the petitioners could only obtain motion pictures for exhibition in their Jackson Park theatre upon the payment of excessive or discriminatory film rentals; (2) that any one zoning system was set up by Twentieth Century-Fox Films Corporation, RKO Radio Pictures, Inc. and Loew's, Incorporated; (3) that the respondents had maintained a uniform system of releasing motion pictures in the City of Chicago; (4) or that the respondents had boycotted producers who licensed their motion pictures for exhibition in the Jackson Park theatre.

Clearance

The petition charged respondent distributors with violating the decree by granting clearances after first run exhibitions in the loop. Section VII of the decree enjoined the defendants from delaying the exhibition of any motion picture in the Chicago exchange territory by creating dead or waiting time between the conclusion of the first run of a picture in any theatre owned by any defendant and the next succeeding run of the same picture. Section X of the decree defines dead or waiting time as a

period of time "uniformly imposed upon exhibitors during which no theatre can exhibit a motion picture which has concluded its first run in the Chicago exchange territory."

The language of Section VII, as defined in Section X, clearly prohibits any defendant distributor from granting clearance to any defendant exhibitor. The Circuit Court of Appeals so construed the section when it upheld this provision despite the complaint of one of the defendants that "the decree should not enjoin the defendants from a first run in the loop in excess of two weeks and a subsequent run in excess of one week *without any waiting time.*" *Bigelow v. RKO,* 162 F. (2d) 520, 523.

Respondents in this proceeding vigorously urged that the decree prohibited only uniform or unreasonable clearance, and contended that if clearances granted by individual distributors upon a picture-by-picture basis, were not arbitrary, and did not follow any uniform plan, such clearances were proper.

The existing authorities undoubtedly establish that there is nothing illegal in clearances as such, and that "in the absence of an unconscionably long time or too extensive an area embraced by the clearance or of a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use." See *U. S. v. Paramount Pictures, et al.,* 66 F. Supp. 323, 342. But the litigation which preceded the entry of this court's decree disclosed the prevalence of abuses. Consequently "the provisions of the decree complained of were reasonably adapted to breaking up the conspiracy, a part of which was the method of release . . ." *Bigelow v. RKO Radio Pictures,* 162 F. (2d) 520, 523.

I do not mean to say that lawful clearances are perpetually enjoined in Chicago. The decree, however, does presently deny to the defendant distributors and exhibitors privileges which are not denied to their competitors. When it is made clear that the absolute prohibition upon clearances is no longer necessary to preclude the revival of uniform systems of clearance or of arbitrary clearances, the decree may be modified upon appropriate application to the court. Those respondents who granted clearance therefore violated the terms of the decree.

Double Features

Section IX of the decree prohibits the respondents from playing "double features for the purpose, with the intent, or with the effect of preventing the Jackson Park Theatre, owned by the plaintiffs from obtaining motion pictures which have not been theretofore played by competing theatres owned or operated by the defendants."

Petitioners apparently assumed that this section prohibits all respondent exhibitors from double featuring any and all prior run pictures on the South Side of Chicago. This conclusion is not justified either by the language of the decree or the intention of this court. Double featuring in and of itself is not illegal. See *Bigelow v. RKO Radio Pictures, et al.,* 150 F. (2d) 877, 885. Theatres throughout the country, whether because of competitive conditions or custom, show double features. Only the use of double features with the intent, purpose and effect "of preventing the plaintiffs from obtaining pictures before the defendants have channeled them through the conspiratorial system" was enjoined. See *Bigelow v. RKO, etc.,* 162 F. (2d) 520, 523.

The evidence convinces me that the respondents attempted to comply with Section IX of the decree. No motion pictures were double featured by any respondent exhibitors on the South Side of Chicago until petitioners' theatre had been given an opportunity to negotiate for a first run. Only after the Jackson Park Theatre refused to negotiate for, or declined to license, these pictures, did the respondents double feature them. The decree enjoined the playing of two feature pictures when the object or effect of the double featuring was to deny petitioners' theatre "clear product." The evidence indicates that "clear product" was available to the petitioners who, at no time during the entire period in question, were compelled to play a motion picture which had been previously exhibited at a South Side theatre owned by any respondent. So long as distributors afford the Jackson Park Theatre an opportunity to negotiate for first run pictures, respondent exhibitors may play two feature pictures on their programs, after the Jackson Park Theatre has refused or failed to license such pictures.

This court's reservation of jurisdiction to modify and enforce the decree will permit the correction of any abuses, if abuses develop, in the practice of double featuring.

"Nightmare Alley"

The picture "Nightmare Alley" was played at the State and Lake Theatre in Chicago

for two weeks, and thereafter duplicate prints thereof were immediately released to outlying theatres, including the Jackson Park. The State and Lake continued to play "Nightmare Alley" for a third week, during which the same motion picture was being exhibited in the neighborhood theatres.

Section VII prohibits the defendants from delaying the exhibition of any motion picture by permitting a run of such picture longer than two weeks in any theatre owned or operated by any defendant.

It is clear from the sequence of events that the exhibition of "Nightmare Alley" was not delayed in the Chicago exchange territory and Section VII was not violated.

Failure to Release Pictures

For several weeks after the effective date of the decree, the respondent Loew's Incorporated failed to release any motion pictures for first run in the City of Chicago. Witnesses on behalf of Loew's admitted the charge that no pictures were immediately released following the decree, but asserted that no violation of this decree was intended and that the respondents were attempting to formulate a legal and proper system for the release of motion pictures in the City of Chicago.

The evidence established that before the issuance of the rule to show cause, Loew's Incorporated had begun the release of motion pictures in Chicago. Under these circumstances, Loew's failure to release pictures does not appear to have been motivated by any desire to violate the decree but was due to its efforts to establish a proper system of release. Its delay in so doing was not arbitrary and did not violate the decree.

Road Show

During the summer of 1947, before the effective date of this decree, Paramount Pictures, Inc. released the motion picture "Unconquered," an unusually costly production, throughout the country on what is called a "road show basis," the picture being exhibited in a single theatre in a selected number of cities for a limited time. After the initial showing in the selected theatres, "Unconquered" was removed from exhibition, and witnesses testified that the picture would be generally released some time in April or May of this year.

The road show is an infrequent but well-known occurrence in the industry. See *U. S. v. Paramount*, 66 F. Supp. 323, 333, footnote 1 for a definition. Nevertheless, the prohibition of clearances and dead or waiting time in the decree did not admit of any exceptions for road shows or any other unusual situations, without specific court authorization. This respondent adopted the paradoxical position of complying with that portion of the decree which prohibits first run theatres from exhibiting a picture for longer than two weeks, while departing from that portion of the decree which prohibits dead or waiting time.

In my opinion, the prohibition against dead or waiting time applied to "Unconquered" with the same clarity as the two week limitation. Paramount Pictures, Inc. consequently violated the decree by its conduct with reference to that motion picture.

Price Fixing

Twentieth Century-Fox Film Corporation was charged with having licensed the picture "Forever Amber" for exhibition in the Rialto Theatre upon condition that an admission price of $1.25 be charged. The evidence did not convincingly establish that the distributor conditioned the licensing of the film upon the maintenance of that admission price. In any event, however, no contempt is involved since Section V (e) of the decree only prohibits the distributors from fixing minimum admission prices at which petitioners herein must exhibit motion pictures. Cf. *U. S. v. Paramount Pictures, Inc.*, 70 Fed. Sup. 53, 73 (D. C. N. Y. 1946). The Jackson Park Theatre was not affected by the incident and no violation of the decree is involved. The general charge in paragraph 12 of the petition that Balaban & Katz and Warner Brothers Theatres maintained admission prices by tacit agreement, was not proved.

Zoning

The evidence failed to establish that the defendant distributors have maintained a uniform system of zoning. The evidence did establish that several distributors, including Paramount Pictures, Twentieth Century-Fox, RKO Radio Pictures, and Loew's Incorporated, devised plans whereby different sections of the City of Chicago, including the South Side, were zoned. The petitioners' theatre, the Jackson Park, was

afforded an opportunity to bid against other theatres within the same zone in order to obtain motion pictures. The zones established by Twentieth Century-Fox differed from those of RKO, those of RKO differed from Loew's, Incorporated, and Paramount's differed from the others.

There is nothing in the decree which prohibits individual distributors from creating zones for competitive bidding. This court does not propose to interfere with the right of distributors to release their pictures pursuant to such plans unless it be shown that the zones are being used as a subterfuge to nullify the decree. The expediting court in *United States v. Paramount Pictures* recognized the propriety of competitive zone bidding when it required that, except with reference to their own theatres, distributors should offer licenses at a minimum price for any run desired by the operators of each theatre within a competitive area. The court stated: "The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered." 66 F. Supp. 323, 358. In the decree in that case, a competitive area was defined as "the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features in any run." 70 F. Supp. 53, 74.

The decree in this case attempted to ensure petitioners' theatre an equal opportunity with theatres operated by defendant exhibitors to compete for first run exhibitions. The Circuit Court of Appeals has already said that "the plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position." 162 F. (2d) 520, 524. It may be that petitioners disagree with the zones fixed by respondents and feel they should be larger in some instances and smaller in others. The determination of whether a zone is properly established involves numerous factors which depend on business judgment and which will not be reviewed by this court except under unusual circumstances. If the distributors provide the Jackson Park Theatre an opportunity to bid for the exhibition of motion pictures in the established competitive areas and if these zones are devised reasonably and in good faith, this court will not interfere with their commercial practices. There is nothing in the record before me to indicate that the respondents did not establish their zones in a manner consistent with these views.

Respondents

Of the corporate respondents, I find the following to have been in contempt: Balaban & Katz corporation, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation.

I further find that no contempt charge was sustained against Warner Bros. Theatres, Inc., Warner Bros. Pictures, Inc., or Loew's, Incorporated. None of these corporations was charged with granting clearance and none of them violated the decree in any other respect. Although no specific charge of granting or accepting clearance was made in the petition for the rule to show cause against RKO or Balaban & Katz, these respondents were charged generally with maintaining an objectionable system of release and the issue was tried with their implied consent. See Rule 15(b), Rules of Civil Procedure.

The rule to show cause will be discharged as to all individual respondents.

The participation of their presidents, Spyros P. Skouras and Barney Balaban, in the contempts committed by Twentieth Century-Fox, Paramount Pictures, and Balaban & Katz, was not established. Modern business practice requires that officers of large corporations delegate duties to, and rely upon, other officers and employees. When there is no evidence of bad faith; where the responsibility for compliance has been reposed upon another official or employee without any attempt to evade the obligation of compliance; and if the president of the corporation was not derelict in performing his direct or supervisory duties, the occupancy of an official position is not enough to demonstrate contumacious participation. See *U. S. v. Standard San. Mfg. Co.*, 191 F. 172, 194, affmd. 226 U. S. 20; *Worden v. U. S.*, 204 F. 1 (CCA 6); *U. S. v. Taystee Baking Co.*, 55 F. Supp. 490.

The Assistant General Counsel of Paramount Pictures was also cited for contempt. The charges against him were not proved. Indeed, no evidence whatsoever was presented to show his connection with any of the contemptuous acts. There is not even a suggestion in the record that his attitude towards this court or this decree was in any wise improper or incorrect. The evidence also failed to prove that the Branch Man-

ager of the Chicago District for RKO Radio Pictures, the Branch Manager of Twentieth Century-Fox, or any of the other individual respondents, bore any responsibility for granting or accepting clearances, with but three exceptions; to-wit: William G. Gehring, General Sales Manager, and Jack Lorentz, Midwest Sales Manager, of Twentieth Century-Fox, and John Balaban, Secretary-Treasurer of Balaban & Katz. In every instance, however these officials were merely following the advice of their attorneys. While their attorneys may have acted imprudently in giving opinions without reference to the views of this court and while counsel may have arrived at erroneous conclusions in so doing, the reliance of these respondents upon counsel for the interpretation of a legal document was reasonable and natural. Although it is no doubt true that in a civil contempt proceeding neither advice of counsel nor good intentions can sterilize conduct otherwise contemptuous (*Economist Furnace Co. v. Wrought-Iron Range Co.*, 86 F. 1010; *Eustace v. Lynch*, 80 F. (2d) 652 (CCA 9); *In re Eskay*, 122 F. (2d) 819 (CCA 3)), the circumstances attending the conduct of the individual respondents in this case persuade me to find that they were not in contempt. That these individuals acted in good faith and in the belief that they were right in following the advice of counsel, I have no doubt. The dignity of this court and the sanctity of the decree will be sufficiently protected by the findings against the corporate respondents. See *Dinsmore v. Louisville, New Albany & Chicago R. R. Co.*, 3 F. 593, 608.

Penalty and Punishment

At the close of the entire proceedings, counsel for petitioners stated that his clients were not asserting any claim to damages, but suggested the imposition of a million dollar fine, to be paid to the clerk of this court and held by him until the lapse of a year. If during that time respondents complied with the decree, such amount was to be returned to them.

As I have already indicated, I regard this as a civil proceeding and hence one which does not permit me to take any punitive measures. In a civil contempt, the court may only impose remedial punishment to compensate a litigant who has suffered special injury or damages by reason of the contumacious conduct of the defendant. See *Parker v. U. S.*, 126 F. (2d) 370, 380 (CCA 1, 1942), 153 F. (2d) 66, 70. Apparently, petitioners have not thus suffered. As partial reparation, however, all respondents who have been found guilty of contempt will be charged with the costs of this proceeding and with the expenses incurred by petitioners in presenting this matter to the court.

Petitioners may file an application for allowance of their attorneys' fees and expenses. The respondents will be given an opportunity to be heard on such application.

Findings and a form of decree should be proposed by the parties in accordance with the views herein expressed.

[¶ 62,243] United States v. Cotton Valley Operators Committee, The Ohio Oil Company, et al.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action No. 2209. Filed April 22, 1948.

Sherman Antitrust Act

Motion for More Definite Statement of Facts—Nature of Alleged Agreement.—In an action charging producers of hydrocarbons with conspiring to monopolize trade, in violation of the antitrust laws, a motion by defendants for a more definite statement of facts is granted in part, (1) to require some allegation of fact as to just what was done to bring about a monopoly and the exclusion of competitors other than the legal conclusions that the monopoly existed and caused the exclusions, and (2) to require a reasonable outline of the conditions in the field that made the products available to public participation in their commerce, and the available facilities and outlets making competition possible, such as refineries, pipelines, etc., which were excluded.

See the Sherman Act annotations, Vol. 1, ¶ 1610.251.

Motion to Produce Certain Documents—Relevancy of Testimony Sought.—The motion of a defendant oil company to require the production of certain documents is denied for

the reasons that such testimony is irrelevant, and that the requirements of the Federal Rules of Civil Procedure were not complied with.

See the Sherman Act annotations, Vol. 1, ¶ 1610.345, and prior opinion, reported at ¶ 62,216.

Motion to Dismiss—Rights of Owners to Dispose of Interests—Nature of Substances.—A motion to dismiss the complaint on the grounds that in pooling their interests in the oil field, pursuant to the requirements of the state statute and orders of the Conservation authorities, the defendants became owners *in indivisum* of the production under their control, with the right to make agreements for handling it to their mutual profit or benefit, and that the nature of the substances produced and the only means for separating the constituent elements for marketing make impracticable a division in kind at any given point prior to realization, without consequent loss or added expense, is denied. It is held that where, as alleged here, eighty-five per cent of the producing area is leased to a number of lessees and they, together with the surface owners, are compelled by virtue of the said conservation requirements to pool that percentage of the field, a situation is created whereby it is made possible for such a group, if the product happens to be of premium quality, to monopolize the same and to demand high prices, so long as competition can be kept out. This appears to be what the complaint intends to charge, and that when complainant shall have complied with the ruling for a more definite statement of the cause of action, the issues of fact and law will appear sufficiently to warrant a trial on the merits.

See the Sherman Act annotations, Vol. 1, ¶ 1610.

For plaintiff: Tom C. Clark, Attorney General; John F. Sonnett, George B. Haddock, W. B. Watson Snyder, and James R. Browning, Special and Assistants Attorney General; Malcolm E. Lafargue, United States Attorney.

For defendants: John M. Madison; W. S. Wilkinson, Wilkinson, Lewis & Wilkinson; John T. Gayton; J. R. Goff; Sidney G. Meyers, all of Shreveport, Louisiana; Vernon Roberts, Ada, Oklahoma.

[*Nature of Action*]

DAWKINS, Judge: The general nature of the complaint in this case is described in the opinion filed herein on January 21, 1948. We now have for consideration three additional motions, to-wit: (1) By some 20 odd defendants for a more definite statement of facts upon which the demand is founded; (2) By the Ohio Oil Co., for the production of certain documents; and (3) a motion to dismiss.

Taking these motions up in the order named (1) requests further information with respect to Articles 10, 11, 13, 14, 15, and 16 of the complaint.

The request as to paragraph 10 has been voluntarily answered by the complainant to the satisfaction of the defendants.

At the oral argument of this motion, after hearing both sides, the request as to Article 11 of the complaint consisting of paragraphs 2, 3, and 5, through 8, were denied from the Bench; while No. 4 had also been answered by complainant to the satisfaction of defendants.

As to Article 13 of the complaint referred to in paragraph 9 of the motion for particulars, the complainant is asked:

"What was the nature of any agreement (tacit or otherwise) between defendants herein (other than those agreements expressed and contained in the 'Cotton Valley Unitization and Pressure Maintenance Agreement') to which it is claimed that this defendant was a party and when and with whom such agreement or agreements made or by what acts or actions was such agreement or conspiracy made manifest?"

Article 13 of the complaint alleges that:

"Said combination and conspiracy (to monopolize and restrain trade in the products of the field, other than what was reinjected for conservation and to increase production) has consisted of a continuing agreement and concert of action among defendants, the substance and terms of which were and are, defendants."

Then follows sub-paragraphs (a) through (d) charging that defendants did agree, while so engaged, "to exclude others" (a) from the business of extracting, processing, and refining various hydrocarbons; (b) from the business of distributing and selling said products; (c) to sell jointly through channels selected by themselves; and (d) to fix uniform prices, terms and conditions of sale, involving over 85 per cent of the "natural

flow of liquid and gaseous hydrocarbons produced from the field and not reinjected therein."

The motion, in paragraphs 9 through 15, both inclusive, requests that complainant (9) state the "nature of any agreements" with persons other than defendants, after unitization and pressure maintenance agreements, outside of and beyond the signed document approved by the Department of Conservation of the state, which it is claimed defendants entered into, giving the names of the parties thereto besides themselves; (10) "by what means and in what manner * * * defendants undertook to exclude others" from any of such activities; (11) the nature of the business in which the defendants agreed to engage other than extracting and reinjecting the substances into the field, "where the same was conducted; and at what point or in what manner or by what means could said operations be recognized or identified"; (12) the means and manner used to exclude others from the business of distributing and selling the products taken from the field; (13) nature of the agreement relating to sale and distribution, other than the sale of defendants' own products upon the open market, and with whom made; (14) through what channels did defendants agree to sell; with whom and how did such agreements arise, for how long did each continue, and how were such channels generally selected; (15) what were the prices, terms and conditions agreed upon and in what respects those prices did not conform to those established and available upon the open market, as well as the persons and dates on which said agreements were made, etc.

As to paragraph 9 (Art. 13 of the complaint) the nature of the alleged agreement is described in general terms in said paragraphs 13 (a) through 13 (d) of the complaint, as having been between the large number of defendants charged, sufficiently, it is believed, to apprise them that it was to permit them to control the residue of production remaining after extracting and reinjecting certain elements into the field for the purpose of greater recoveries, including refining, distributing and selling at uniform prices agreed on between them and by excluding all others from any of these activities.

The details as to which of the defendants refined, distributed, shipped, marketed or sold these products and fixed the prices therefor, including the choosing of the channels of operations, to the exclusion of others, whether carried on through third persons or agencies or by the defendants themselves, involved matters of evidence or proof, it is believed, which did not have to be alleged. Defendants may have recourse to interrogatories under No. 33 of the Rules of Federal Procedure for any additional information to which they may be properly entitled.

Paragraph 16 of the motion deals with Article 14 of the complaint. This article charges as follows:

> "14. The continuing agreements, understandings and concerted action of the defendants set out in paragraphs 11 and 12 of this complaint do not contribute to the conservation of the oil and gas resources of the Field or of the State of Louisiana, or prevent the waste and depletion thereof. Said agreements, understandings and concerted action are not necessary, and do not contribute, to the separation of any of the liquid and gaseous hydrocarbons taken from the Field, nor to the reinjection of a residue of liquid and gaseous hydrocarbons under pressure into the natural reservoirs of the Field. Said agreements, understandings and concerted action are not authorized by Act Number 225 of the Legislature of the State of Louisiana of 1936, Act Number 157 of the Legislature of the State of Louisiana of 1940, nor by Order Number 10-B, dated July 1, 1940, Order Number 10-C, dated January 28, 1941, nor any other order issued by the Commissioner of Conservation of the State of Louisiana."

Defendants asked "in what respects * * * it is claimed that * * * operations * * * by defendants did not contribute to conservation * * * or were not authorized by statute or order of the Commissioner of Conservation * * * and at what point in the course of such operations did defendants depart from conservation and administrative authority?"

It must be assumed, it would seem, that in the course of the investigation preceding the filing of the complaint, complainant determined the nature of the operation up to the point where permissible acts of conservation ended and the alleged illegal combination and conspiracy in restraint of trade and commerce began. In order to prevail, it will have to make proof of this sufficiently to enable the Court to draw the line and be able to say that "so far your conduct was proper, but beyond this, you began to violate the Sherman Act." The situation presented in this case is unique, in that the complaint as pointed out in the former opinion,

set forth the background and history of operations in this field, which it says were proper acts of conservation, having the approval of the state agency, even though the defendants were acting in concert. It then proceeds to charge that certain other activities which were necessary to a realization of the profits or benefits in money from production were illegal. Extraction of the elements from the field production, by refining or otherwise, their transporting and marketing, were not illegal in themselves, but became so only when a point had been reached where the public or those desiring, could participate therein under the conditions which prevailed. Was it at the mouth of the well where the hydrocarbons were withdrawn, at the tanks if storage existed in the field, or at some other point, if the residue had to be transported by pipe lines. It can easily be conceived that a single extraction plant or a refinery existed in the field or vicinity, which was also operated by defendants, who conceived and put into effect the measures of conservation. If so, did any situation arise that compelled them to construct pipe lines or otherwise provide means of transportation for the use of competing refineries or operators, or can it be made to appear that there were already operating, facilities of competitors, who were denied the right to purchase those products at points available to the public? It is true that defendants must be familiar with conditions in the area, and no doubt have in their possession, records of whatever transactions took place; but charges such as those made in the complaint are quasi criminal, and as defendants' counsel say, if the Government prevails, may be taken advantage of by other private litigants to recover triple damages from these defendants. In fact, the Sherman Act is primarily criminal in its nature, but permits civil remedies, such as are sought here by the Government, to prevent its violation; and the character of the combination and conspiracy should be set forth with sufficient particularity to permit defense, if such exists. Facts should be furnished to show when and where the illegal activity began and by what means competitors were excluded.

If the defendants in this case were stockholders or officers in a single corporation, operating in the Cotton Valley Field, there would appear to be no reason why they could not acquire any part of the production, transport it in the crude state, by pipeline or otherwise, separate its consituent elements in the field, if facilities existed there, or carry it to refineries operated by themselves and then distribute and sell the finished product, as is done by most big companies throughout the country. On the other hand, if, because of the peculiar conditions, it was necessary that the owners of independent interests in the field should pool the same for the purpose of efficient and profitable recovery, under a system recognized and approved by proper authorities, a point might be reached where a continuation of that pooling of interest might become illegal, if it involved a substantial portion of production, to which the public had access before the necessity for conservation measures arose, and they were denied such rights through refusal of defendants to permit these competitors to participate, after the acts of conservation had been completed. There should be some allegation of fact as to just what was done to bring about a monopoly and the exclusion of competitors other than the legal conclusions that such monopoly existed and caused the exclusions.

Paragraph 16 (a) through 16 (d) of the complaint, under the heading "effects" alleges that the conduct of defendants "excluded other persons and companies from the business" (a) of extracting and processing the hydrocarbons, (b) from selling and marketing, (c) transporting and (d) refining and distributing the same.

Defendants asked that complainant be required to give the names and manner in which other persons were excluded from all the activities covered by these four subdivisions of the complaint.

Here again, the complaint should give a reasonable outline of the conditions in the field that (1) made the products available to public participation in their commerce, and (2) the available facilities and outlets making competition possible such as refineries, pipelines, etc., which were excluded. In all other respects the motion for particulars or further statement of facts will be denied.

The Motion of Ohio Oil Company to Produce Certain Documents

The issues presented by this motion are the same as were considered in an almost identical motion by the Magnolia Petroleum Co. in the opinion handed down on January 21, 1948. After further consideration the Court is of the view that this motion should likewise be denied for the reasons stated in that opinion.

Motion to Dismiss

The motion to dismiss is based on the contention that in pooling their interests in the Cotton Valley field, pursuant to the requirements of the state statute and orders of the Conservation authorities, the defendants became owners *in indivisum* of the production under their control, with the right to make agreements for handling it to their mutual profit or benefit; further, that the nature of the substances produced and the only means for separating the constituent elements for marketing made impracticable, though not impossible, a division in kind at any given point, prior to realization, without consequent loss or added expense. State decisions, as well as Federal cases are cited to the point, that there is no ownership in these fugacious minerals until brought to the surface and reduced to possession, but only a common right in the surface owners to explore therefor and bring about such possession; from which it follows that the state, under its police power, may regulate the same by requiring pooling and sharing in production, to prevent economic waste and to insure each surface owner his fair share.

There is no question that, in Louisiana, the nature of the right of surface owners in minerals is such that the state possesses and in recent years has exercised extensively its power of control and regulation by compelling landowners in many fields, where ownership was in small tracts, to pool their interests and to share in production through one or more wells for an entire block, according to acreage owned. In such situation, up to the point where the minerals pass into commerce, there exists a joint or common enterprise. Usually, the drilling or marketing is done by one or more lessees, who provide storage or access to pipelines, and the surface owners are paid in accordance with what are commonly called "division orders".

However, where, as alleged here, 85 per cent of the producing area is leased to a number of lessees and they, together with the surface owners, are compelled, by virtue of the said requirements of conservation to pool that percentage of a field of the size of Cotton Valley, a situation is created whereby it is made possible for such a group, if the product happens to be of premium quality, to monopolize the same and to demand high prices, so long as competition can be kept out. And the temptation to do so is increased by the extent of participation of the several interests in those profits; whereas, if competition in the purchase, refining and marketing were allowed to have free play, such premium production might be held to its fair value by those who were willing to take a reasonable profit instead of demanding all the traffic would stand.

In general terms this appears to be what the complaint intends to charge; although as stated in passing upon the motion for particulars or a more definite statement of facts, it has not been made clear just where the line of demarcation between conservation and the alleged monopolistic operations lies. Undoubtedly, if persons, such as are the defendants, according to the complaint, without compulsion for conservation, voluntarily entered into an agreement to pool 85 per cent of production in a field such as this, and to exclude from participation all others, through all steps to ultimate realization of the profits or benefits, which are the controlling reasons for all business enterprises, it could hardly be contended, that such a course was not within the purview of the anti-trust laws. If this were permissible as to one field, no reason can be seen why it could not be extended to others, and thus bring about a condition similar to that which precipitated dissolution of the original Standard Oil Company years ago.

It is believed that when complainant shall have complied with the ruling for a more definite statement of the cause of action, the issues of fact and law will appear sufficiently to warrant a trial on the merits.

The motion to dismiss will therefore be overruled.

Proper decree should be presented.

[¶ 62,244] United States v. Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Inc. et al. (No. 79).

Loew's, Inc., Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al. v. United States (No. 80).

Paramount Pictures, Inc., and Paramount Film Distributing Corporation v. United States (No. 81).

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc. v. United States (No. 82).

United Artists Corporation v. United States (No. 83).

Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures, Company, Inc.), Universal Film Exchanges, Inc., and Big U. Film Exchange, Inc. v. United States (No. 84).

American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz et al. v. United States (No. 85).

W. C. Allred, Charles E. Beach and Elizabeth L. Beach et al. v. United States, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al. (No. 86).

In the Supreme Court of the United States. October Term, 1947. May 3, 1948.

Appeals from the District Court of the United States for the Southern District of New York.

Sherman Antitrust Act

Exhibition of Motion Pictures—Restraint of Trade—Price Fixing.—The finding of the District Court that the fixing of minimum admission prices in licenses issued by motion picture distributors constituted a conspiracy in restraint of trade is affirmed. A vertical price-fixing conspiracy was established by proof of express agreements between each distributor-defendant and its licensees; a horizontal conspiracy was inferred from the pattern of price-fixing disclosed in the record. It is not necessary to find an express agreement to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. The establishment of substantially uniform minimum admission prices in licenses between distributor-defendants and exhibitor-defendants, and in licenses to independent exhibitors, constituted a price-fixing combination in violation of the Sherman Act. The privilege of a copyright owner to fix the price at which his licensee may exhibit the copyrighted films cannot be used to deter competition between rivals in the exploitation of their licenses.

See the Sherman Act annotations, Vol. 1, ¶ 1240.101.

Exhibition of Motion Pictures—Restraint of Trade—Clearances and Runs.—Evidence to support the finding of the District Court that the defendants either participated in evolving a uniform system of clearances or acquiesced in it and so furthered its existence is held adequate to support a finding of a conspiracy to restrain trade by imposing unreasonable clearances. The provision of the decree enjoining defendants and their affiliates from agreeing with each other or with any exhibitors to maintain a system of clearances or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted, was plainly warranted by the findings. The Court refuses to construe the provision to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor. Such a construction would give the defendants power to retain the effects of the conspiracy. The provision of the decree placing the burden of proving the legality of clearance provisions upon the distributor is upheld.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Exhibition of Motion Pictures—Restraint of Trade—Pooling Agreements; Joint Ownership.—The conclusion of the District Court that the result of agreements between exhibitor-defendants, and between exhibitor-defendants and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, the profits being shared according to prearranged percentages, was to eliminate competition *pro tanto* both in exhibition and distribution of features, and that the result of like agreements between exhibitor-defendants and certain independent exhibitors was to nullify competition between the allied theatres and to make more effective the competition of the group against theatres not members of the pool, is affirmed. The provision of the decree requiring dissolution of existing pooling agreements and enjoining future arrangements of that kind is upheld.

It is held that the District Court erred in ordering disaffiliation in instances of joint ownership by exhibitor-defendants and independents where the facts show that these instances are wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Restraint of Trade—Formula Deals, Master Agreements and Franchises.—The conclusion of the District Court that formula deals, which are licensing agreements with theatre circuits in which the fee of a given feature is measured by a specified percentage of the feature's national gross, and master agreements covering the exhibition of features in a number of theatres, constitute restraint of trade is upheld. Such arrangements are unlawful in that they eliminate the possibility of bidding for films theatre by theatre, thus giving an advantage to the large circuit, and because the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations. The finding of the District Court that a franchise, which is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement, constituted a restraint of trade is set aside so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Restraint of Trade—Block-Booking.—The holding of the District Court that block-booking is illegal for the reasons that it prevents competitors from bidding for single features on their individual merits, and that it adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first, and the provision of the decree prohibiting defendants from entering into or performing any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features, is affirmed. The practice tends to equalize rather than differentiate the reward for the individual copyrights. The result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.

See the Sherman Act annotations, Vol. 1, ¶ 1270.101.

Restraint of Trade—Discrimination.—The findings of the District Court that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions which gave to the large circuits great competitive advantages, and the conclusion that such discriminatory practices constitute restraints of trade condemned by the Sherman Act, are affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1220.192.

Provision of Decree—Competitive Bidding.—The provision of the decree requiring that films be licensed on a competitive bidding basis is ordered eliminated. The proposed system of bidding affords little in the way of relief against the real evils of the conspiracy, and the task of supervising such a system would implicate the judiciary heavily in the details of business management if supervision is to be effective.

See the Sherman Act annotations, Vol. 1, ¶ 1610.391.

Monopoly—Expansion of Theatre Holdings—Divestiture.—The conclusions of the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a national monopoly and that the five major defendants through their present theatre holdings alone do not collectively or individually have a monopoly of exhibition are based on insufficient inquiry. The failure of the District Court to consider the presence of monopoly in the first-run field, the inconclusiveness of its findings on the question of purpose or intent, and the failure of the court to consider other questions bearing on the monopoly issue require that the findings on monopoly and divestiture be set aside. The provision of the decree barring the five major defendants from further theatre expansion is likewise eliminated.

See the Sherman Act annotations, Vol. 1, ¶ 1022.27.

Consent Decree—Arbitration System.—The District Court has the power to authorize the maintenance of an arbitration system by those parties who consent, and to provide the rules and procedure under which it is to operate. Such a system would be an auxiliary procedure, barring no one from the use of other remedies for violation of the Sherman Act or of the decree. Whether such a system should be inaugurated is for the discretion of the District Court.

See the Sherman Act annotations, Vol. 1, ¶ 1580.30.

Denial of Leave to Intervene.—The orders of the District Court denying certain associations of exhibitors and a number of independent exhibitors leave to intervene are affirmed. The elimination from the decree of provisions for competitive bidding eliminates any basis for granting intervention.

See the Sherman Act annotations. Vol. 1, ¶ 1610.371.

Affirming in part and reversing in part the judgments of the District Court, 66 Fed. Supp. 323; 70 Fed. Supp. 53.

For appellants: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Robert L. Wright, Kenneth L. Kimble, Herbert Bockland, Stanley M. Silverberg, Philip Marcus, Special Assistants to Attorney General.

For appellees: John W. Davis for Loew's Inc.; James F. Byrnes, Otto E. Koegel, John J. Coshey, for Twentieth Century-Fox; William J. Donovan, Ralstone R. Iwine, for Radio-Keith; Joseph M. Proskauer, Robert W. Perkins, for Warner Bros.; Whitney North Seymour for Paramount Pictures Inc.

[*Nature of Action*]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on appeal[1] from a judgment of a three-judge District Court[2] holding that the defendants had violated § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53.

The suit was instituted by the United States under § 4 of the Sherman Act to prevent and restrain violations of it. The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporations and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artist Corporation, which is engaged only in the distribution of motion pictures. The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.

The complaint charged that the producer-defendants had attempted to monopolize and had monopolized the production of motion pictures. The District Court found to the contrary and that finding is not challenged here. The complaint charged that all the defendants, as distributors, had conspired to restrain and monopolize and had restrained and monopolized interstate trade in the distribution and exhibition of films by specific practices which we will shortly relate. It also charged that the five major defendants had engaged in a conspiracy to restrain and monopolize, and had restrained and monopolized interstate trade in the exhibition of motion pictures in most of the larger cities of the country. It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants violated § 1 and § 2 of the Act. It charged that each distributor-defendant had entered into various

[1] Sec. 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

[2] The court was convened pursuant to the provisions of the Act of April 6, 1942, 56 Stat. 198, 199, 15 U. S. C. § 28.

contracts with exhibitors which unreasonably restrained trade. Issue was joined; and a trial was had.[3]

First. Restraint of Trade—(1) Price Fixing

No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed. The District Court found that the defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge, whether the rental of the film was a flat amount or a percentage of the receipts. It found that substantially uniform minimum prices had been established in the licenses of all defendants. Minimum prices were established in master agreements or franchises which were made between various defendants as distributors and various defendants as exhibitors and in joint operating agreements made by the five majors with each other and with independent theatre owners covering the operation of certain theatres.[4] By these later contracts minimum admission prices were often fixed for dozens of theatres owned by a particular defendant in a given area of the United States. Minimum prices were fixed in licenses of each of the five major defendants. The other three defendants made the same requirement in licenses granted to the exhibitor-defendants. We do not stop to elaborate on these findings. They are adequately detailed by the District Court in its opinion. See 66 F. Supp. 334-339.

The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit v. United States,* 306 U. S. 208, 226-227; *United States v. Masonite,* 316 U. S. 265, 275. That was shown here.

On this phase of the case the main attack is on the decree which enjoins the defendants and their affiliates from granting any license, except to their own theatres, in which minimum prices for admission to a theatre are fixed in any manner or by any means. The argument runs as follows: *United States v. General Electric Co.,* 272 U. S. 476, held that an owner of a patent could, without violating the Sherman Act, grant a license to manufacture and vend, and could fix the price at which the licensee could sell the patented article. It is pointed out that defendants do not sell the films to exhibitors, but only license them and that the Copyright Act (35 Stat. 1075, 1088, 17 U. S. C. § 1), like the patent statutes, grants the owner exclusive rights.[5] And it is argued that if the patentee can fix the price at which his licensee may sell the patented article, the owner of the copyright should be allowed the same privilege. It is maintained that such a privilege is essential to protect the value of the copyrighted films.

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se. United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *United States v. Masonite Corporation, supra.* We recently held in *United States v. Gypsum Co.,* 333 U. S. —, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry.

[3] Before trial, negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period the United States moved for trial against all the defendants.

[4] A master agreement is a licensing agreement or "blanket deal" covering the exhibition of features in a number of theatres, usually comprising a circuit.

A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

An independent as used in these cases means a producer, distributor, or exhibitor, as the context requires, which is not a defendant in the action, or a subsidiary or affiliate of a defendant.

[5] See note 12, *infra.*

Certainly the rights of the copyright owner are no greater than those of the patentee.

Nor can the result be different when we come to the vertical conspiracy between each distributor-defendant and his licensees. The District Court stated in its findings:

> "In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices."

That consequence seems to us to be incontestable. We stated in *United States v. Gypsum Co., supra,* p. —, that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that *United States v. General Electric Co., supra,* as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See *Interstate Circuit v. United States, supra,* p. 230.

(2) Clearances and Runs

Clearances are designed to protect a particular run of a film against a subsequent run.[6] The District Court found that all of the distributor-defendants used clearance provisions and that they were stated in several different ways or in combinations: in terms of a given period between designated run; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; or in terms of clearances as fixed by other distributors.

The Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here. In its view their justification was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly diminished. A clearance when used to protect that interest of the exhibitor was reasonable, in the view of the court, when not unduly extended as to area or duration. Thus the court concluded that although clearances might indirectly affect admission prices, they do not fix them and that they may be reasonable restraints of trade under the Sherman Act.

The District Court held that in determining whether a clearance is unreasonable, the following factors are relevant:

> (1) The admission prices of the theatres involved, as set by the exhibitors;
>
> (2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;
>
> (3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;
>
> (4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;
>
> (5) The extent to which the theatres involved compete with each other for patronage;
>
> (6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and
>
> (7) There should be no clearance between theatres not in substantial competition.

[6] A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

It reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343-346, that many clearances had no relation to the competitive factors which alone could justify them.[7] The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances.

The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted.

Some of the defendants ask that this provision be construed (or, if necessary, modified) to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor. We reject that suggestion. If that were allowed, then the exhibitor-defendants would have an easy method of keeping alive at least some of the consequences of the effective conspiracy which they launched. For they could then justify clearances granted by other distributors in favor of their theatres in terms of the competitive requirements of those theatres, and at the same time justify the restrictions they impose upon independents in terms of the necessity of protecting their film rental as licensor. That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked. It plainly should not be allowed so long as the exhibitor-defendants own theatres. For in its baldest terms it is in the hands of the defendants no less than a power to restrict the competition of others in the way deemed most desirable by them. In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords.

Whether the same restrictions would be applicable to a producer who had not been a party to such a conspiracy is a question we do not reach.

Objection is made to a further provision of this part of the decree stating that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724. The court certainly then could take the lesser step of making them *prima facie* invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party

[7] Thus the District Court found:

"Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States v. Crescent Amusement Co.*, 323 U. S. 173, 188.

(3) Pooling Agreements; Joint Ownership

The District Court found the exhibitor-defendants had agreements with each other and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages. Some of these agreements provided that the parties might not acquire other competitive theatres without first offering them for inclusion in the pool. The court concluded that the result of these agreements was to eliminate competition *pro tanto* both in exhibition and in distribution of features,[8] since the parties would naturally direct the films to the theatres in whose earnings they were interested.

The District Court also found that the exhibitor-defendants had like agreements with certain independent exhibitors. Those alliances had, in its view, the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool. The court found that in some cases the operating agreements were achieved through leases of theatres, the rentals being measured by a percentage of profits earned by the theatres in the pool. The District Court required the dissolution of existing pooling agreements and enjoined any future arrangement of that character.

These provisions of the decree will stand. The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.

There was another type of business arrangement that the District Court found to have the same effect as the pooling agreements just mentioned. Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent.[9] The result is, according to the District Court, that the theatres are operated "collectively, rather than competitively." And where the joint owners are an exhibitor-defendant and an independent the effect is, according to the District Court, the elimination by the exhibitor-defendant of "putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." The District Court found these joint ownerships of theatres to be unreasonable restraints of trade within the meaning of the Sherman Act.

The District Court ordered the exhibitor-defendants to disaffiliate by terminating their joint ownership of theatres; and it enjoined future acquisitions of such interests. One is authorized to buy out the other if it shows to the satisfaction of the District Court and that court first finds that such acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." This dissolution and prohibition of joint ownership as between exhibitor-defendants was plainly warranted. To the extent that they have joint interests in the outlets for their films each in practical effect grants the other a priority for the exhibition of its films. For in this situation, as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership be-

[8] A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet.

[9] *Theatres jointly owned with independents:*

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1287

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214

Of the 1287 jointly owned with independents, 209 would not be affected by the decree since one of the ownership interests is less than 5 per cent, an amount which the District Court treated as *de minimis*.

tween exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

The District Court also ordered disaffiliation in those instances where theatres were jointly owned by an exhibitor-defendant and an independent, and where the interest of the exhibitor-defendant was "greater than five per cent unless such interest shall be ninety-five per cent or more," an independent being defined for this part of the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." The exhibitor-defendants are authorized to acquire existing interests of the independents in these theatres if they establish, and if the District Court first finds that the acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." All other acquisitions of such joint interests were enjoined.

This phase of the decree is strenuously attacked. We are asked to eliminate it for lack of findings to support it. The argument is that the findings show no more than the existence of joint ownership of theatres by exhibitor-defendants and independents. The statement by the District Court that the joint ownership eliminates "putative competition" is said to be a mere conclusion without evidentiary support. For it is said that the facts of the record show that many of the instances of joint ownership with an independent interest are cases wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. Some are said to be rather fortuitous results of bankruptcies; others are said to be the results of investments by outside interests who have no desire or capacity to operate theatres, and so on.

It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. *United States v. Crescent Amusement Co., supra,* p. 189; *Schine Chain Theatres, Inc. v. United States, ante,* p. —. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United States v. Crescent Amusement Co., supra,* pp. 189-190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that no monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause.

(4) Formula Deals, Master Agreements, and Franchises

A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross. The District Court found that Paramount and RKO had made formula deals with independent and affiliated circuits. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit. The inclusion of theatres of a circuit into a single agreement gives no oportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. The District Court found some master agreements[10] open to the same objection. Those are the master agreements that cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leaves other terms to the discretion of the circuit. The District Court enjoined the making or further performance of any formula deal of the type described above. It also enjoined the making or further performance of any master agreement covering the exhibition of features in a number of theatres.

The findings of the District Court in these respects are supported by facts, its conclusion that the formula deals and master agreements constitute restraint of trade is valid, and the relief is proper. The formula deals and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations. The reasons have been stated in *United States v. Griffiths, ante*, p. —, and *Schine Chain Theatres, Inc. v. United States, ante*, p. —, and need not be repeated here. It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. See *United States v. Crescent Amusement Co., supra*, p. 183.

The District Court also enjoined the making or further performance of any franchise. A franchise is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement. The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors. At least that is the way we read its findings.

Universal and United Artists object to the outlawry of franchise agreements. Universal points out that the charge of illegality of franchises in these cases was restricted to franchises with theatres owned by the major defendants and to franchises with circuits or theatres in a circuit, a circuit being defined in the complaint as a group of more than five theatres controlled by the same person or a group of more than five theatres which combine through a common agent in licensing films. It seems, therefore, that the legality of franchises to other exhibitors (except as to block-booking, a practice to which we will later advert) was not in issue in the litigation. Moreover, the findings on franchises are clouded by the statement of the District Court in the opinion that franchises "necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder." As will be seen hereafter, we eliminate from the decree the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.

We can see how if franchises were allowed to be used between the exhibitor-defendants each might be able to strengthen its strategic position in the exhibition field and continue the ill effects of the conspiracy which the decree is designed to dissipate.

[10] See note 4, *supra*.

Franchise agreements may have been employed as devices to discriminate against some independents in favor of others. We know from the record that franchise agreements often contained discriminatory clauses operating in favor not only of theatres owned by the defendants but also of the large circuits. But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. The findings do not deal with the issue doubtlessly due to the fact that any system of franchises would necessarily conflict with the system of competitive bidding adopted by the District Court. Hence we set aside the findings of franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

We do not take that course in the case of formula deals and master agreements, for the findings in these instances seem to stand on their own bottom and apparently have no necessary dependency on the provision for competitive bidding.

(5) Block-Booking

Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corporation v. United States,* 309 U. S. 436, 459; *Morton Salt Co. v. Suppiger Co.,* 314 U. S. 488, 491; *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U. S. 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.[11]

We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal,* 286 U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands

[11] Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it. To remedy the problems created by that practice the District Court included the following provision in its decree:

"To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature."

The court advanced the following as its reason for inclusion of this provision:

"Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designated to prevent such blind-selling, are poorly attended by exhibitors. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."

We approve this provision of the decree.

not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.[12]

It is argued that *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not *per se* illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here.

Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the anti-trust laws receive judicial sanction.

We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

(6) Discrimination

The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers[13] and extended runs; granting road show privileges;[14] allowing overage and underage;[15] granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices because they were thought to be impossible under the system of competitive bidding adopted by the District Court.

These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. See *Interstate Circuit v. United States, supra,* p. 231; *United States v. Crescent Amusement Co., supra,* pp. 182-183. It will be for the District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.

There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them

[12] The exclusive right granted by the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1 includes no such privilege. It provides, so far as material here, as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

[13] A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre.

[14] A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas.

[15] Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another.

onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Second. Competitive Bidding

The District Court concluded that the only way competition could be introduced into the existing system of fixed prices, clearances and runs was to require that films be licensed on a competitive bidding basis. Films are to be offered to all exhibitors in each competitive area.[16] The license for the desired run is to be granted to the highest responsible bidder, unless the distributor rejects all offers. The licenses are to be offered and taken theatre by theatre and picture by picture. Licenses to show films in theatres, in which the licensor owns directly or indirectly an interest of ninety-five per cent or more, are excluded from the requirement for competitive bidding.

Paramount is the only one of the five majors who opposes the competitive bidding system. Columbia Pictures, Universal, and United Artists oppose it. The intervenors representing certain independents oppose it. And the Department of Justice, which apparently proposed the system originally, speaks strongly against it here.

At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largly out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken.

Each film is to be licensed on a particular run to "the highest responsible bidder, having a theatre of a size, location and equip ment adequate to yield a reasonable return to the licensor." The bid "shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make." We do not doubt that if a competitive bidding system is adopted all these provisions are necessary. For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash of tobacco, wheat, or other produce. Columbia puts these pertinent queries: "No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?"

The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining "a reasonable return to the licensor" would seem necessary.

We mention these matters merely to indicate the character of the job of supervising such a competitive bidding system. It would involve the judiciary in the administration of intricate and detailed rules gov-

[16] Competitive bidding is required only in a "competitive area" where it is "desired by the exhibitors." As the District Court said, "the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The details of the competitive bidding system will be found in 70 F. Supp. pp. 73-74.

erning priority, period of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals, could be done only with the greatest reluctance. At least such choices should not be faced unless the need for the system is great and its benefits plain.

The system uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause. If a premium is placed on purchasing power, the court-created system may be a powerful factor towards increasing the concentration of economic power in the industry rather than cleansing the competitive system of unwholesome practices. For where the system in operation promises the advantage to the exhibitor who is in the strongest financial position, the injunction against discrimination [17] is apt to hold an empty promise. In this connection it should be noted that even though the independents in a given competitive area do not want competitive bidding, the exhibitor-defendants can invoke the system.

Our doubts concerning the competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own features. They thus start with an inventory which all other exhibitors lack. The latter have no prospect of assured runs except what they get by competitive bidding. The proposed system does not offset in any way the advantages which the exhibitor-defendants have by way of theatre ownership. It would seem in fact to increase them. For the independents are deprived of the stability which flows from established business relationships. Under the proposed system they can get features only if they are the highest responsible bidders. They can no longer depend on their private sources of supply which their ingenuity has created. Those sources, built perhaps on private relationships and representing important items of good will, are banned, even though they are free of any taint of illegality.

The system was designed, as some of the defendants put it, to remedy the difficulty of any theatre to break into or change the existing system of runs and clearances. But we do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strengthen their hold in the industry. We are reluctant to alter decrees in these cases where there is agreement with the District Court on the nature of the violations. *United States v. Crescent Amusement Co., supra,* p. 185; *International Salt Co. v. United States,* 332 U. S. 392, 400. But the provisions for competitive bidding in these cases promise little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective. They vest powerful control in the exhibitor-defendants over their competitors if close supervision by the court is not undertaken. In light of these considerations we conclude that the competitive bidding provisions of the decree should be eliminated so that a more effective decree may be fashioned.

We have already indicated in preceding parts of this opinion that this alteration in the decree leaves a hiatus or two which will have to be filled on remand of the cases.

[17] The competitive bidding part of the decree provides: "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

We will indicate hereafter another phase of the problem which the District Court should also reconsider in view of this alteration in the decree. But out of an abundance of caution we add this additional word. The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated.

Third. Monopoly, Expansion of Theatre Holdings, Divestiture

There is a suggestion that the hold the defendants have on the industry is so great that a problem under the First Amendment is raised. Cf. *Associated Press v. United States,* 326 U. S. 1. We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted. The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.

The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business.

The five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076.[18] Those theatres paid 45 per cent of the total domestic film rental received by all eight defendants.

In the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors. In four of those cities the five majors have no theatres. In 38 of those cities there are no independent first-run theatres. In none of the remaining 50 cities did less than three of the distributor-defendants license their product on first run to theatres of the five majors. In 19 of the 50 cities less than three of the distributor-defendants licensed their product on first run to independent theatres. In a majority of the 50 cities the greater share of all of the features of defendants were licensed for first-run exhibition in the theatres of the five majors.

In about 60 per cent of the 92 cities having populations of over 100,000, independent theatres compete with those of the five majors in first-run exhibition. In about 91 per cent of the 92 cities there is competition between independent theatres and the theatres of the five majors or between theatres of the five majors themselves for first-run exhibition. In all of the 92 cities there is always competition in some run even where there is no competition in first runs.

In cities between 25,000 and 100,000 populations the five majors have interests in 577 of a total of 978 first-run theatres or about 60 per cent. In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town.

[18] The theatres which each of the five majors owned independently of the others were: Paramount 1,395 or 7.72 per cent; Warner 501 or 2.77 per cent; Loew's 135 or .74 per cent; Fox 636 or 3.52 per cent; RKO 109 or .60 per cent. There were in addition 361 theatres or about 2 per cent in which two or more of the five majors had joint interests. These figures exclude connections through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

These theatres are located in 922 towns in 48 States and the District of Columbia. For further description of the distribution of theatres see Bertrand, Evans, and Blanchard, The Motion Picture Industry—A Pattern of Control 15-16 (TNEC Monograph 43, 1941).

The District Court held that the five majors could not be treated collectively so as to establish claims of general monopolization in exhibition. It found that none of them was organized or had been maintained "for the purpose of achieving a national monopoly" in exhibition. It found that the five majors by their present theatre holdings "alone" (which aggregate a little more than one-sixth of all the theatres in the United States), "do not and cannot collectively or individually, have a monopoly of exhibition." The District Court also found that where a single defendant owns all of the first-run theatres in a town, there is no sufficient proof that the acquisition was for the purpose of creating a monopoly. It found rather that such consequence resulted from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the five majors, or the preference of the public for the best equipped theatres. And the percentage of features on the market which any of the five majors could play in its own theatres was found to be relatively small and in nowise to approximate a monopoly of film exhibition.[19]

Even in respect of the theatres jointly owned or jointly operated by the defendants with each other or with independents the District Court found no monopoly or attempt to monopolize. Those joint agreements or ownership were found only to be unreasonable restraints of trade. The District Court, indeed, found no monopoly on any phase of the cases, although it did find an attempt to monopolize in the fixing of prices, the granting of unreasonable clearances, block-booking and the other unlawful restraints of trade we have already discussed. The "root of the difficulties," according to the District Court, lay not in theatre ownership but in those unlawful practices.

The District Court did, however, enjoin the five majors from expanding their present theatre holdings in any manner.[20] It refused to grant the request of the Department of Justice for total divestiture by the five majors of their theatre holdings. It found that total divestiture would be injurious to the five majors and damaging to the public. Its thought on the latter score was that the new set of theatre owners who would take the place of the five majors would be unlikely for some years to give the public as good service as those they supplanted "in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres." Divestiture was, it thought, too harsh a remedy where there was available the alternative of competitive bidding. It accordingly concluded that divestiture was unnecessary "at least until the efficiency of that system has been tried and found wanting."

It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, *i. e.* it was designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals, as the Dis-

[19] The number of feature films released during the 1943-44 season by the eleven largest distributors is as follows:

	No. of Films	*Percentages of Total* — *With "Westerns" included*	*Percentages of Total* — *With "Westerns" excluded*
Fox	33	8.31	9.85
Loew's	33	8.31	9.85
Paramount	31	7.81	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.32	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Republic	–29 features –30 "Westerns"	14.86	8.66
Monogram	–26 features –16 "Westerns"	10.58	7.76
PRC	–20 features –16 "Westerns"	9.07	5.97
Totals	397 335 without "Westerns"	100.00	100.00

[20] Excepted from this prohibition was the acquisition of interests in theatres jointly owned, a matter we have discussed in a preceding portion of this opinion.

trict Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible."

It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five majors through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly.

An example will illustrate the problem. In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States v. Griffith, ante,* p .—, and see *Schine Chain Theatres, Inc. v. United States, ante,* p. —, even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc. v. United States, ante,* p. —, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution. What findings would be warranted after such an inquiry in the present cases, we do not know. For the findings of the District Court do not cover this point beyond stating that monopoly was an objective of the several restraints of trade that stand condemned.

Moreover, the problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. That is the position we have taken in *Schine Chain Theatres, Inc. v. United States, ante,* p. —, in dealing with a projection of the same conspiracy through certain large circuits. Parity of treatment of the unaffiliated and the affiliated circuits requires the same approach here. For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors.

The findings of the District Court are deficient on that score and obscure on another. The District Court in its findings speaks of the absence of a "purpose" on the part of any of the five majors to achieve a "national monopoly" in the exhibition of motion pictures. First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the ***first-run*** field for the entire country, in the ***first-run*** field in the 92 largest cities of the country, or in the ***first-run*** field in separate localities. Yet the ***first-run*** field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of "any part" of trade or commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. *United States v. Yellow Cab Co.,* 332 U. S. 218, 225. Second, we pointed out in *United States v. Griffith, ante* p. —, that "specific intent" is not necessary to establish a "purpose or in-

tent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of "purpose" the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States v. Griffith, ante* p. —), for as we stated in *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811, the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question.

Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se.* But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. *United States v. Reading Co.,* 253 U. S. 26, 57; *United States v. Lehigh Valley R. Co.,* 254 U. S. 255, 269-270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States v. Aluminum Co. of America,* 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in *United States v. Griffith, ante,* p. —, n. 10, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See *United States v. Swift & Co.,* 286 U. S. 106, 116; *United States v. Aluminum Co. of America, supra,* p. 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (*United States v. Aluminum Co. of America, supra,* p. 430), and the leverage on the market which the particular vertical integration creates or makes possible.

These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand.

It follows that the provision of the decree barring the five majors from further theatre expansion should likewise be eliminated. For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem. We in no way intimate, however, that the District Court erred in prohibiting further theatre expansion by the five majors.

The Department of Justice maintains that if total divestiture is denied, licensing of films among the five majors should be barred. As a permanent requirement it would seem to be only an indirect way of forcing divestiture. For the findings reveal that the theatres of the five majors could not operate their theatres full time on their own films.[21] Whether that step would, in absence of competitive bidding, serve as a

[21] The District Court found, "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor."

short range remedy in certain situations to dissipate the effects of the conspiracy (*United States v. Univis Lens Co.*, 316 U. S. 241, 254; *United States v. Bausch & Lomb Co., supra*, p. 724; *United States v. Crescent Amusement Co., supra*, p. 188) is a question for the District Court.

Fourth. [*Arbitration System*]

The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs "with rare efficiency." But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.

We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the anti-trust laws. But the District Court has the power to authorize the maintenance of such a sysem by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court.

Fifth. Intervention

Certain associations of exhibitors and a number of independent exhibitors, appellant-intervenors in Nos. 85 and 86, were denied leave to intervene in the District Court. They appeal from those orders. They also filed original motions for leave to intervene in this Court. We postponed consideration of the original motions and of our jurisdiction to hear the appeals until a hearing on the merits of the cases.

Rule 24 (a) of the Rules of Civil Procedure, which provides for intervention as of right, reads in part as follows: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these anti-trust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. *United States v. St. Louis Terminal*, 236 U. S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the anti-trust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency proposed the idea of competitive bidding in the District Court.

We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed. Now that the provisions for competitive bidding have been eliminated from the decree there is no basis for saying that the decree affects their legal rights. Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared.

The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

[Dissenting Opinion]

MR. JUSTICE FRANKFURTER, dissenting in part.

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." On this guiding consideration, the Court earlier this Term sustained a Sherman Law decree, which was not the outcome of a long trial involving complicated and contested facts and their significance, but the formulation of a summary judgment on the bare bones of pleadings. *International Salt Co. v. United States,* 332 U. S. 392, 400-401. The record in this case bespeaks more compelling respect for the decree fashioned by the District Court of three judges to put an end to violations of the Sherman Law and to prevent the recurrence, than that which led this Court not to find abuse of discretion in the decree by a single district judge in the *International Salt* case.

This Court has both the authority and duty to consider whether a decree is well calculated to undo, as far as is possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition. But it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo.* We are, after all, an appellate tribunal even in Sherman Law cases. It could not be fairly claimed that this Court possesses greater experience, understanding and prophetic insight in relation to the movie industry, and is therefore better equipped to formulate a decree for the movie industry than was the District Court in this case, presided over as it was by one of the wisest of judges.

The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measureable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

The crucial legal question before us is not whether we would have drawn the decree as the District Court drew it, but whether, on the basis of what came before the District Court, we can say that in fashioning remedies it did not fairly respond to disclosed violations and therefore abused a discretion, the fair exercise of which we should respect and not treat as an abuse. Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout purpose on the part of that court to enforce its thoroughgoing understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors.

How did the District Court go about working out the terms of the decree some of which this Court now displaces? The case was before that court from October 8, 1945, to January 22, 1947. A vast body of the evidence which had to be considered below, and must be considered here in overturning the lower court's decree, consisted of documents. A mere enumeration of these documents, not printed in the record before us, required a pamphlet of 42 pages. It took 460 pages for a selection of exhibits deemed appropriate for printing by the Government. The printed record in this Court consists of 3,841 pages. It is on the basis of this vast mass of evidence that the District Court, on June 11, 1946, filed its careful opinion, approved here, as to the substantive issues. Thereafter, it heard argument for three days as to the terms of the judgment. The parties then submitted their proposals for findings of fact and conclusions of law by the District Court. After a long trial, an elaborate opinion on the merits, full discussion as to the terms of the decree, more than two months for the gestation of the decree, the terms were finally promulgated.

I cannot bring myself to conclude that the product of such a painstaking process of adjudication as to a decree appropriate for such a complicated situation as this rec-

ord discloses was an abuse of discretion, arrived at as it was after due absorption of all the light that could be shed upon remedies appropriate for the future. After all, as to such remedies there is no test, ultimately, except the wisdom of men judged by events.

Accordingly, I would affirm the decree except as to one particular, that regarding an arbitration system for controversies that may arise under the decree. This raises a pure question of law and not a judgment based upon facts and their significance, as are those features of the decree which the Court sets aside. The District Court indicated that "in view of its demonstrated usefulness" such an arbitration system was desirable to aid in the enforcement of the decree. The District Court, however, deemed itself powerless to continue an arbitration system without the consent of the parties. I do not find such want of power in the District Court to select this means of enforcing the decree most effectively, with the least friction and by the most fruitful methods. A decree as detailed and as complicated as is necessary to fit a situation like the one before us is bound, even under the best of circumstances, to raise controversies involving conflicting claims as to facts and their meaning. A court could certainly appoint a master to deal with questions arising under the decree. I do not appreciate why a proved system of arbitration, appropriate as experience has found it to be appropriate for adjudicating numberless questions that arise under such a decree, is not to be treated in effect as a standing master for purposes of this decree. See *Ex parte Peterson,* 253 U. S. 300. I would therefore leave it to the discretion of the District Court to determine whether such a system is not available as an instrument of auxiliary enforcement. With this exception I would affirm the decree of the District Court.

[¶ 62,245] Schine Chain Theatres, Inc. et al. v. United States.

In the Supreme Court of the United States. No. 10. October Term, 1947. May 3, 1948.

On Appeal from the District Court of the United States for the Western District of New York.

Monopoly—Restraint of Trade—Combining of Open and Closed Towns.—The combining of open and closed towns to increase buying power for the negotiation of films for the defendant theatre circuit was a restraint of trade and the use of monopoly power in violation of the Sherman Act. The concerted action of the parent company, its subsidiaries, and its officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. The execution of master agreements between distributors and exhibitors brought the distributors into unlawful combination with the defendant theatre circuit.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Conspiracy—Admissibility of Evidence.—Since a conspiracy between defendant theatre circuit and each of the distributors was established by independent evidence, interoffice communications between officials of the distributors with whom the defendant theatre circuit dealt were admissible against all conspirators as declarations of some of the associates so far as they were in furtherance of the unlawful project.

See the Sherman Act annotations, Vol. 1, ¶ 1610.301.

Findings of Fact—Evidence to Support.—The findings of fact that the defendant arbitrarily deprived independents of first- and second-run pictures, through the use of combined buying power, is supported by substantial evidence. The finding that the use of long-term film-rental agreements, or franchises, is an unreasonable restraint of trade is affirmed. The findings that defendant threatened to build theatres or to open closed ones to force sales of theatres or to prevent entry by an independent operator, and that defendant exacted agreements not to compete from competitors whom it bought out, are supported by the evidence. A finding that the defendant obtained film-rental concessions not made available to independent operators is set aside to be clarified on remand of the cause. The bare finding that the defendant cut admission prices is held not adequate to sup-

port an injunction against price cutting. Price cutting without more is not a violation of Sherman Act. The findings as to clearances are set aside for insufficiency on the issue of reasonableness.

See the Sherman Act annotations, Vol. 1, ¶ 1610.601.

Provisions of Decree—Terms Not Specific.—The injunction against monopolizing first- and second-run films is held to be too general. The public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have violated the Act should be specifically enjoined.

See the Sherman Act annotations, Vol. 1, ¶ 1610.411.

Divestiture—Dissolution of Pooling Agreements.—The case is remanded so that the District Court may make appropriate findings as to the rewards of the conspiracy, so that the Court may consider the preferable method of causing defendants to surrender them. Divestiture or dissolution must take account of the present and future conditions in the industry as well as past violations. The divestiture provisions are set aside so that the District Court can make the findings necessary for an appropriate decree. The dissolution of the pooling agreements, the prohibition against buying or booking films for theatres in which the defendant has no financial interest, and the restriction on future acquisitions of theatres, are affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1610.450.

Affirming in part and reversing in part, and remanding the decision of the District Court.

For appellants: Willard S. McKay, Attorney for appellants; Bruce Bromley; Alfred McCormack; Richard T. Davis, of counsel.

For respondents: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Robert L. Wright, Stanley M. Silverberg, Philip Marcus, Special Assistants to Attorney General.

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to No. 64, *United States v. Griffith, ante,* p. —, and is here by way of appeal from the District Court. The appellants, who were defendants below, are a parent company, three of its officers and directors, and five of its wholly owned subsidiaries—to whom we refer collectively as Schine. As of May 19, 1942, Schine owned or had a financial interest in a chain of approximately 148 motion picture theatres[1] located in 76 towns in 6 states,[2] the greater portion being 78 theatres in 41 towns in New York and 36 theatres in 17 towns in Ohio. Of the 76 towns, 60 were closed towns, *i. e.,* places where Schine had the only theatre or all the theatres in town.[3] This chain was acquired beginning in 1920 and is the largest independent theatre circuit in the country. Since 1931 Schine acquired 118 theatres. Since 1928 the closed towns increased by 56. In 1941 there were only three towns in which Schine's competitors were playing major film products.

The United States sued to prevent and restrain appellants from violating §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The complaint charged that the Schine interests by pooling their entire circuit buying power in the negotiation of films from the distributors so as to combine its closed and open towns got advantages for itself and imposed restrictions on its competitors which otherwise would not have been possible. It charged that the distributors granted certain favors to Schine which were withheld from Schine's competitors, *e. g.,* giving Schine the first run, refusing at times second runs to Schine's competitors, charging Schine with lower

[1] These figures do not include 18 which were closed and had been or were being converted to other uses.

[2] New York (78), Ohio (36), Kentucky (18), Maryland (12), Delaware (2), Virginia (2).

[3] Schine had the only theatre in each of 21 towns, both theatres in 21 towns that had two each, all theatres in 16 towns that had three each, and all theatres in one town that had six theatres and in another that had four theatres.

Of these theatres approximately 87 per cent are located in cities or villages with populations under 25,000 and 60 per cent in cities or villages with populations under 10,000.

rentals than it charged others, licensing to Schine films in excess of Schine's reasonable requirements.

The complaint also charged that Schine had forced or attempted to force competitors out of business and where competitors would not sell out to Schine had threatened to build or had built an opposition theatre, had threatened to deprive or had deprived competitors of a desirable film or run, had cut admission prices, and had engaged in other unfair practices. In these and other ways it was charged that Schine had used its circuit buying power to maintain its monopoly and to restrain trade. The conspiracy charged was between the Schine defendants themselves and between them and the distributors.

The District Court found that the appellants had conspired with each other and with the eight major film distributors[4] to violate § 1 and § 2 of the Sherman Act. Its findings may be summarized as follows:

The entire circuit buying power was utilized to negotiate films for all the theatres from the distributors, the negotiations ending in master agreements between a distributor and the exhibitor. This large buying power[5] gave Schine the "opportunity to exert pressure on the distributors to obtain preferences." Moreover, Schine by combining its closed and open towns in its negotiations for films was able "to dictate terms to the distributors." Schine bought films for some theatres in which it had no financial interest (but as respects most of which it had an option to purchase). It also performed the service (under so-called pooling agreements) fcr groups of theatres in which it and others were interested. Through the use of such buying power Schine arbitrarily deprived competitors of first- and second-run pictures, was able in many towns to secure unreasonable clearances[6] year after year of from 90 to 180 days, obtained long-term agreements for rental of film (franchises) which gave it preferences not given independent operators,[7] and received more advantageous concessions from the distributors respecting admission prices than competitors were able to get. Schine made threats to build or to open closed theatres in order to force sales of theatres in various towns or to prevent entry by an independent operator. Schine cut admission prices. Schine obtained from competitors whom it bought out agreements not to compete for long terms of years which agreements at times extended to other towns as well. Schine obtained film-rental concessions not made available to independents. The District Court entered a decree enjoining these practices and requiring a divestiture by Schine of various of its theatres. 63 F. Supp. 229.

[*Combining of Open and Closed Towns*]

First. For the reasons stated in *United States v. Griffiths, ante,* p. —, the combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of § 1 and § 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See *United States v. Yellow Cab Co.,* 332 U. S. 218, 227; *United States v. Crescent Amusement Co.,* 323 U. S. 173. The negotiations which Schine had with the distributors resulted in the execution of master agreements between the distributors and exhibitors. This brought the distributors into unlawful combinations with the Schine defendants. See *United States v. Paramount Pictures, Inc., post,* p. —. The course of business makes plain that the commerce affected was interstate. *United States v. Crescent Amusement Co., supra,* pp. 180, 183-184.

[*Evidence*]

Second. Appellants object to admission in evidence of numerous inter-office communications between officials of the distributors with whom Schine dealt. The District Court placed considerable reliance on them in making its findings. We will advert

[4] Fox, Loew, Paramount, RKO, Warner, Columbia, Universal, and United Artists.

[5] In the 1939-1940 season Schine paid $1,647,000 to six distributors in film rental.

[6] By clearance is meant the period of time agreed upon which must elapse between runs of the same feature within a particular area or in specified theatres.

[7] The District Court used "independents" or "independent operators" to mean competitors other than the exhibitor-distributors. Schine, of course, is an independent circuit, as that term is used in the industry.

later to the use of these documents to prove the unreasonableness of clearances. It is sufficient at this point to say that since a conspiracy between Schine and each of the named distributors was established by independent evidence, these inter-office letters and memoranda were admissible against all conspirators as declarations of some of the associates so far as they were in furtherance of the unlawful project. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249; *United States v. Crescent Amusement Co., supra*, p. 184; *United States v. Gypsum Co.*, 333 U. S. —.

[*Findings of Fact Challenged*]

Third. Appellants make detailed challenges to many of the other findings of the District Court on which it based its holdings that appellants violated the Act.

(1) They vigorously attack the findings that Schine arbitrarily deprived independents of first- and second-run pictures. Their chief contention is that there is no support for the finding of arbitrary action on the part of Schine, that Schine did not buy pictures beyond its needs in order to keep them away from its competitors, that any successful purchaser of a first- or second-run picture has an exclusive privilege that necessarily deprives competitors of the film for the period of the run, and that any advantage which Schine obtained in this regard was the result of the operation of forces of competition.

As we read the evidence underlying this finding, it was the use of Schine's monopoly power—represented by combining the buying power of the open and closed towns—which enabled it to obtain that which its competitors could not obtain. Deprivation of competitors of first- and second-run pictures in that way was indeed arbitrary in the sense that it was the product of monopoly power, not of competitive forces. That is the construction we give the finding of the District Court; and as so construed it is supported by substantial evidence. There may be exceptions in the case of some subsidiary findings. But we do not stop to relate them. For even if we lay them aside as clearly erroneous for lack of support in the evidence, the conclusion is irresistible that Schine so used its monopoly power to gain advantages and preferences which, on a purely competitive basis, it could not have achieved.

(2) Defense of the long-term film-rental agreements—the franchises—is made on the ground that they were accepted methods of doing business in the industry,[8] that they were favored by distributors as devices to stabilize their end of the business and to save expense, and that they were not chosen by Schine as instruments to suppress competition. But it seems to us apparent that their use served to intensify the impact of Schine's monopoly power on its competitors. For when Schine's buying power was used to acquire films produced by a distributor for two or three years rather than for one year alone, it plainly strengthened through the exercise of monopoly power such dominant position as Schine had over each of its competitors.

Appellants also challenge the finding that Schine obtained preferences through the franchises, in addition to long-term supplies of pictures, which were not granted independent operators. One of these preferences was found to be the unfair and inequitable clearance provisions; another, special film-rental concessions. We will consider these later. The other aspects of the findings we do not stop to analyze. For the franchise agreements as employed by Schine are unreasonable restraints of trade for the reasons stated; and they must be permanently enjoined, even though we assume their collateral aspects are not accurately described by the District Court and so may not be condemned.

(3) Appellants challenge the finding that Schine made threats to build theatres or to open closed ones in order to force sales of theatres in various towns or to prevent entry by an independent operator. There are inaccuracies in some of the subsidiary findings. There are episodes which are susceptible of two interpretations, one wholly innocent and the other unlawful. There are still other episodes which have the unmistakable earmarks of the use of monopoly power with intent to expand an empire and

[8] A consent order was entered in the present case on May 19, 1942, which provided, *inter alia*, that appellants would not enter into any agreement licensing films released by any distributor during a period of more than one year and that all agreements in existence having a longer term should be void as to all films released after the thirtieth day following the date of the consent order.

to restrain competition. On the whole we think the District Court was justified in drawing the inference of unlawful purpose from the ambiguous episodes and that those coupled with the others are adequate to support these findings of the District Court.

(4) We reach the same result as respects the agreements not to compete which Schine exacted from competitors whom it bought out. It is not enough that the agreements may be valid under local law. Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. See *United States v. American Tobacco Co.*, 221 U. S. 106, 174; *United States v. Crescent Amusement Co., supra*, p. 181. If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices, it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended.

(5) The finding that Schine obtained film-rental concessions not made available to independent operators is not intelligible to us. For the District Court went on to state that "These provisions were also in contracts with independents." How those concessions constitute a restraint of trade is therefore not apparent. We set aside this finding so that it may be clarified on remand of the cause.

(6) There is challenge to the findings that Schine's rental agreements contained minimum admission prices, or minimum admission prices lower than those to be charged by the independent operators for subsequent runs, or relieved Schine of requirements for minimum admission prices though imposing them on its competitors. There is evidence to support the findings that minimum prices were fixed. It is well settled that the fixing of minimum prices like other types of price-fixing, is unlawful *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150. The findings that Schine was either granted minimum admission prices more favorable than those required of its competitors, or that Schine, unlike its competitors, was relieved of all requirements for minimum prices, are also supported by evidence. It is said that these provisions of the agreements were not adhered to. But since they did exist, it is not for us to speculate as to what force or sanction they may have had.

(7) There is also challenge to the finding that Schine cut admission prices. This seems uncontroverted. But price cutting without more is not a violation of the Sherman Act. It is indeed a competitive practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful *per se*, facts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power. Here there is nothing except a bare finding that at times Schine cut admission prices. That finding is not sufficiently discriminating to withstand analysis and is not adequate to support an injunction against price cutting.

(8) The finding as to unreasonable clearances presents rather large issues. We have elaborated the point in *United States v. Paramount Pictures, Inc., post*, —, and need not repeat what is said there. Clearance is an agreement by a distributor not to exhibit a film nor to license others to do so within a given area and for a stated period after the last date of the showing of the film by the licensee with whom the agreement is made.[9] It is, in other words, an agreement by a distributor to license films only for specified successive dates. It is in part designed to protect the value of the license which is granted. While it thus protects the income of the first exhibitor, there is no contention that clearance agreements are *per se* unlawful restraints on competition by reason of the effect they may have on admission prices or otherwise. All the District Court purported to condemn, and all the appellee maintains is unlawful, are "unreasonable clearances." If reasonableness is the test, the factors which bear on it would appear to be numer-

[9] See note 6, *supra*.

ous.[10] The findings and opinion of the District Court, however, do not greatly illuminate the problem. What standards or criteria of unreasonableness were applied does not clearly appear. There are, however, in some of the subsidiary findings in this case a few clues as to the basis used by the District Court in classifying clearances as unreasonable. Thus it said that Schine got some clearances "over towns in which Schine did not operate." But that is irrelevant to the problem of reasonableness of clearances, since by definition clearances run to both theatres and towns not owned by him who has the clearance.

The District Court also found that clearances "were given over towns over which there had been no previous clearance." But that without more would not make a clearance "unreasonable." The District Court found that Schine got clearances over "some towns distant from 10 to upwards of 20 miles" and that clearances were also obtained over "outside towns of comparably small population, distant so far that no clearance is justified." If the basis for these findings is that the towns were in different competitive areas, it would come closest to revealing the standard used by the District Court in determining whether the clearances were or were not reasonable, unless possibly it be the finding that in a few instances Schine got clearances over towns where there were no theatres.

The District Court cites instances of clearances which in its view were illegal because unreasonable as to time. But some of these turn out to be situations where clearances were granted over towns where Schine had the only theatre in town. So perhaps the District Court used as a basis for some of its findings of unreasonable clearances the absence of any competition between the theatres in question. But as to that we can only guess in each case and then wonder whether our guess was correct, because appellee suggests that one vice of Schine's clearances was that they ran not to specified theatres but to specified towns. We are, however, left somewhat in the dark whether the District Court followed that theory or made the reasonableness of clearances turn on whether or not the theatres affected were in different competitive areas.

Appellee also suggests that proof of the unreasonableness of Schine's clearances is that their periods were almost uniformly the same even though there were wide variations in the condition and size of theatres and of the type of pictures played in the various theatres. But we are given no clue in the findings whether that was the view of the District Court. On its face it seems more like an attempt of the appellee to show what findings could have been made on the basis of the record had some discrimination been made in appraising the evidence.

Appellee seems to argue that standards of reasonableness can be dispensed with by reason of statements in the inter-office memoranda of the distributors that many of Schine's clearances were "unreasonable." On the matter of clearances, however, the interests of distributors and exhibitors are not necessarily identical. For the self-interest of exhibitors which would call for long clearances would militate against the best interests of distributors.[11] So it is not clear that these declarations can properly be said to fall within the scope of the unlaw-

[10] See Bertrand, Evans & Blanchard, The Motion Picture Industry—A Pattern of Control 40-41 (TNEC Monograph No. 43, 1941):

"The establishment of clearance schedules is an intricate procedure. It involves a complex bargaining process and the balance of a variety of opposing economic interests. It may be stated initially that the primary objective of the distributor is, of course, to maximize his total revenue from each picture. This aim gives him a very direct interest in clearance periods. The higher rental fees paid by the prior-run exhibitor are directly conditioned on the extent of the protection which he is granted, and in general the longer the clearance period before subsequent showing, the higher the rental fee the prior-run exhibitor will pay.

"On the other hand, the distributor's revenue from subsequent-run exhibition is also important to him; this income may mean the difference between black or red ink on his ledgers. But the longer the clearance period, the smaller will be these returns—not only because more customers will have attended the prior showing rather than wait for subsequent exhibition, but also because the effects of the advertising and exploitation efforts made when the picture was released will have been vitiated over this time. In general, the greater the total box-office return earned by a film in all showings, the greater will be the distributor's revenue.

. . . . .

"The relation between run, clearance and zoning, admission price, seating capacity, and rental fees is indeed a complex one. The range covered by these factors is indicated by this fact: a license fee amounting to many thousands of dollars may be paid for the first showing of a film in a large metropolitan theater, and within a year the same film may be exhibited in some small theater in the same city for a fee of less than $20."

[11] See note 10, *supra*.

ful project which the two groups were sponsoring. Cf. *Pinkerton v. United States,* 328 U. S. 640, 647-648. But however that may be, these statements do not advance us very far with the problem because they too fail to give specific content to the concept of unreasonable as applied to clearances.

As a last resort appellee seeks to sustain these findings on the ground that Schine got at least some of its clearances by refusing to make any deal for the circuit unless its terms were met. But any clearance so obtained, though otherwise reasonable, would be unlawful, for it would be the product of the exercise of monopoly power. It is evident, however, that that was not the theory adopted by the District Court for it did not look to see what clearances had been obtained in that manner.

The short of the matter is that since we do not know for certain what the findings of the District Court on clearances mean, they must be set aside. In doing so we of course do not intimate here, any more than we do in case of the other findings we have set aside in the case, that the record would not sustain findings adverse to Schine. We only hold that before we can pass on the questions tendered, findings on clearances must be made which reflect an appraisal of the complex of factors bearing on this question of reasonableness. That is a function of the District Court.

[*Provisions of Decree*]

Fourth. The decree entered by the District Court enjoins appellants from specified acts or practices.[12] To the extent that these provisions are directed to practices reflected in findings which we set aside, they must be re-examined by the District Court on remand of the case.

Appellants object to the generality of the injunction against "monopolizing" first- and second-run films.[13] The statutory requirement is that these injunctions "shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained." 38 Stat. 738, 28 U. S. C. § 383. And see Fed. R. Civ. P., 65 (d). We need not determine whether the provision in question if read, as it must be, in light of the other paragraphs of the decree (*Swift & Co. v. United States,* 274 U. S. 311, 328) would pass muster. For we think the public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have violated the act should be specifically enjoined.

We have considered the objections to the other parts of the injunction (apart from provisions as to divestiture which we discuss later) and find them without merit.

[*Divestiture, Pooling Agreements*]

Fifth. The District Court included in its decree a divestiture provision adjudging that appellant companies be "dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained." The parties subsequently submitted various plans and after hearings the one submitted by the Department of Justice was approved with modifications. The plan does not provide for the

[12] This part of the decree provides:

"Each of the defendants is hereby enjoined and restrained:

"1. From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof and from monopolizing the supply of second run film in any situation where there is a suitable theatre for second run exhibition thereof.

"2. From demanding or receiving clearance over theatres operated by others which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever.

"3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation and from entering into any film franchise.

. . . . .

"5. From enforcing any existing agreements heretofore entered into (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes.

"6. From using any threats or deception as a means whereby a competitor is induced to sell.

"7. From continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States."

[13] See note 12, *supra,* paragraph 1.

dissolution of the Schine circuit through the separation of the several affiliated corporations as was done in *United States v. Crescent Amusement Co., supra*, pp. 188-189. It keeps the circuit intact in that sense but requires Schine to sell certain theatres. The plan requires Schine to sell its interest in all but one theatre of its selection in each of 33 towns, all but two in each of four larger towns, and two of four theatres in Rochester, New York.[14] Schine is to be divested of more than 50 of its theatres. The towns affected are over 40 out of the 70-odd in which Schine is operating.[15] The one-theatre towns of Schine are unaffected.

The decree also dissolves the pooling agreements. A trustee is appointed to make the sales which are ordered. Schine is prohibited from acquiring any financial interest in additional theatres "except after an affirmative showing that such acquisition will not unreasonably restrain competition." Schine is ordered not to buy or book films for any theatre other than those in which it owns a financial interest. The District Court concluded that this program of divestiture was necessary in order to restore "free enterprise and open competition amongst all branches of the motion picture industry."

As we have noted, the District Court did not follow the procedure of *United States v. Crescent Amusement Co., supra*, and order the dissolution of the combination of the affiliated corporations. Schine presented such a plan and it was rejected. That plan contemplated the divisions of the Schine theatres among three separate corporations, with members of the Schine family owning each corporation. The District Court rejected that plan because it did not furnish such separation of ownership as would assure discontinuance of the practices which had constituted violations of the Act. The District Court did not pursue further the prospect of dismemberment of the Schine circuit through separation of the theatres into geographical groupings under separate and unaffiliated ownerships. Nor do the findings reflect an inquiry to determine what theatres had been acquired by Schine through methods which violate the Act. So far as the findings reveal, the theatres which are ordered divested may be properties which in whole or in part were lawfully acquired; and theatres which Schine is permitted to retain may, so far as the findings reveal, be ones which it obtained as the result of tactics violating the Act.

In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees. See *United States v. Cresent Amusement Co., supra*, p. 189, and cases cited.

To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project. Nor is *United States v. National Lead Co.*, 332 U. S. 319, 351-353, opposed to this view. For in that case there was no showing that the plants sought to be divested were either unlawfully acquired or used in a manner violative of the antitrust laws.

Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act. See *United States v. Crescent Amusement Co., supra*, pp. 188-190; *United States v. Griffith, ante*, p. —.

The last two phases of this problem are the ones presented in this case. But the District Court purported to deal with only

[14] It also requires Schine to sell specific theatres remaining unsold under the consent decree of May 19, 1942.

[15] Schine had withdrawn from five towns pursuant to the consent order of May 19, 1942.

one of them. It did not determine what dividends Schine had obtained from the conspiracy. In *United States v. Crescent Amusement Co., supra,* pp. 181, 189, some of the affiliated corporations through which that empire was built were products of the conspiracy. Hence that fact without more justified the direction in the decree to unscramble them. There are no findings which would warrant such a course in this case. But an even more direct method of causing appellants to surrender the gains from their conspiracy is to require them to dispose of theatres obtained by practices which violate the antitrust acts. We do not know what findings on that score would be supported by the record, for the District Court did not address itself to the problem. The upshot of the matter is that the findings do not reveal what the rewards of the conspiracy were; and consequently the court did not consider what would be the preferable way of causing appellants to surrender them. The case must therefore be remanded so that the District Court may make appropriate findings on this phase of the case.

While such an inquiry is the starting point for determining to what extent divestiture should be ordered, the matter does not end there. For it may be that even after appellants are deprived of the fruits of their conspiracy, the Schine circuit might still constitute a monopoly power of the kind which the Act condemns (see *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811), in spite of the restrictive provisions of the decree. Monopoly power is not condemned by the Act only when it was unlawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed. *United States v. Griffith, ante,* p. —; *United States v. Aluminum Co. of America,* 148 F. 2d 416, 432. But whether that condition will obtain in this case must await the findings on the other phase of the case.

We accordingly set aside the divestiture provisions of the decree so that the District Court can make the findings necessary for an appropriate decree. We approve the dissolution of the pooling agreements, the prohibition against buying or booking films for theatres in which Schine has no financial interest, and the restriction on future acquisitions of theatres. See *United States v. Crescent Amusement Co., supra,* pp. 185-187. We do not reach the question of the appointment of a trustee to sell theatres as that merely implements the divestiture provisions which must be reconsidered by the District Court.

The judgment of the District Court is affirmed in part and reversed in part and the cause is remanded to it for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of the case.

[¶ 62,246] United States v. Griffith et al.

In the Supreme Court of the United States. No. 64. October Term, 1947. May 3, 1948.

On Appeal from the District Court of the United States for the Western District of Oklahoma.

Circuit Buying Power—Master Agreements—Restraint of Trade.—The pooling of buying power and the negotiation of master agreements granting exclusive privileges such as preemption in the selection of films and the receipt of clearances over competing theatres, by a group of affiliated exhibitors, is held to result in monopoly and restraint of trade in violation of the Sherman Act. It is not always necessary to find a specific intent to restrain trade or to build a monopoly to find that the antitrust laws have been violated. It is sufficient that a restraint or monopoly results as the consequence of a defendant's conduct or business arrangements. When the buying power of an entire circuit is used to negotiate films for theatres in competitive as well as in closed towns, it results in the licensing of films on a non-competitive basis in what would otherwise be competitive situations, and constitutes a misuse of monopoly power under the Sherman Act. The case is remanded to the

District Court for the determination of the question of the effect of the monopoly power of the defendants on their competitors and on the growth of defendants' circuit, and for the fashioning of a decree to remedy the wrongs and prevent their recurrence.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Reversing and remanding the decision of the District Court, 68 Fed. Supp. 180, reported in '44-'47 Court Decisions Supp. at ¶ 57,564.

For appellant: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Robert L. Wright, Milton A. Kallis, Robert W. Ginnane, Special Assistants to Attorney General.

For appellees: Charles B. Cochran, Henry S. Guffing, and John B. Dudley of Oklahoma City, Oklahoma.

[*Facts*]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit brought by the United States in the District Court to prevent and restrain appellees from violating §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The District Court, finding there was no violation of the Act in any of the respects charged in the complaint, dismissed the complaint on the merits. 68 F. Supp. 180. The case is here by appeal under § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

The appellees are four affiliated corporations and two individuals who are associated with them as stockholders and officers.[1] The corporations operate (or own stock in corporations which operate) moving picture theatres in Oklahoma, Texas, and New Mexico. With minor exceptions, the theatres which each corporation owns do not compete with those of its affiliates but are in separate towns. In April, 1939, when the complaint was filed, the corporate appellees had interests in theatres in 85 towns. In 32 of those towns there were competing theatres. Fifty-three of the towns (62 per cent) were closed towns, *i. e.* towns in which there were no competing theatres. Five years earlier the corporate appellees had theatres in approximately 37 towns, 18 of which were competitive and 19 of which (51 per cent) were closed. It was during that five-year period that the acts and practices occurred which, according to the allegations of the complaint, constitute violations of §§ 1 and 2 of the Sherman Act.

Prior to the 1938-1939 season these exhibitors used a common agent to negotiate with the distributors for films for the entire circuit.[2] Beginning with the 1938-1939 season one agent negotiated for the circuit represented by two of the corporate appellees, and another agent negotiated for the circuit represented by the other two corporate appellees. A master agreement was usually executed with each distributor covering films to be released by the distributor during an entire season.[3] There were variations among the master agreements. But in the main they provided as follows: (a) They lumped together towns in which the appellees had no competition and towns in which there were competing theatres. (b) They generally licensed the first-run exhibition in practically all of the theatres in which appellees had a substantial interest of substantially all of the films to be released by the distributor during the period of a year.[4] (c) They specified the towns for which second runs were licensed for exhibition by appellees, the second-run rental sometimes being included in the first-run rental. (d) The rental specified often was the total minimum required to be paid (in

[1] Griffith Amusement Co., Consolidated Theatres, Inc., R. E. Griffith Theatres, Inc., Westex Theatres, Inc., H. J. Griffith, and L. C. Griffith. R. E. Griffith, a brother of H. J. and L. C. Griffith, was a defendant, but died while the suit was pending in the District Court and the action was not revived against his estate or personal representative.

[2] The circuit includes the four corporate appellees and their affiliated exhibitors. When less than the full ownership of a theatre was acquired, the contract would provide that the buying and booking of films was exclusively in the hands of the Griffith interests.

[3] The agreement negotiated by the common agent would be executed between a distributor and each of the corporate appellees or between a distributor and an individual exhibitor.

[4] There were a few franchise agreements covering films to be released by a distributor during a term of years, usually for three years and in one instance for five years.

The theatres of appellees in Oklahoma City were second, not first, run theatres.

equal weekly or quarterly installments) by the circuit as a whole for use of the films throughout the circuit, the appellees subsequently allocating the rental among the theatres where the films were exhibited. (e) Films could be played out of the order of their release, so that a specified film need not be played in a particular theatre at any specified time.[5]

[*Restraint of Competition*]

The complaint charged that certain exclusive privileges which these agreements granted the appellee exhibitors over their competitors unreasonably restrained competition by preventing their competitors from obtaining enough first- or second-run films from the distributors[6] to operate successfully. The exclusive privileges charged as violations were preemption in the selection of films and the receipt of clearances over competing theatres. It also charged that the use of the buying power of the entire circuit in acquiring those exclusive privileges violated the Act.

The District Court found no conspiracy between the appellee exhibitors or between them and the distributors, which violated the Act. It found that the agreements under which films were distributed were not in restraint of trade; that the appellees did not monopolize or attempt to monopolize the licensing or supply of film for first run or for any subsequent run; that the appellees did not conspire to compel the distributors to grant them the exclusive privilege of selecting films before the films were made available to any competing exhibitor; that there was no agreement between defendants and distributors granting defendants unreasonable clearances; that the appellees did not compel or attempt to compel distributors to grant them privileges not granted their competitors or which gave them any substantial advantage over their competitors; and that appellees did not condition the licensing of films in any competitive situation on the licensing of such films in a noncompetitive situation, or *vice versa*.

The appellant introduced evidence designed to show the effect of the master agreements in some twenty-odd competitive situations. The District Court made detailed findings on this phase of the case to the effect that difficulties which competitors had in getting desirable films after appellee exhibitors entered their towns, the inroads appellees made on the business of competitors, and the purchases by appellees of their competitors were not the result of threats or coercion nor the result of an unlawful conspiracy, but solely the consequence of lawful competitive practices.

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, a group of affiliated exhibitors, such as we have in the present case, were found to have violated §§ 1 and 2 of the Sherman Act by the pooling of their buying power and the negotiation of master agreements similar to those we have here. A difference between that case and the present one, which the District Court deemed to be vital, was that in the former the buying power was used for the avowed purpose of eliminating competition and of acquiring a monopoly of theatres in the several towns, while no such purpose was found to exist here. To be more specific, the defendants in the former case through the pooling of their buying power increased their leverage over their competitive situations by insisting that they be given monopoly rights in towns where they had competition, else they would give a distributor no business in their closed towns.

[*Specific Intent*]

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U. S. 525, 543; *United States v. Masonite Corp.*, 316 U. S. 265, 275. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432, "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.

[5] The privilege was frequently conditioned on the playing of, or paying for, a designated quantity of the film obligation during stated portions of the season.

[6] Those are the eight major film distributors who originally were defendants. The charge that these distributors conspired with each other was eliminated from the complaint and they were dismissed as defendants by stipulation or on motion of appellant. But the charge that each of the distributors had conspired with the appellee exhibitors was retained.

The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co. v. United States,* 196 U. S. 375, 396:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee,* 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

And see *United States v. Aluminum Co. of America, supra,* pp. 431-432. And so, even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act.

Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. *Standard Oil Co. v. United States,* 221 U. S. 1, 61. But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade.[7] Section 2 is not restricted to conspiracies or combinations to monopolize[8] but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.[9] For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States v. Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811, 814. It is indeed "unreasonable, *per se,* to foreclose competitors from any substantial market." *International Salt Co. v. United States,* 332 U. S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America, supra.* It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

[*Use of Monopoly Power*]

A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.[10] He need not be as crass as the exhibitors in *United States v. Crescent Amusement Co., supra,* in order to make his monopoly power effective in his competitive situations. Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns

[7] Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

[8] Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

[9] So also a conspiracy to monopolize violates § 2 even though monopoly power was never acquired. *American Tobacco Co. v. United States,* 328 U. S. 781, 789.

[10] It was said in *United States v. United States Steel Corp.,* 251 U. S. 417, 451, that mere size is not outlawed by § 2. But size is of course an earmark of monopoly power. Moreover, as stated by Justice Cardozo, speaking for the Court in *United States v. Swift & Co.,* 286 U. S. 106, 116, "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. *United States v. Patten, supra,* p. 543.

The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to begat monopoly, the Act becomes a feeble instrument indeed. Large-scale buying is not, of course, unlawful *per se.* It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor, as we hold in *United States v. Paramount Pictures, Inc., post* p. —, may it be used to stifle competition by denying competitors less favorably situated access to the market.

Appellees were concededly using their circuit buying power to obtain films. Their closed towns were linked with their competitive towns. No effort of concealment was made as evidenced by the fact that the rental specified was at times the total minimum amount required to be paid by the circuit as a whole. Monopoly rights in the form of certain exclusive privileges were bargained for and obtained. These exclusive privileges, being acquired by the use of monopoly power, were unlawfully acquired. The appellees, having combined with each other and with the distributors to obtain those monopoly rights, formed a conspiracy in violation of §§ 1 and 2 of the Act. It is plain from the course of business that the commerce affected was interstate. *United States v. Crescent Amusement Co., supra,* pp. 180, 183-184.

[*Effect of Practices Not Determined*]

What effect these practices actually had on the competitors of appellee exhibitors or on the growth of the Griffith circuit we do not know. The District Court, having started with the assumption that the use of circuit buying power was wholly lawful, naturally attributed no evil to it and thus treated the master agreements as legitimate weapons of competition. Since it found that no competitors were driven out of business, or acquired by appellees, or impeded in their business by threats or coercion, it concluded that appellees had not violated the Sherman Act in any of the ways charged in the complaint. These findings are plainly inadequate if we start, as we must, from the premise that the circuit buying power was unlawfully employed. On the record as we read it, it cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit. Its extent must be determined on a remand of the cause. We remit to the District Court not only that problem but also the fashioning of a decree which will undo as near as may be the wrongs that were done and prevent their recurrence in the future. See *United States v. Crescent Amusement Co., supra,* pp. 189-190; *Schine Chain Theatres v. United States, post,* p. —; *United States v. Paramount Pictures, Inc., post,* p. —.

Reversed.

MR. JUSTICE FRANKFURTER dissents, substantially for the reasons set forth in the opinion of the District Court, 68 F. Supp. 180.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[¶ 62,247] **Federal Trade Commission v. Morton Salt Company.**

In the Supreme Court of the United States. No. 404. October Term, 1947. May 3, 1948.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Robinson-Patman Price Discrimination Act

Price Discrimination—Quantity Discounts—Standard Discounts May Be Discriminatory.—Standard quantity discounts, available to all purchasers on equal terms, are nevertheless discriminatory within the meaning of the Robinson-Patman Act and are prohibited by

it whenever their effect may be substantially to lessen competition or tend to create a monopoly. Standard prices of $1.60 per case of salt in less-than-carload purchases, $1.50 in carload purchases, $1.40 in 5,000-case purchases in any consecutive 12 months, and $1.35 in 50,000-case purchases in any consecutive 12 months, theoretically are equally available to all purchasers, but functionally they are not when the record indicates that no single independent retailer, and probably no single wholesaler, bought as many as 50,000 cases of table salt in one year, and some made purchases in such small quantities that they could not qualify for any of these discounts, even those based on carload shipments. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price."

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.305, 2212.5338, 2212.5355, 2212.5467, 2212.5477.

Price Discrimination—Quantity Discounts—Burden of Proof of Justification on Respondent.—In order to establish "discrimination in price" under the Robinson-Patman Act, the Federal Trade Commission need prove only that a seller charged one purchaser a higher price for like goods than he charged one or more of the purchaser's competitors, in a case involving competitive injury between a seller's customers. The burden does not rest on the Commission to prove that respondent's quantity discount differentials were not justified by its cost savings. "The general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of Section 2(a)." Further, "the Senate committee report on the bill explained that the provisos of Section 2(a) throw 'upon any who claims the benefit of those exceptions the burden of showing that their case falls within them.' "

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.300.

Price Discrimination—Injury to Competition—Proof.—The Robinson-Patman Act does not require the Federal Trade Commission to find that the discriminations in fact harmed competition, but only that there is a "reasonable possibility" that they "may" have such an effect. (Two justices, in a dissenting opinion, hold that the record should show a reasonable "probability" instead of "possibility" of such an effect.) Evidence that respondent's quantity discounts resulted in price differentials between competing purchasers sufficient to influence their resale price of salt is adequate to support the Commission's findings that the effect may be substantially to lessen competition and to injure, destroy and prevent competition. The fact that respondent's less-than carload sales are very small in comparison with the total volume of its business is no reason for rejecting the Commission's findings that the effect of a carload discrimination may substantially lessen competition. "In enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots." The fact that salt is a small item in most wholesale and retail businesses is no reason for rejecting the Commission's findings that the effect of the discrimination may substantially lessen competition. "Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock."

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.603.

Price Discrimination—Form of Federal Trade Commission Order.—The form of a Federal Trade Commission order is upheld insofar as it prohibited price discrimination by selling products to some wholesalers (and to some retailers) at prices different from the prices charged other wholesalers (and other retailers) who in fact compete in the sale and distribution of such products. A proviso "that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure or destroy competition

among such wholesalers [retailers]" is objectionable because the qualifying clause shifts to the courts in subsequent contempt proceedings for violation of the order the very questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.710.

Reversing 162 Fed. (2d) 949, reported at ¶ 57,569 of the '44-'47 Court Decisions Supplement; reversing in part the Federal Trade Commission's order in Dkt. 4319.

For petitioners: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Robert L. Stern, Herbert Bockland, Special Assistants to Attorney General; W. J. Kelly, General Counsel of the Federal Trade Commission.

For respondent: L. M. McBride of Chicago, Illinois.

MR. JUSTICE BLACK delivered the opinion of the Court.

[*Facts of Case*]

The Federal Trade Commission, after a hearing, found that the respondent, which manufactures and sells table salt in interstate commerce, had discriminated in price between different purchasers of like grades and qualities, and concluded that such discriminations were in violation of § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13.[1] It accordingly issued a cease and desist order. 39 F. T. C. 35.[2] Upon petition of the respondent the Circuit Court of Appeals, with one judge dissenting, set aside the Commission's findings and order, directed the Commission to dismiss its complaint against respondent, and denied a cross petition of the Commission for enforcement of its order. 162 F. 2d 949. The Court's judgment rested on its construction of the Act, its holding that crucial findings of the Commission were either not supported by evidence or were contrary to the evidence, and its conclusion that the Commission's order was too broad. Since questions of importance in the construction and administration of the Act were presented, we granted certiorari. 332 U. S. 850. Disposition of these questions requires only a brief narration of the facts.

Respondent manufactures several different brands of table salt[3] and sells them directly to (1) wholesalers or jobbers, who in turn resell to the retail trade, and (2) large retailers, including chain store retailers. Respondent sells its finest brand of table salt, known as Blue Label, on what it terms a standard quantity discount system, available to all customers. Under this system the purchasers pay a delivered price and the cost to both wholesale and retail purchasers of this brand differs according to the quantities bought. These prices are as follows, after making allowance for rebates and discounts:

	Per case
Less-than-carload purchases	$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive 12 months	1.40
50,000-case purchases in any consecutive 12 months	1.35

Only five companies have ever bought sufficient quantities of respondent's salt to obtain the $1.35 per case price. These companies could buy in such quantities because they operate large chains of retail stores in various parts of the country.[4] As a result of this low price these five companies have been able to sell Blue Label salt at retail cheaper

[1] Section 2(a) provides in part "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

[2] The original findings and order were modified by the Commission on its own motion. The controversy here deals only with the findings and order as modified.

[3] Respondent also produces and sells other kinds of salt, but the trade practices here involved only relate to table salt.

[4] These chain stores are American Stores Company, National Tea Company, Kroger Grocery Co., Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company.

than wholesale purchasers from respondent could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.

Respondent's table salts, other than Blue Label, are also sold under a quantity discount system differing slightly from that used in selling Blue Label. Sales of these other brands in less-than-carload lots are made at list price plus freight from plant to destination. Carload purchasers are granted approximately a 5 per cent discount; approximately a 10 per cent discount is granted to purchasers who buy as much as $50,000 worth of all brands of salt in any consecutive twelve-month period. Respondent's quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused.

In addition to these standard quantity discounts, special allowances were granted certain favored customers who competed with other customers to whom they were denied.[5]

[*Standard Quantity Discounts Held Discriminatory*]

First. Respondent's basic contention, which it argues this case hinges upon, is that its "standard quantity discounts, available to all on equal terms, as contrasted, for example, to hidden or special rebates, allowances, prices or discounts, are not discriminatory within the meaning of the Robinson-Patman Act." Theoretically, these discounts are equally available to all, but functionally they are not. For as the record indicates (if reference to it on this point were necessary) no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some of their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts, even those based on carload shipments. The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Section 2 of the original Clayton Act had included a proviso that nothing contained in it should prevent "discrimination in price . . . on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation. . . ." That section has been construed as permitting quantity discounts, such as those here, without regard to the amount of the seller's actual savings in cost attributable to quantity sales or quantity deliveries. *Goodyear Tire & Rubber Co. v. Federal Trade Comm'n,* 101 F. 2d 620. The House Committee Report on the Robinson-Patman Act considered that the Clayton Act's proviso allowing quantity discounts so weakened § 2 "as to render it inadequate, if not almost a nullity."[6] The Committee considered the present Robinson-Patman amendment to § 2 "of great importance." Its purpose was to limit "the use of quantity price differentials to the sphere of actual cost differences. Otherwise," the report continued, "such differentials would become instruments of favor and privilege and weapons of competitive oppression."[7] The Senate Committee reporting the bill emphasized the same pur-

[5] One such customer, a wholesaler, received a special discount of 7½ cents per case on purchases of carload lots of Blue Label Salt. Respondent sold to this wholesaler at $1.42½ per case, although competing wholesalers were required to pay $1.50 per case on carload lots. The Circuit Court of Appeals held that findings of the Commission on these special allowances were supported by substantial evidence, that they were not maintained to meet lower prices of respondent's competitors, and that the allowances were discriminatory. It nevertheless set the findings aside on the ground that the Commission's finding of injury to competition from the discriminations engaged in by respondent was too general and had little evidence to support it. We think the finding and supporting evidence of injury to competition on account of these special allowances are similar to the finding and evidence with reference to the quantity discount system and need not be separately treated.

[6] H. R. Rep. No. 2287, 74th Cong., 2d Sess. 7.

[7] *Id.* at 9.

pose,[8] as did the Congressman in charge of the Conference Report when explaining it to the House just before final passage.[9] And it was in furtherance of this avowed purpose—to protect competition from all price differentials except those based in full on cost savings—that § 2 (a) of the amendment provided "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The foregoing references, without regard to others which could be mentioned, establish that respondent's standard quantity discounts are discriminatory within the meaning of the Act, and are prohibited by it whenever they have the defined effect on competition. See *Federal Trade Comm'n v. Staley Co.*, 324 U. S. 746, 751.

[*Burden of Proof of Justification of Price Rests on Respondent*]

Second. The Government interprets the opinion of the Circuit Court of Appeals as having held that in order to establish "discrimination in price" under the Act the burden rested on the Commission to prove that respondent's quantity discount differentials were not justified by its cost savings.[10] Respondent does not so understand the Court of Appeals decision, and furthermore admits that no such burden rests on the Commission. We agree that it does not. First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,[11] requires that respondent undertake this proof under the proviso of § 2 (a). Secondly, § 2 (b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2 (a) throw "upon any who claim the benefit of those exceptions the burden of showing that their case falls within them."[12] We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.[13] This construction is consistent with the first sentence of § 2 (a) in which it is made unlawful "to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

[*Actual Injury to Competition Not Essential Factor of Discrimination*]

Third. It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition . . . or to injure, destroy or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co. v. Federal Trade Comm'n*, 324 U. S. 726, 742.[14] Here the

[8] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 4-6.
[9] 80 Cong. Rec. 9417.
[10] See 42 Ill. L. Rev. 556-561; 15 U. of Chi. L. Rev. 384-391; 60 Harv. L. Rev. 1167-1169.
[11] *Javierre v. Central Altagracia*, 217 U. S. 502, 507-508 and cases cited.
[12] Sen Rep. No. 1502, 74th Cong., 2d Sess. 3. See also 80 Cong. Rec. 3599, 8241, 9418.
[13] See *Moss v. Federal Trade Comm'n*, 148 F. 2d 378, 379, holding that proof of a price differential in itself constituted "discrimination in price," where the competitive injury in question was between sellers. See also *Federal Trade Comm'n v. Cement Institute*, 333 U. S. 683, 721—726.
[14] This language is to be read also in the light of the following statement in the same case, discussing the meaning of § 2 (a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act:
"It is to be observed that § 2 (a) does not require a finding that the discriminations in

Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

[*Commission's Findings of Injury to Competition Supported by Evidence*]

Fourth. It is urged that the evidence is inadequate to support the Commission's findings of injury to competition.[15] As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory prices upon the "reasonable possibility" that different prices for like goods to competing purchasers may have the defined effect on competition.[16] That respondent's quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale prices of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition . . . and to injure, destroy and prevent competition."

The adequacy of the evidence to support the Commission's findings of reasonably possible injury to competition from respondent's price differentials between competing carload and less-than-carload purchasers is singled out for special attacks here. It is suggested that in considering the adequacy of the evidence to show injury to competition respondent's carload discounts and its other quantity discounts should not be treated alike. The argument is that there is an obvious saving to a seller who delivers goods in carload lots. Assuming this to be true, that fact would not tend to disprove injury to the merchant compelled to pay the less-than-carload price. For a ten-cent carload price differential against a merchant would injure him competitively just as much as a ten-cent differential under any other name. However relevant the separate carload argument might be to the question of justifying a differential by cost savings, it has no relevancy in determining whether the differential works an injury to a competitor. Since Congress has not seen fit to give carload discounts any favored classification we cannot do so. Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof.

It is also argued that respondent's less-than-carload sales are very small in comparison with the total volume of its business[17] and for that reason we should reject the Commission's finding that the effect of the carload discrimination may substantially lessen competition and may injure competition between purchasers who are granted and those who are denied this discriminatory discount. To support this argument, reference is made to the fact that salt is a small

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price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-357. But as was held in the *Standard Fashion case, supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." 324 U. S. at 738; see also *United States v. Lexington Mill Co.*, 232 U. S. 399, 411.

The Committee Reports and Congressional debates on this provision of the Robinson-Patman Act indicate that it was intended to have a broader scope than the corresponding provision of the old Clayton Act. See note 18 *infra*.

[15] After discussing all of respondent's discriminations, the Commission stated: "The Commission finds that the effect of the discriminations in price, including discounts, rebates, and allowances, generally and specifically described herein may be substantially to lesson competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices, discounts, rebates, and allowances and those to whom they are denied."

[16] The statute outlaws any discrimination the effect of which "may be substantially to lessen competition . . . or to injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

[17] Respondent introduced testimony and exhibits intended to show that only one-tenth of one per cent of its sales were made at less-than-carload prices. It appears that this figure relates only to a single one-year period and was obtained by lumping together statistics on respondent's sales of table salt along with those on sales of its other products, such as salt tablets, coarse rock salt, and sal soda. Since this proceeding is concerned only with discounts on table salts, these figures are of dubious value. Furthermore, they are limited to sales in respondent's Chicago area, whereas respondent carried on a nation-wide business.

item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive in requiring a showing of general injury to competitive conditions. . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination".[18] Since there was evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

Apprehension is expressed in this Court that enforcement of the Commission's order against respondent's continued violations of the Robinson-Patman Act might lead respondent to raise table salt prices to its carload purchasers. Such a conceivable, though, we think, highly improbable contingency, could afford us no reason for upsetting the Commission's findings and declining to direct compliance with a statute passed by Congress.

The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue —injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

[*Order Properly Prohibits Unlawful Practices Similar to Those Committed*]

Fifth. The Circuit Court of Appeals held, and respondent here contends, that the order was too sweeping, that it required the respondent to "conduct its business generally at its peril," and that the Commission had exceeded its jurisdiction in entering such an order.[19] Reliance for this contention

[18] In explaining this clause of the proposed Robinson-Patman Act, the Senate Judiciary Committee said:

"This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, 74th Cong., 2d Sess. 4. See also H. R. Rep. No. 2287, 74th Cong., 2d Sess. 8; 80 Cong. Rec. 9417.

[19] The prohibiting paragraphs of the order were:

"(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

"(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in

chiefly rests on *Labor Board v. Express Publishing Co.,* 312 U. S. 426. That case held that the Labor Board could not broadly enjoin violations of all the provisions of the statute merely because a single violation of one of the Act's many provisions had been found. *Id.* at 435-436. But it also pointed out that the Labor Board, "Having found the acts which constitute the unfair labor practice . . . is free to restrain the practice and other like or related unlawful acts." It there pointed out that this Court had applied a similar rule to a Federal Trade Commission order in *Federal Trade Comm'n v. Beech-Nut Co.,* 257 U. S. 441, 455. In the latter case the Court not only approved restraint of the unlawful price-fixing practices found, but "any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company." See also *May Dep't Stores Co. v. Labor Board,* 326 U. S. 376, 392-393. We think the Commission's order here, save for the provisos in (a) and (b) later considered, is specifically aimed at the pricing practices found unlawful, and therefore does not run counter to the holding in the *Express Publishing Co.* case. Certainly the order in its relation to the circumstances of this case is only designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board [Commission] has found to have been committed by the . . . [respondent] in the past." *Labor Board v. Express Publishing Co., supra,* 436-437.

[*Order Improper Insofar as it Permits Differential if it Does Not Lessen Competition*]

The specific restraints of paragraphs (a) and (b) of the order are identical, except that one applies to prices respondent charges wholesalers and the other to prices charged retailers. It is seen that the first part of these paragraphs, preceding the provisos, would absolutely bar respondent from selling its table salt, regardless of quantities, to some wholesalers and retailers at a price different from that which it charged competing wholesalers and retailers for the same grade of salt. The Commission had found that respondents had been continuously engaged in such discriminations through the use of discounts, rebates and allowances. It had further found that respondent had failed to show justification for these differences by reason of a corresponding difference in its costs. Thus the restraints imposed by the Commission upon respondent are concerned with the precise unlawful practices in which it was found to have engaged for a number of years. True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied. Paragraphs (a) and (b) up to the language of the provisos are approved.

The provisos in (a) and (b) present a more difficult problem. They read: "Provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers [retailers]." The first clause of the provisos, but for the second qualifying clause, would unequivocally permit respondent to maintain price differentials of less than five cents as between competing wholesalers and as between competing retailers.[20] This clause would appear to benefit respondent, and no challenge to it, standing alone, is here raised. But respondent seriously objects to the second clause of the proviso which qualifies the permissive less-than-five-cent differentials provided in the first clause. That qualification permits such differentials only if they do "not tend to lessen, injure, or destroy

the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

"(c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.

"For the purposes of comparison, the term 'price' as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale."

[20] The only finding of the Commission specifically relating to five-cent differentials was: "Salt is a staple commodity with a medium turnover and is generally sold by wholesalers to their retail customers on a lower margin of profit than that received on other commodities. Consequently, the price at which the wholesaler offers his table salt is usually controlling, and a difference of five cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase."

competition." Respondent points out that where a differential tends in no way to injure competition, the Act permits it. "The Commission," so respondent urges, "must either find and rule that a given differential injures competition, and then prohibit it, or it must leave that differential entirely alone." Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying clauses require consideration.

One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U. S. C. §§ 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide. But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials it could not then shift to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission.

[*Paragraph (c) of Commission's Order Upheld*]

This leaves for consideration the objection to paragraph (c) of the order which reads: "By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer." The only criticism here urged to (c) is that it bars respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer. Section 2 (a) of the Act specifically authorizes the Commission to bar discriminatory prices which tend to lessen or injure competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This provision plainly supports paragraph (c) of the order.

[*Commission To Reconsider Provisos*]

We sustain the Commission's order with the exception of the provisos in paragraphs (a) and (b) previously set out. Since the qualifying clauses constitute an important limitation to the provisos, we think the Commission should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary. This the Commission may do upon the present evidence and findings or it may hear other evidence and make other findings on this phase of the case, should it conclude to do so. See *Federal Trade Comm'n v. Royal Milling Co.*, 228 U. S. 212, 218.

[*Judgment Reversed and Proceedings Remanded*]

The judgment of the Circuit Court of Appeals is reversed and the proceedings are remanded to that court to be disposed of in conformity with this opinion.

Reversed.

[Dissenting Opinion]

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER joins, dissenting in part.

While I agree with much of the Court's opinion, I cannot accept its most significant feature, which is a new interpretation of the Robinson-Patman Act that will sanction prohibition of any discounts if "there is a reasonable *possibility* that they 'may' have the effect to wit: to lessen, injure, destroy" or prevent competition. [Italics supplied.] I think the law as written by the Congress and as always interpreted by this Court requires that the record show a reasonable

probability of that effect. The difference, as every lawyer knows, is not unimportant and in many cases would be decisive.

The law rarely authorizes judgments on proof of mere possibilities. After careful consideration this Court has, at least three times and as late as 1945, refused to interpret these laws as doing so. In 1922, in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, at 356, a unanimous Court, construing like language in § 3 of the Clayton Act, said: "But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly."

In 1930, in *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291, the Court said (at p. 298) with respect to identical language in § 7 of the Clayton Act: ". . . the Act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357 . . ." And MR. JUSTICE STONE wrote for the dissenting justices (280 U. S. 306):

> "Nor am I able to say that the McElwain Company . . . was then in such financial straits as to preclude the reasonable inference by the Commission that its business . . . would probably continue to compete with that of petitioner. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-357."

With these interpretations on our books the Robinson-Patman Act was passed.

When the latter Act came before this Court in 1945, this same question was carefully considered and Chief Justice Stone, with the concurrence of all but two members of the Court and with no disagreement noted on this point, wrote:

> "It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition.' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of these consequences, but to reach those which would probably have the defined effect on competition."

Corn Products Company v. Federal Trade Commission, 324 U. S. 726, 738.

It is true that later (324 U. S. at 742) the opinion uses the language as to possibility of injury now quoted in part[1] by the Court as the holding of that case. But the phrase appears in such form and context and is so irreconcilable with the earlier careful and complete statement, set out above, that the inconsistency must appear to a fair reader as one of those inadvertencies into which the most careful judges sometimes fall. It is the only authority for making a thrice-rejected rule of interpretation a prevailing one. I know of no other instance in which this Court has ever held that administrative orders applying drastic regulation of business practices may hang on so slender a thread of inference.

The Court uses overtones of hostility to all quantity discounts, which I do not find in the Act, but they are translated into a rule which is fatal to any discount the Commission sees fit to attack. To say it is the law that the Commission may strike down any discount "upon 'the reasonable possibility' that different prices for like goods to competing purchasers may" substantially injure competition, coupled with the almost absolute subservience of judicial judgment to administrative experience, cf. *Securities & Exchange Commission v. Chenery Corp.*, 332 U. S. 194, means that judicial review is a word of promise to the ear to be broken to the hope. The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not. That is not the law which Congress enacted and which this Court has uniformly stated until today.

[1] The full text of the later reference, quoted in part by the Court, is: "As we have said, the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

It seems obvious that the Court's "as we have said" refers to the earlier statement that the test is "probability" which is quoted in full above, particularly in the absence of any other citation or reference.

The Robinson-Patman Act itself, insofar as it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.

On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods, made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should, be passed down the line to the consumer. I think the Court's disposition of this case pretty much sanctions an obliteration of the difference between discounts which the Act would foster and those it would condemn.

It will illustrate my point to discuss only two of the discounts involved—two which the Commission and the Court lump together and treat exactly alike, but which to me require under the facts of this case quite different inferences as to their effect on competition.

In addition to a general ten-cent per case carload lot discount, there is what we may call a quota discount, by which customers who purchase 5,000 or more cases in a twelve-month period get a further rebate of 10 cents per case, while those who purchase 50,000 or more cases in such periods get an additional 5 cents per case. The application of this schedule to distribution of the table salt involved is substantially illustrated by one of the Company's exhibits, from which we find:

Cases purchased	*Number customers*	*Discount per case*
1–500	3,643	0
501–4,999	343	0
5,000–10,000	35	.10
10,000–49,999	14	.10
50,000 and over	5	.15

It thus appears that out of approximately 4,000 customers only 54 receive either of these two quota discounts in practice, and the larger one is available to only four or five major chain store organizations. The quota discounts allowed a customer are not related to any apparent difference in handling costs but are based solely on the volume of his purchases, which in turn depends largely on the volume of his sales, and these in turn are surely influenced by his lowered costs which he can reflect in his retail prices.

I agree that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the Company, which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification. I agree, too, that the result of this system on respondent's customer list is enough to warrant the inference that the effects "may be substantially to lessen competition or tend to create a monopoly."

Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

However, a very different problem is presented by the differential of 10 cents per case when delivered in carload lots. This carload price applies to various small purchasers who pool their orders to make a carload shipment and to all who pick up their orders, no matter how small, at the company warehouses which are maintained in ten cities. The evidence is that less than 1/10 of 1% of the respondent's total salt business fail to get the benefit of this carload-lot discount.

It does not seem to me that one can fairly draw the inference that competition *probably* is affected by the carload-lot discount. Indeed, the discount is so small in proportion to price, salt is so small an item in wholesale or retail business and in the consumer's budget that I should think it farfetched even to find it reasonably *possible* that competition would be *substantially* affected. Hence, the discount, whether more or less than the exact savings in handling, would not fall under condemnation of the statute. The incidence of this discount on customers is not arbitrarily determined by the volume of their business but depends upon an obvious difference in handling and delivery costs.

The Commission has forbidden respondent to continue this carload-lot differential. The

Commission has no power to prescribe prices, so that it can order only that the differential be eliminated. Unless competitive conditions make it impossible, the respondent's self-interest would dictate that it abolish the discount and maintain the higher base price, rather than make the discount universally applicable. The result would be to raise the price of salt 10 cents per case to 99.9% of respondent's customers because 1/10 of 1% were not in a position to accept carload shipments. This is a quite different effect than the elimination of the quota discount.

It seems to me that a discount which gives a lowered cost to so large a proportion of respondent's customers and is withheld only from those whose conditions of delivery obviously impose greater handling costs, does not permit the same inferences of effect on competition as the quota discounts which reduce costs to the few only and that on a basis which ultimately is their size.

The two types of discount involved here seem to me to fall under different purposes of the Act and to require different conclusions of fact as to effect on competition. Accordingly, I should sustain the court below insofar as it sets aside the cease and desist order as to carload-lot discounts.

[¶ 62,248] United States v. De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Societe Generale de Belgique, Societe Miniere du Beceka, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Consolidated African Selection Trust, Ltd., Sierra Leone Selection Trust, Ltd., Russell Johnson Parker, Lute J. Parkinson, Herbert H. Breeland, Albert E. Thiele, Solomon R. Guggenheim, Glendenin J. Ryan, and George K. Strum.

In the United States District Court for the Southern District of New York. Civil 29-446. April 22, 1948.

Sherman Antitrust Act

Alien Corporations—Venue—Service of Process.—Motions by six corporate defendants engaged in mining and selling diamonds, charged with violations of the antitrust laws, for an order quashing the return of the service of summons and dismissing the complaint for lack of jurisdiction and because the individuals upon whom purported service was made were not persons authorized to receive process on behalf of the corporations, are granted where it is shown that the business of defendants within the district is not of such a nature and character as to warrant the inferences that the corporations have subjected themselves to the local jurisdiction and are by their duly authorized agents present within the district where service is attempted. The maintenance of bank accounts which were used to facilitate transactions within the district which were merely incidental to the main business of defendants, the purchase of equipment, the maintenance of an office, and the carrying on of an extensive advertising campaign in the district, do not warrant a finding that defendants were "doing business" in the district so as to be liable to process. Such activities constitute the "transacting of business" but not the "doing of business". The fact that if defendants are not required to stand trial in this district the Government will not be able to bring them to trial in any other district, is unpersuasive. There is no rule which would render an alien corporation subject to the jurisdiction of the Court where, under similar circumstances, jurisdiction over a domestic foreign corporation would not lie.

See the Sherman Act annotations, Vol. 1, ¶ 1610.391.

For plaintiff: Ephraim Jacobs, James Minicus, Special Attorneys, both of Washington, D. C.

For defendants: Cravath, Swaine & Moore; Hooker, Alley & Duncan, appearing specially; Root, Ballantine, Harlan, Bushby & Palmer, appearing specially, all of New York, N. Y.

[Facts]

HULBERT, D. J.: Six corporate defendants, hereinafter specifically designated, moved for an order quashing the return of the service of the summons herein and dismissing the complaint against each of them for lack of jurisdiction over said defendants and, further, that the individuals, upon whom

purported service was made, were not persons authorized to receive process on behalf of said corporations.

This action was commenced by the filing of the complaint in the office of the Clerk of this Court on January 29, 1945. No responsive pleading has yet been interposed.

Simultaneously with the filing of the complaint, the plaintiff submitted a petition for preliminary injunction. Defendants unsuccessfully challenged the granting thereof and their petitions directly to the United States Supreme Court for certiorari presented:

(A) the propriety of review of the determination of the Court below, and

(B) the alleged excess of jurisdiction in making such decree granting the injunction.

The decree was reversed (325 U. S. 212) and this motion was then brought on.

Elaborate affidavits, depositions, briefs and exhibits have been submitted by the parties involved. The facts differ to some extent as to each defendant, but the Court will endeavor to consider the motions of the three defendants (1) De Beers Consolidated Mines, Ltd., (2) Diamond Corporation, Ltd., and (3) Diamond Trading Company, Ltd., together, but separately from the motions of the defendants (4) Societe Internationale Forestiere et Miniere du Congo (referred to as Forminiere), (5) Societe Miniere du Beceka (referred to as Beceka) and (6) Companhia de Diamantes de Angola (referred to as Diamang), which will be severally considered.

The defendants all are alien corporations existing under and by virtue of the laws of certain foreign countries.

[*Issues Presented*]

The motions present two issues:

(a) Are the defendants "found" in this district within the meaning of Section 12 of the Clayton Act (15 U. S. C. A. 22), and

(b) if so, was the service of process in accordance with Rule 4d (3) or (7) F. R. C. P. (28 U. S. C. A. following Sec. 723c).

Under Sec. 12 of the Clayton Act, service of process must be made in the district in which the defendant is resident, or where it may be "found" although the venue may lie in the district where the defendant "transacts business." *Eastman Kodak Company v. Southern Photo Materials Co.*, 273 U. S. 359.

Whether or not a corporation is "found" within a given district is akin to the concept of whether it is "doing business." *U. S. v. Scophony Corp., et al.*, 69 Fed. Supp. 666, probable jurisdiction noted March 10, 1947, 67 Supreme Ct. R. 972, #2,1030.*

In order that it may be said that a foreign corporation is "doing business" within a state or district so as to be subject to the service of process there "the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents, present within the state or district where service is attempted." *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79.

The determination of whether a foreign corporation is "doing business" within a particular state or district depends upon the facts of the individual case. *People's Tobacco Co. v. American Tobacco Co., supra; Roark v. American Distilling Co.*, 97 Fed. (2d) 297; *Costello v. Lee*, 43 Fed. Supp. 947.

In approaching the disposition of these motions this Court is mindful that the facts presented should be viewed as a whole in determining whether the defendants are "doing business" in this district so as to be subject to process here. *United States v. United States Alkali Export Association, Inc., et al.*, Leibell, D. J., S. D. N. Y. Civil 24-464, decided July 16, 1946 (unreported); In Re *Grand Jury Subpoenas Duces Tecum addressed to Canadian International Paper Co., et al.*, 72 Fed. Supp. 1013.

As to Defendants 1, 2 and 3

The Government sets up in its answering affidavit that defendant (1) De Beers, owns 80 per cent of the ordinary shares in the defendant (2) Diamond Corporation, and that the defendant (3) Diamond Trading Co., is wholly owned, jointly, by (1) De Beers and (2) Diamond Corporation.

Sir Ernest Oppenheimer is Chairman of the Board of all three and, for all intents and purposes, the personnel of the directorates present an identity for these three corporate defendants; that De Beers is engaged in the mining of diamonds; that Dia-

* This case was reversed by the U. S. Supreme Ct. April 26, 1948.

mond Corporation purchases, in normal times, about 95 per cent in dollar value of the world's diamond output, of which approximately 90 per cent is ultimately exported to and disposed of in the markets of the United States; that Diamond Trading Company purchases the stock of diamonds of the Diamond Corporation and sells same to dealers, brokers and cutters.

It is to be noted that defendants 1, 2 and 3, take issue with respect to the aforesaid allegations as to the stock ownership of De Beers in the other two defendants and to the amount of the world's production of diamonds disposed of in the United States.

The Government's purpose in this regard, reflecting a high degree of integration existing between the three defendants, admittedly is, to emphasize that any activities which increase the sale of diamonds in the United States is of benefit to all three of said defendants.

Apparently, it is the Government's position that for the purpose of ascertaining if the three defendants are "doing business" in this district it is to be inferred that the act of any one of them, is the act of all, because of their close relationship. We are not dealing in this action with the problem of parent-subsidiary which so often arises in cases of this character. It is not contended that any one of the three defendants acted through a subsidiary located in the district.

If a parent company is found to be doing business here it does not necessarily follow that a subsidiary company is also doing business here, nor is the converse necessarily true. Cf. *Schenstrom v. Continental Machines, Inc.*, 7 F. R. D. 434. However, this does not appear to be of particular import in the consideration of the present motion.

In support of its contention that these defendants were "doing business" in this district, the Government alleges many items or activities from which it would have the Court conclude that the defendants are here present and subject to its process. Although the Court has carefully considered all points raised by the Government, it does not feel that a discussion of each of them is essential but will endeavor to mention those upon which the Government appears to make particular point.

[*Bank Accounts*]

Reference is made to the maintenance by these defendants of ten bank accounts in the City of New York within six years preceding the filing of the complaint. The record as it stands does not fully disclose the exact purpose of these accounts. The complaint contains an allegation that these bank accounts were maintained for the purpose of paying for advertising, publicity, public relations work, and purchases of machinery, tools and supplies.

It appears to the Court that the items "purchases of machinery, tools and supplies" relate more particularly to the defendants 4, 5 and 6. It does appear that the bank accounts were used in connection with an exhibition which defendants 1, 2 and 3 had at the New York World's Fair in 1939 and 1940 for advertising in this country, and the expense of visits made by certain of their representatives from time to time in connection therewith. But it does not appear that these bank accounts were used as a part of the main business of said defendants; at most, they were used to facilitate transactions within the district which, in their nature, were incidental to the main business of the defendants. Cf. *Fowble v. Chesapeake & O. Ry. Co.*, 16 Fed. (2d) 504.

[*Advertising Campaign*]

Much stress is laid upon an advertising and publicity campaign conducted for defendants 1, 2 and 3, by the advertising agency of N. W. Ayer & Son, Inc., from 1939 to the date of filing of the complaint in this action. Before undertaking that advertising campaign, the defendants consulted Ayer who made a survey of the diamond market in the United States and reported to De Beers on whose behalf Ayer undertook to ascertain if advertising would stimulate sales in gem diamonds and indirectly, rough diamonds. Sales of diamonds in the United States were not made by these defendants, 1, 2 and 3 directly, (except in limited instances hereinafter mentioned) but any increase in sales here would, of course, be reflected in their business abroad. It should be made clear that Ayer did not function solely on behalf of these defendants, but handled advertising for other clients; nor was it engaged in taking orders for the sale of defendants' products.

The fact that the advertising conducted in this instance was extensive and expensive hardly warrants a finding that it was "doing business." Many of our large corporations advertise in all States of the Union, yet

they do not thereby "do business" in each State so as to subject themselves to suit in all States.

Under the general heading of advertising, it appears that Ayer not only bought advertising space in magazines, but it publicized diamonds by such methods as furnishing news items to newspapers and by the use of the radio and the movies. It employed a lecturer to deliver addresses on diamonds at girls' schools; it sold window displays, booklets, etc., to dealers to assist in the sale of diamonds. All this activity on the part of Ayer was nothing more than a method toward the accomplishment of the function they were engaged to perform, namely, the advertising, publicity and promotion, to attract the interest of the public in the purchase of diamonds. In some of the advertisements which were published, a price range for diamonds of various weights was quoted. Such information was included at the suggestion of Ayer after they had made their survey from which they concluded that few people had knowledge of what the retail cost of gem diamonds was. De Beers did indicate some objection to the inclusion of prices but consented to this practice upon the advice of Ayer. While the quotation of prices might have some materiality, were this action tried on the merits, the Court is not persuaded that it adds anything to the "doing business" aspect of this case.

The record reflects that Ayer rendered certain services to De Beers which were not directly connected with the advertising campaign. Such services included the rendering of reports with respect to Government price regulations, complaints made by some users of industrial diamonds, and reports showing the hours, wages and union membership of diamond cutters in the United States. Many other instances of the rendition of services to the defendants are cited, including the use from time to time of office space in Ayer's office by representatives of the defendants while in this country.

Upon careful consideration of each of these items, it is the Court's conclusion that such activities do not add up to "doing business" for it is not established that these defendants continuously conducted a substantial part of their main business here to the extent that it can be said that they were present in this jurisdiction.

[Transacting Business]

There is no question that they did "transact business" here, but that is not enough. Some few sales were made in this country to the United States Government and to private buyers. One such sale was made of certain of the diamonds which De Beers had on display at the New York World's Fair.

On pages 16 and 17 of the Government's affidavit (Minicus) verified Jan. 24, 1947, re De Beers, contention is made that sales of diamonds to dealers in the United States were effected within the United States, but this contention is met to the satisfaction of the Court by the facts stated in the affidavit of Paul J. Timbal, verified March 21, 1945.

The last point which the Court deems worthy of mention is the fact that there were in the United States from time to time certain representatives of defendants. The purpose of these visits, according to the Government, is reflected in the Minicus affidavit (*supra*) at pages 14 and 15. Viewing these visits in a light most favorable to the Government, it does not appear to add anything of substance against this motion.

While as it has heretofore been pointed out each case must rest upon its own facts, the following citations have, in addition to those mentioned, *supra,* been of assistance to the Court in reaching its decision. *Shelton v. Schwartz,* 43 Fed. Supp. 328; *Consolidated Textile Corp. v. Gregory,* 289 U. S. 85; *Davega, Inc. v. Lincoln Furniture Mfg. Co.,* 29 Fed. (2d) 164; *Hutchinson v. Chase & Gilbert, Inc.,* 45 Fed. (2d) 139; *Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc.,* 30 Fed. Supp. 580.

The Court has also considered many other cases concerning the concept of "doing business" and "transacting business" but no useful purpose would be served by specific reference to them.

The Government suggests as part of its argument, that consideration should be given to the fact that if the defendants are not required to stand trial in this district, the Government will not be able to bring them to trial in any other district. The Court cannot be influenced by any such argument. If the defendants are not "doing business" here there can be no due process and suit cannot be maintained if the Court has not acquired jurisdiction, which, in this type of action, must rest on a determination that the defendants are "found" here. There is

no rule which will render an alien corporation subject to the jurisdiction of the Court where, under similar circumstances, jurisdiction over a domestic foreign corporation would not lie. *United States v. Scophony Corp., supra.*

As to Defendant 4

Forminiere is a corporation existing by virtue of the laws of the Belgian Congo; 25 per cent of its stock is owned by American stockholders who have for years been represented on the Board of Directors of this defendant, by two members, and on the Board of Auditors, by one member.

The record does not clearly reflect the function of the two American directors, but the defendant contends they are entitled to receive information about the affairs of the corporation to effectively enable the American stockholders to protect their investment. Defendant points out that the actual management of the company takes place in Europe and that the American members of the Board of Directors have never attended such meetings. There is evidence, however, that on at least one occasion, the American members of the Board executed proxies so that they might thus be represented at a Board meeting. One of the two American directors who were members of the Board at the time this action was commenced, has since died, and hence there is no affidavit by him to reflect what his activities were as a Director. The affidavit of the other Director, Mr. Whelpley, who has since resigned as such, is before the Court, as is the deposition of Mr. Thiele, who succeeded him. Mr. Whelpley denies taking any part in the management of Forminiere or in any decision on the management of its affairs, or on the conduct of its business. He states that his becoming a Director was with the understanding that his activities would be limited to obtaining information and keeping himself advised regarding the affairs of the Company, to the extent that he deemed it necessary in the interest of the American stockholders. Mr. Thiele also denies that he rendered any services pursuant to his directorship.

Forminiere, from 1939 until January 1944, maintained a bank account in this district with the Guaranty Trust Company of New York. This account was opened and managed, and deposits made from abroad. This account, it is said, was opened as a war-time measure. The American Directors had authority to sign checks, as did Mr. Sturm, who was on the Board of Auditors, and Mr. Ball (whose activities will be discussed hereafter).

The bank was requested to send monthly statements to Mr. Ball. There is evidence that this account was used to pay for purchases of mining machinery and equipment fabricated in this country for shipment and use abroad, and for other disbursements specifically directed by the Company. Mr. Ball and Mr. Sturm aver that neither of them ever drew any checks on this account, although so authorized, but it appears that transfers from this account to Ball were made to enable him to make purchases for the defendant.

In opposition to the motion of the defendant Forminiere, the Government places great stress on the activities of Mr. Sydney H. Ball in its behalf. Mr. Ball is a geologist and mining engineer and a member of the firm of Rogers, Mayer & Ball, with offices at 26 Beaver Street, New York, within this district. For a number of years he has acted as consulting geologist for Forminiere. He supplied said Company with technical information, subscribed to technical journals for it, arranged for payments in this country to the account for Americans working for the Company abroad, and bought for the Company mining equipment and supplies.

[*Maintenance of Office*]

The Government contends that Forminiere maintains an office at the place of business of Mr. Ball and pays part of the office expenses of Mr. Ball, and that Mr. Ball uses stationery which bears the name of this defendant across the top; that Mr. Ball is authorized to draw on an account in the Chase National Bank, in this district, opened in 1910, which account bears the name "S. H. Ball, Consulting Geologist, Forminiere," the funds of said account being supplied by the defendant. It is established that payment of the purchases made by Mr. Ball for the Company are paid out of this account as is his fee and the expenses which the Company pays in connection with the functions rendered by Mr. Ball's office for the defendant.

The Government invites the attention of the Court to the reference made by the defendant to "Forminiere office New York" but even the maintenance of an office in and of itself does not establish that the defend-

ant is "doing business" here. The record clearly shows that Ball made substantial purchases for this defendant. It is likewise clear that the volume of purchases was influenced by the existence of World War II.

The foregoing circumstances prompted the Court to suggest the desirability of a reference to a Special Master (hereinafter more particularly mentioned).

As heretofore indicated, the cases on the subject of "doing business" are, at most, guide posts.

> "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." *Hutchinson v. Chase & Gilbert, supra.*

Absent the element of purchasing, the activities of this defendant would certainly not establish "doing business." When the purchasing element is considered along with the other activities of said defendant, a stronger argument is presented in support of the Government's position, but it is not strong enough. True, the buying of equipment and supplies in this country must have been a great aid in the functioning of this defendant and perhaps was necessary to its successful operation, but it seems unreasonable, even upon the facts presented, to say that it is present here to such an extent that it has subjected itself to the jurisdiction of this Court. The defendant was engaged in the mining of diamonds, an activity performed wholly without this country. Apparently its operations were conducted on a large scale. It seems entirely logical that it would turn to the United States to acquire equipment in view of world conditions at that time.

In viewing all the facts presented concerning the activities of the defendant within this district, the Court is forced to the conclusion that the defendant is not "doing business" or "found" here.

As to Defendant 5

With respect to the defendant Beceka, the facts presented do not in the opinion of this Court show that it was "doing business" here.

Beceka and Forminiere are associated companies. Purchases on behalf of Beceka were made by Mr. Ball through Forminiere. It appears that Mr. Ball in purchasing for Beceka arranged for priorities and export licenses and handled shipping arrangements. The overall picture of the activities of Beceka in this district does not warrant more than a conclusion that it transacted business in this district which, as heretofore indicated, is not enough to subject it to suit here.

As to Defendant 6

The activities of the defendant Diamang in this jurisdiction are substantially of the same general character as those of the defendants Forminiere and Beceka. No useful purpose would be served by a detailed listing of such activities which, when considered as a whole, spell out the "transacting of business" but not the "doing of business" and the net result is the same as reached in the preceding cases.

In conclusion it must be emphasized that the disposition of these motions has not been accomplished with ease. The Court has endeavored to view realistically the facts presented. As previously stated, after argument, it proposed a reference to a Special Master to hear and report, but counsel for the Government declared that no appropriation existed and hence, consent on its behalf thereto, was unauthorized, but, he suggested, that if the disposition of the case were held in abeyance until after the first of July, 1947, an appropriation might be made available. However, it was not.

In the meantime the writer became ill. In October he was hospitalized and after his discharge two months later, was still unable to resume his duties until recently, and records that his determination has been reached with less personal satisfaction than if the affiants had been required to appear before a Special Master and subjected to examination and cross examination.

This prompts me to refer to the case of *Pickthall v. Anaconda Mining Co., et al.*, S. D. N. Y., Oct. 3, 1947 (unreported) cited by the Government, where it was held that the functions of officers and directors of one of the defendants were sufficient to subject it to suit in this jurisdiction.

I have again looked into this question and do not feel at all able to analyze and compare the facts in the case cited and the case at bar without some further elucidation not disclosed by the record before me.

[*Motions Granted*]

The motions of the several defendants must be granted.

[¶ 62,249] The Newark Evening News Publishing Company v. King Features Syndicate, Inc., The Hearst Corporation, and Hearst Consolidated Publications, Inc.

In the United States District Court for the District of New Jersey. Civil Action No. 10627. January 27, 1948.

Clayton Antitrust Act

Motion for Summary Judgment—Conspiracy to Restrain Trade—Facts Insufficient to Support Summary Judgment.—In a civil action brought under the Clayton Act by a newspaper publishing company against the owner and exclusive distributor of certain copyrighted comic strips and the publisher of another newspaper, alleging a combination and conspiracy to restrain trade, in violation of the antitrust laws, a motion by plaintiff for summary judgment is denied where the facts established, together with all the inferences of which they are reasonably susceptible, are not sufficient to support a summary judgment. Where it appears from the record that there is a genuine issue of fact, the court is without jurisdiction to enter a summary judgment. Defendants deny that the combination violates the antitrust laws, that it will restrain interstate commerce, and that plaintiff will suffer irreparable injury. A judgment on the issues raised by these denials can be had only upon a trial of the action on the merits.

See the Clayton Act annotations, Vol. 1, ¶ 2036.76.

[*Nature of Action*]

SMITH, D. J.: This is a civil action under Section 16 of the Clayton Act, 15 U. S. C. A. 26. The plaintiff's claim to injunctive relief is predicated upon the charge that the defendants, in violation of Section 3 of the said Act, 15 U. S. C. A. 14, and Section 1 of the Sherman Act, 15 U. S. C. A. 1, and pursuant to and in furtherance of an unlawful conspiracy, "combined with other persons, known and unknown to the plaintiff, to restrain trade and commerce among several states" to the irreparable injury of the plaintiff, "its readers, its advertisers and the public." This charge is denied by the defendants, who assert a lawful right to pursue the business policy of which the plaintiff complains. An extensive recital of the allegations of the respective pleadings is unnecessary to the determination of the questions here presented.

[*Motion for Summary Judgment*]

The action is before the Court at this time on a motion for summary judgment filed by the plaintiff pursuant to Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A., foll. Sec. 723 (c), and is submitted on the pleadings, affidavits and accompanying exhibits, and admissions. This record, although voluminous, will not support a determination that "there is no genuine issue as to any material fact," a prerequisite to the entry of summary judgment under the said rule.

Facts

I.

The Newark Evening News Publishing Company, hereinafter identified as the News, is the owner and publisher of a daily newspaper, which is sold and distributed in both intrastate and interstate commerce, to wit, in the states of New Jersey, New York, Pennsylvania, and other states. There is no evidence, however, as to the magnitude of the newspaper's sales in interstate commerce.

II.

Prior to 1943, when it was merged with the Hearst Corporation (the present defendant),[1] King Features Syndicate, Inc., hereinafter identified as the Syndicate, was the owner and exclusive distributor of certain comic strips which were copyrighted under the laws of the United States, 17 U. S. C. A. 1, et seq. These comic strips were sold and distributed in interstate commerce.

III.

The News and the Syndicate entered into an agreement, dated September 18, 1937, under which the former acquired the right to use and publish two comic strips, to wit, "Bringing Up Father" and "Blondie," daily for a period of one year. A similar agreement covering other comic strips was made between the same parties on November 12, 1941. These contracts were self-renewable

[1] King Features Syndicate, Inc., was successively the wholly owned subsidiary of Newspaper Feature Service, Inc., the Star Holding Corporation, and the Hearst Corporation. It should be noted, however, that the last corporation is not the defendant in the present action.

but subject to termination by either party upon notice to the other. The comic strips have been exploited and published continuously in the daily newspaper of the News since the agreements were made.

IV.

The Syndicate was merged with the Hearst Corporation in December of 1943, and the latter acquired all the right, title and interest of the former in and to the copyrighted comic strips. The Hearst Corporation organized a new corporation "King Features Syndicate, Inc.," hereinafter identified as King. Contemporaneously King and the Hearst Corporation entered into an agreement under which the latter assigned its right, title and interest in and to the copyrighted comic strips to the former, and the former granted to the latter the exclusive right and license to sell and distribute the copyrighted comic strips throughout the world, reserving to itself its property in the copyrighted comic strips and the right to use and publish them in comic books.

V.

Thereafter the Hearst Corporation assumed the agreements between the News and the Syndicate and fulfilled the obligations thereunder continuously until June 19, 1947, when it gave notice to the News of its intention to terminate the earlier agreement as of October 4, 1947 and the later agreement as of January 1, 1948. The termination of these agreements was prompted by the proposed plan of the Hearst Corporation to grant to the Hearst Consolidated Publications, Inc., a subsidiary of the Hearst Corporation, publisher of the New York Journal-American, the exclusive right to use and publish the copyrighted comic strips in the metropolitan area.

Discussion

The only facts clearly beyond dispute are those herein summarized. These facts, together with all the inferences of which they are reasonably susceptible, are not sufficient to support a summary judgment. The defendants deny: first, that the combination violates the Clayton and Sherman Acts; second, that the combination will effect an unreasonable restraint on interstate commerce; and third, that the plaintiff will suffer irreparable injury. It is our opinion that a judgment on the issues raised by these denials can be had only upon a trial of the action on the merits. The present record, although not completely devoid of any evidence on these issues, leaves much to be desired.

Rule 56 of the Rules of Civil Procedure, *supra,* does not vest in the court the jurisdiction to summarily try the factual issues on the pleadings and affidavits of the parties, but vests in the court the limited authority to enter summary judgment only if it clearly appears from the record that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The complete absence of any genuine issue of fact must be apparent and all doubts thereon must be resolved against the moving party. *Fishman v. Teter,* 133 F. 2d 222; *Toebelman v. Missouri-Kansas Pipe Line Co.,* 130 F. 2d 1016; *McElwain v. Wickwire Spencer Steel Co.,* 126 F. 2d 210; *Miller v. Miller,* 122 F. 2d 209; *Whitaker v. Coleman,* 115 F. 2d 305; see also *Sarnoff v. Ciaglia,* — F. 2d, recently decided by the United States Circuit Court of Appeals for the Third Circuit. If it appears from the record that there is a genuine issue of fact, even though it may relate only to the credibility and the weight of the testimony, the court is without jurisdiction to enter summary judgment. *Sartor v. Arkansas Gas Corp,.* 321 U. S. 620; *Arnstein v. Porter,* 154 F. 2d 464.

Conclusion

The motion for summary judgment will be denied. It is suggested, however, that the facts herein summarized may be embodied in a pretrial order as though a pretrial conference had been had under Rule 16 of the Rules of Civil Procedure.

[¶ 62,250] National Pressure Cooker Company v. Philip Klein, trading as Phil's Distributors.

In the Court of Chancery of the State of Delaware, in and for New Castle County. February 9, 1948.

Delaware Fair Trade Act

Unfair Competition—Bill to Enjoin—Demurrer.—In an action by a Wisconsin corporation engaged in the manufacture of pressure cookers to enjoin the violation of the Dela-

ware Fair Trade Act by a retailer of plaintiff's products, a demurrer to the bill on the ground that the title of the Act is misleading, and therefore violates the Delaware constitution, is overruled. The contention that the reasonable inference from the phrase "through the use of voluntary contracts establishing minimum resale prices, and providing for refusal to sell unless such minimum resale prices are observed" is that the Act applies only to persons who contract with manufacturers, and that Section 6 of the Act, which specifically includes non-contracting dealers, is more comprehensive, is rejected. It is held that that part of the title relied on by defendant as being more restricted than Section 6 is reasonably capable of the construction that it is merely descriptive of the method by which retail prices are to be established and the general intent of the Act carried out.

See the Delaware Fair Trade Act, Vol. 2, ¶ 8124; and Resale Price Maintenance Commentary, Vol. 2, ¶ 7134.

For plaintiff: David F. Anderson, of Southerland, Berl & Potter, Wilmington, Del.

For defendant: F. William Carr, of the office of Killoran & Van Brunt, Wilmington, Del.

[*Nature of Action*]

HARRINGTON, CHANCELLOR: The plaintiff's action is based on Chapter 201, Volume 43, Laws of Delaware, known as the Fair Trade Act, and the defendant has demurred to the bill.

National Pressure Cooker Company alleges that it is engaged in the manufacture of pressure cookers and other articles which are marketed and sold at retail to the consumer under certain brand or trade names; that the plaintiff company has spent large sums of money to advertise and promote the sale of its products under such names (specified in the bill); that, pursuant to the Delaware statute, fair trade agreements were made between the plaintiff company and a large number of retailers in this State which are still in effect and by which certain minimum resale prices were established in Delaware for the plaintiff's products, bearing brand or trade names, and a copy of such contracts, together with a list of the prices established, is attached to the bill; that the defendant, Philip Klein, trading as Phil's Distributors, at a specified place in the City of Wilmington, was fully advised of such agreements and of the price list in force and effect in the State of Delaware, but has sold, or offered to sell, the plaintiff's products bearing its brand or trade names, at prices below the minimum retail prices so established, and unless restrained by this court will continue to do so.

National Pressure Cooker Company seeks to enjoin the defendant from selling or offering to sell plaintiff's products of the kind described in the bill at prices less than those established in this State.

It appears from the bill that the defendant had not entered into a fair trade agreement with the plaintiff.

[*Fair Trade Act*]

Chapter 201, Volume 43, Laws of Delaware is entitled: "An Act To protect trademark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trademark, brand or name, through the use of voluntary contracts establishing minimum resale prices, and providing for refusal to sell unless such minimum resale prices are observed."

Section 6 (which is set out in the bill) and on which the action is based, provides:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Constitution*]

Section 16, Article XI of the Constitution of 1897 provides:

"No bill or joint resolution, except bills appropriating money for public purposes, shall embrace more than one subject which shall be expressed in its title."

[*Demurrer*]

As we have seen, Klein, the defendant, did not enter into a fair trade agreement with National Pressure Cooker Company, the plaintiff, and under his demurrer claims that in view of the provisions of Section 6 of the Act the title is misleading, and therefore violates the constitutional provision above quoted. He does not attack the Act on any other ground. That part of the title relied on as being misleading as to the

scope of the Act is the phrase "through the use of voluntary contracts establishing minimum resale prices, and providing for refusal to sell unless such minimum resale prices are observed." Klein claims that the reasonable inference from that language is that the Act only applies to persons who make contracts establishing retail sale prices with the manufacturers or distributors of commodities bearing trade-mark or brand names, while Section 6 is more comprehensive.

[*Purpose of Constitutional Provision*]

The conclusion in each case necessarily depends upon the particular statute and title involved, but the purpose of Section 16, Article XI of the Constitution is to prevent deception by provisions of which the title gives no intimation. *Wilmington Trust Co. v. Highfield,* 4 W. W. Harr. (34 Del.) 394; *Monaghan v. Lewis,* 5 Penn. 218. The title of an Act must, therefore, "be sufficiently comprehensive to give * * * fair and reasonable notice of the subject matter of the legislation proposed." *State v. Ferschke,* 2 Boyce 477. But it need not be an index of the provisions of the bill or a synopsis of the means by which its object is to be accomplished. *State v. Emerson,* 1 Terry 233; *State v. Grier,* 4 Boyce 322; *In re Cypress Farms Ditch Co.,* 7 W. W. Harr. (37 Del.) 71; 1 Cooley Const. Lim. § 297, note. Moreover, the courts are disposed to construe Section 16, Article XI liberally, and where reasonably "possible, it should be so construed as to uphold, rather than to destroy, legislation." *Wilmington Trust Co. v. Highfield, supra; Monaghan v. Lewis, supra.* It is, therefore, sufficient "if the title is so framed as to apprize those interested in the subject matter of legislation as reasonably to lead to inquiry into the body of the bill." *State v. Emerson, supra.*

In *Clendaniel v. Conrad,* 3 Boyce 549, the court said:

> "If the provisions of the Act, relating directly or indirectly to the same subject, are naturally connected and are not foreign to the subject expressed in the title, they will not be held unconstitutional * * *"

The court also said the constitutional provision

> "* * * is not violated by any Act having various details properly pertinent and germane to one general subject."

In other words, if the title is such as to fairly disclose the general character of the enactment, it is usually sufficient. 1 Cooley Constit. Lim. § 297, note. These principles are "but a particular application to the constitutional provision in question of the general principle * * * that every presumption is in favor of the constitutionality of legislative enactment and that they should not be declared invalid unless their invalidity is beyond doubt." *Wilmington Trust Co. v. Highfield, supra.*

[*Title of Act Not Misleading*]

Section 1 of the so-called "Fair Trade Act" defines certain terms. Section 2 provides that no contract, relating to the sale or resale of a commodity, which bears the trade-mark, brand or name of the producer or distributor, shall be deemed in violation of any law of Delaware by reason of provisions under which the seller requires the buyer not to sell at less than minimum prices established by the seller. Section 3 provides that "for the purpose of preventing evasion of the resale price restrictions imposed in respect to any commodity by any contract entered into pursuant to the provisions of this Act," certain specified practices, such as combination sales, shall be deemed a violation of such resale price restrictions. Section 4 provides that the minimum resale price may be fixed only by the owner or distributor specifically authorized by the owner of the trade-mark, brand or name. Section 5 exempts certain resales which otherwise would be covered by a contract entered into under the Act. Section 6 has already been quoted. Section 7 provides that the Act shall not apply to contracts between purchasers. Section 8 contains the usual severability clause. Section 9 repeals inconsistent Acts, and Section 10 gives the popular name of the Act. Its apparent intent is to protect the owners of trade-marks or trade or brand names from practices regarded by the legislature as unfair business competition, and Section 6 is consistent with that general purpose. Nor do I think the title is misleading, though some persons may not enter into the contemplated trade agreements. Applying the principles above stated, that part of the title relied on by the defendant as being more restricted than Section 6 is reasonably capable of the construction that it is merely descriptive of the method by which retail prices are to be established and the general intent of the Act carried out.

The Maryland Court of Appeals reached the same conclusion, though other reasons for sustaining the title of the Act were also relied on. *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682. A different conclusion was reached in *Bristol-Myers v. Webb's Cut Rate Co., Inc.*, 137 Fla. 508; but the rule adopted by the Maryland court seems more consistent with established principles. *State v. Emerson*, 1 Terry (40 Del.) 233, relied on by the defendant, is not inconsistent with this conclusion.

[*Demurrer Overruled*]

The defendant's demurrer to the plaintiff's bill is overruled, and an order will be entered accordingly.

[¶ 62,251] Mandeville Island Farms, Inc., and Roscoe C Zuckerman v. American Crystal Sugar Company.

In the Supreme Court of the United States. No. 75. October Term, 1947. May 10, 1948.

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Sherman Antitrust Act

Restraint of Interstate Commerce—Agreements Among Refiners to Pay Uniform Price—Complaint Improperly Dismissed.—A complaint alleging a combination and conspiracy among California sugar refiners, who control the supply of sugar beet seed and the market for sugar beets in that area, to violate the Sherman Act by agreeing among themselves to pay a uniform price for sugar beets grown in California, such price being computed on the basis of average net returns of all of the refiners rather than the separate returns of the purchasing refiner, states a cause of action arising under the Sherman Act.

See the Sherman Act annotations, Vol. 1, ¶ 1640.125, 1640.621.

Interstate Commerce—Total Economic Process.—The growing and refining of sugar beets wholly within a state, for distribution and sale in interstate commerce, may have a real and substantial effect upon interstate commerce. The artificial separation of "production" and "manufacturing" from "commerce" without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congressional authority or of the Sherman Act. Given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to the policy of the Act to constitute a forbidden consequence. If so, the restraint must fall. The dissenting opinion states that since the amended complaint failed to allege that the cost of the sugar which moved in interstate commerce was affected, no cause of action was stated.

See the Sherman Act annotations, Vol. 1, ¶ 1640.188.

Change in Form of Commodity—Effect upon Interstate Commerce.—A mere change in the form of the commodity does not defeat application of the Act to practices occurring either during the changing processes or before they begin, when they have the effects forbidden by the Act. The mere fact that the price fixing related directly to the unrefined beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

See the Sherman Act annotations, Vol. 1, ¶ 1640.125.

Lessening of Competition—Creation of Monopoly.—The alleged agreements had the effect of rendering the price received by the grower devoid of all competitive influence in amount, and of reducing competition in the interstate distribution of sugar. By their agreement the combination of refiners acquired a monopoly of raw material, and, thereby, control of the quantity of sugar sold and shipped from that area.

See the Sherman Act annotations, Vol. 1, ¶ 1640.485.

Injury to Petitioners—Treble Damages.—The test of the legality and immunity of the combination is whether the policy of the Act has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case: the restraints on the public interest in the interstate sale of sugar; and special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.

See the Sherman Act annotations, Vol. 1, ¶ 1640.351.

Reversing and remanding the decision of the United States Circuit Court of Appeals for the Ninth Circuit, 159 Fed. (2d) 71, reported in '44-'47 Court Decisions Supp. at ¶ 57,527.

For petitioners: Guy Richards Crump, Los Angeles, Calif.

For respondent: Louis W. Myers, Pierce Works, Los Angeles, Calif.; O'Melveny & Myers, John Whyte, of counsel.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

[*Facts of Case*]

The action is for treble damages incurred by virtue of alleged violation of the Sherman Act, §§ 1 and 2. 26 Stat. 209, 38 Stat. 731, 15 U. S. C. §§ 1, 2, 7, 15. The case comes here on certiorari, 331 U. S. 800, from affirmance by the Circuit Court of Appeals, 159 F. 2d 71, of a judgment of the District Court, 64 F. Supp. 265. That judgment dismissed the amended complaint as insufficient to state a cause of action arising under the Act. In this posture of the case, the legal issues are to be determined upon the allegations of the amended complaint.[1]

The main question is whether, in the circumstances pleaded, California sugar refiners who sell sugar in interstate commerce may agree among themselves to pay a uniform price for sugar beets grown in California without incurring liability to the local beetgrowers under the Act. Narrowly the question is whether the refiners' agreement together with the allegations made concerning its effects shows a conspiracy to monopolize and to restrain interstate trade and commerce or one thus affecting only purely local trade and commerce.

The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding, may be summarized as follows: Petitioners' farms are located in northern California, within the area lying north of the thirty-sixth parallel. The only practical market available to beet growers in that area was sale to one of three refiners.[2] Respondent was one of these. Each season growers contract with one of the refiners to grow beets and to sell their entire crops to the refiner under standard form contracts drawn by it. Since prior to 1939 petitioners have thus contracted with respondent.

The refiners control the supply of sugar beet seed. Both by virtue of this fact and by the terms of the contracts, the farmers are required to buy seed from the refiner. The seed can be planted only on land spe-

[1] The original complaint contained three counts, the first alleging violations of the Sherman Act and the second and third charging breach of contracts made in 1940 and 1941 respectively. In order to expedite decision and review upon the Sherman Act contention, by stipulation the amended complaint was filed setting forth, with an amendment to be noted, see note 5, only the allegations of the Sherman Act count. The stipulation provided for following this course without prejudice to further assertion by petitioners of rights under the two contract counts within a specified period following final determination of the Sherman Act issues.

[2] It was alleged that the beets, when harvested, are "bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period . . . when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured."

There were also allegations that initial outlay, annual upkeep and operating expenses, and time required for erecting and equipping a refinery, were so great that no competition from any new refinery could be expected short of two years at best; that the three refiners had a monopoly in the area of the supply of seeds and of refining; and that no grower in the region could sell beets at a profit except to one of the three refiners.

cifically covered by the contract. Any excess must be returned to the refiner in good order at the end of the planting season.

The standard contract gives the refiner the right to supervise the planting, cultivation, irrigation and harvesting of the beets, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. Before delivering beets to the company, the farmers must make preliminary preparations for processing them into raw sugar.[3] The refiner has the option to reject beets if the contract conditions are not complied with and if the beets are not suitable in its judgment for the manufacture of sugar.

Prior to 1939 the contract fixed the grower's price by a formula combining two variables, a percentage of the refiner's net returns per hundred pounds from sales of sugar and the sugar content of the individual grower's beets determined according to the refiner's test.[4]

Sometime before the 1939 season the three refiners entered into an agreement to pay uniform prices for sugar beets. The mechanics of the price-fixing arrangement were simple. The refiners adopted identical form contracts and began to compute beet prices on the basis of the average net returns of all three rather than the separate returns of the purchasing refiner. Inevitably all would pay the same price for beets of the same quality.

Since the refiners controlled the seed supply and the only practical market for beets grown in northern California, when the new contracts were offered to the farmers, they had the choice of either signing or abandoning sugar beet farming. Petitioners accordingly contracted with respondent under this plan during the 1939, 1940 and 1941 seasons. The plan was discontinued after the 1941 season. Because beet prices were determined for the three seasons with reference to the combined returns of the three refiners, the prices received by petitioners for those seasons were lower than if respondent, the most efficient of the three, had based its prices on its separate returns.

The foregoing allegations set forth the essential features of the contractual arrangements between the refiners and the growers and of the agreement among the refiners themselves. Other allegations were made to complete the showing of violation and injury. They relate specifically to the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.

With reference to the industry in general. it was stated that sugar beets were grown during the seasons 1938 to 1942 on large acreages not only in northern California but also in Utah, Colorado, Michigan, Idaho, Illinois and other states. The crops so grown, when harvested, were not "sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce." Then follow the allegations summarized above in note 2 concerning the bulky and semi-perishable nature of sugar beets, the impossibility of transporting them over long distances or of storing them cheaply or safely, their rapid deterioration when ripe, and the necessity for prompt harvesting and marketing. These allegations must be taken as intended and effective to put the agreements complained of in the general setting of the industry's unique structure and special mode of operation.

The specific allegation is added that the sugar manufactured by respondent and the other northern California refiners from beets grown in the region "was, during all of said period [1938 to 1942], sold in interstate commerce throughout the United States."

By way of legal as well as ultimate factual conclusions the amended complaint charged that respondent had unlawfully conspired with the other northern California refiners to "monopolize and restrain trade

[3] These include cutting off the beet tops, trimming the crowns in a specified way, and removing all foreign substances likely to interfere with factory work.

[4] Net returns from sugar sales were measured by gross sales price less selling expenses directly applicable to sugar. Monthly settlements were made for beets delivered during the preceding month on the estimated net returns of the refiner. But final settlement had to be deferred until the end of the season when net returns could be accurately determined.

and commerce[5] among the several states and to unlawfully fix prices to be paid the growers . . . all in violation of the anti-trust laws . . ."; and that each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price on the agreed uniform basis of average net returns.

There were further charges that prior to 1939 the northern California refiners had "competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses," with the result that for 1938 respondent secured substantially greater "net gross receipts of sales of sugar" than the other refiners. These in turn were reflected in the payment of 29½ to 52½ cents per ton more to petitioners and other growers dealing with respondent than was paid by the other refiners to their growers.

However, for the seasons 1939, 1940 and 1941, under the new uniform contracts and prices, "there was no longer any such competition . . ." Instead it was alleged upon information and belief that, as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or "as it would have had said conspiracy not existed." In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free, and petitioners "did not receive the reasonable value of their sugar beets."

Further charges were that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners "producing and selling raw sugar in interstate commerce . . . in competition with each other . . . they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system . . ."; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, "in so far as the growers were concerned," as if they were one corporation owning and controlling all factories in the area, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring.[6]

We are not concerned presently with the allegations relating to the injuries and amounts of damages inflicted upon petitioners,[7] except to say that they are sufficient to present those questions for support by proof, if the allegations made to show a cause of action arising under the statute are sufficient for that purpose.

In our judgment the amended complaint states a cause of action arising under the Sherman Act, §§ 1 and 2, and the complaint was improperly dismissed.

[*Growing, Refining and Distribution Integrated*]

I.

Broadly petitioners regard the entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth, as a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it that, for purposes of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp.

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[5] At this point the words "in sugar and sugar beets" appeared in the original complaint. They were stricken from the amended complaint by petitioner's counsel prior to dismissal of that complaint. Cf. note 1. This change however did not affect numerous other allegations remaining in the amended complaint concerning the combination's restrictive and monopolistic effects upon interstate trade in sugar. See note 6 and text; also note 24 and text Part IV *infra*.

[6] Paragraph XIX of the amended complaint summarized petitioners' conclusions as follows: "By reason of the foregoing acts of the defendant and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein* was not only substantially lessened but *was destroyed,* the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid." (Italics added.) Cf. notes 5 and 24.

[7] It is not clear whether damages were to be measured by the difference between the prices actually paid and those that would have been paid if based on respondent's separate returns, or by the difference between the prices paid and the prices set by the Secretary of Agriculture, pursuant to the Sugar Act of 1937, 50 Stat. 910, 7 U. S. C. § 1131 (d); see 5 Fed. Reg. 5231. But that is an issue that need not concern us now. Petitioner Mandeville Island Farms prayed judgment for $315,043.80; petitioner Zuckerman for $112,192.14.

Respondent, on the contrary, broadly severs the phase or phases of growing and selling beets from the later ones of refining them and of marketing the sugar. The initial growing process together with sale of the beets, and it would seem also the intermediate stage of refining, are taken to be "purely local," since all occurred entirely within California; therefore were wholly intrastate events; and consequently were beyond the Sherman Act's reach.

Connected with this severance is the assertion that the complaint alleges no monopolistic or restrictive effects upon interstate commerce, but only such effects in the intrastate phases of the industry.

Much stress is laid upon the so-called interruption of the sequence at the refining stage. Prior to the interruption only beets are involved, afterward only sugar. Since the two commodities are different and all that affects the beets takes place in California, including the restraints alleged upon their sale, the trade and commerce in beets is wholly distinct from that in sugar and is entirely local, as are therefore the restraint and monopolization of that trade. Admittedly once the beets are converted into sugar and the sugar starts on its interstate journey to the tables of the nation, interstate commerce becomes involved. But only then is it affected, and nothing occurring before the journey begins or at any rate before the beets become sugar substantially affects or, for purposes of the statute's application, has relevance to that commerce.

Thus sugar together with its interstate sale and transportation is absolutely divorced from sugar beets, their production, sale and delivery to the refiner. Manufacture breaks the relationship and with it all consequences growing out of the restraints for the interstate processes and the purposes of the statute. In other words, since the restraints precede the interstate marketing of the sugar and immediately affect only the local marketing of the beets, they have no restrictive effect upon the trade and commerce in sugar.

This very nearly denies that sugar beets contain sugar. It certainly denies that the price of beets and restrictions upon it have any substantial relation in fact or in legal significance for the statute's purposes to the price of sugar sold interstate, when the restrictions take place within the confines of a single state and before the interstate marketing process begins.

[*Interstate Commerce Involved*]

II.

The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard v. Filburn,* 317 U. S. 111, or the scope of the Sherman Act's coverage. The artificial and mechanical separation of "production" and "manufacturing" from "commerce," without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. *United States v. E. C. Knight Co.,* 156 U. S. 1. Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving "primarily" only "production" or "manufacturing," although the vast part of the sugar produced was sold and shipper interstate,[8] and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only "incidentally," "indirectly," or "remotely" involved; and to be "incidental," "indirect," or "remote" was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See *Wickard v. Filburn, supra,* at 119 *et seq.*

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[8] It has been previously noted here that the Court applied these labels as a heritage from prior decisions under the commerce clause, dealing not as the *Knight* case with an act or acts of Congress, but with the validity of state statutes, *Wickard v. Filburn,* 317 U. S. 111, 121; *United States v. South-Eastern Underwriters Assn.,* 322 U. S. 533, 543-545, an approach reflecting Marshall's idea of the mutual exclusiveness of state and national power in this area and ignoring the later evolution of different conceptions in *Cooley v. Board of Wardens,* 12 How. 299. See *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408, 412-427.

The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.[9]

We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in *Wickard v. Filburn, supra.*[10] Suffice it to say that after coming back to life again in the *Northern Securities* case, 193 U. S. 197, for matters of transportation, the Sherman Act received a second rebirth in 1911 with the decisions in *Standard Oil Co. v. United States,* 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106. Cf. *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 553 *et seq.*

Not thereafter could it be foretold with assurance that application of the labels of "production" and "manufacture," "incidental" and "indirect," would throw protective covering over those processes against the Act's consequences. Very soon also came the *Shreveport Rate Cases,* 234 U. S. 342, again in the field of transportation, but inevitably to add force and scope to the *Standard Oil* and *American Tobacco* rulings that manufacturing companies lay within the reach of the power and of the statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

With extension of the *Shreveport* influence to general application,[11] it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Board of Wardens,* 12 How. 299. For, while the latter gave play for state power to work

[9] Compare, *e. g., United States v. E. C. Knight Co.*, 156 U. S. 1, with *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106; *Hammer v. Dagenhart*, 247 U. S. 251, with *United States v. Darby*, 312 U. S. 100; *Carter v. Carter Coal Co.*, 298 U. S. 238, with *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *United States v. Chicago, etc., R. Co.*, 282 U. S. 311, and *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, with *United States v. Lowden*, 308 U. S. 225; *Hopkins v. United States*, 171 U. S. 578, with *Stafford v. Wallace*, 258 U. S. 495; *Employers' Liability Cases*, 207 U. S. 463, 498, with *Virginia R. Co. v. Federation*, 300 U. S. 515, 557, and *Weiss v. United States*, 308 U. S. 321; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495 and authorities cited, with *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, and *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408.

[10] See particularly the discussion in 317 U. S. at 119-120. See also *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408; *South-Eastern Underwriters Assn. v. United States*, 322 U. S. 533; *Labor Board v. Jones & Laughlin*, 301 U. S. 1; *United States v. Darby*, 312 U. S. 100; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 883.

The *Filburn* case dealt with the second Agricultural Adjustment Act and the power of Congress to enact it. But, referring to the first Interstate Commerce Act and the Sherman Act, the Court in the *Filburn* case (pp. 121-122) said that those statutes "ushered in new phases of adjudication" requiring a different approach to interpretation of the commerce clause, although "when it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress." For the latter statement the *Knight* case was cited as the principal example.

[11] The doctrine encompassed fundamentally not merely an expanding factor in federal power over transportation. It was rather an integer in the sum of power over commerce, of which authority over transportation was but a part. The "affectation" approach was actually a revival of Marshall's "necessary and proper" doctrine, cf. *Wickard v. Filburn*, 317 U. S. 111, 120, 122, but unqualified by his idea of mutual exclusiveness, see note 8. Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act. Time and events were disclosing ever more clearly the impact of their effects upon interstate trade and commerce. And this was posing the same necessity for regulation as in the field of transportation, in order to protect and preserve the national commerce and carry out Congress' policy regarding it.

in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the haltering labels of "production" and "manufacturing" and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action.

The transition, however, was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1930's. But after the historic decisions of 1911, and even more following the *Shreveport* decision, a constantly growing number of others rejected the idea that production and manufacturing are "purely local" and hence beyond the Act's compass, simply because those phases of a combination restraining or monopolizing trade were carried on within the confines of a single state or, of course, of several states.[12] The struggle for supremacy between the conflicting approaches was long continued. But more and more until the climax came in the late 1930's, this Court refused to decide those issues of power and coverage merely by asking whether the restraints or monopolistic practices, shown to have the forbidden effects on commerce, took place in a phase or phases of the total economic process which, apart from other phases and from the outlawed effects, occurred only in intrastate activities.[13]

In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.[14] For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

The *Shreveport* doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach.

Obviously therefore the criteria respondent would have us follow furnish no basis for reaching the result it seeks. Only by returning to the *Knight* approach, and severing the intrastate events relating to the beets, including the price restraints, from the later events relating to the sugar, including its interstate sale, could we conclude there were no forbidden restraints or practices touching interstate commerce here. At this late day we are not willing to take that long backward step.

III.

We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations

[12] *United States v. Reading Co.*, 253 U. S. 26; *United States v. Keystone Watch Case Co.*, 218 F. 502; *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 F. 254; *United States v. E. I. Du Pont de Nemours & Co.*, 188 F. 127. See Mr. Justice Holmes dissenting in *Hammer v. Dagenhart*, 247 U. S. 251, 279.

[13] *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *Binderup v. Pathe Exchange*, 263 U. S. 291; *Federal Trade Commission v. Pacific Paper Assn.*, 273 U. S. 52; *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251.

[14] In *United States v. Frankfort Distilleries*, 324 U. S. 293, 297, we said: "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." The decisions cited were *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457; cf. *Local 167 v. United States*, 291 U. S. 293, 297, and *United States v. Hutcheson*, 312 U. S. 219.

disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which recovery of treble damages by the petitioners is authorized.

It is clear that the agreement is the sort of combination condemned by the Act,[15] even though the price-fixing was by purchasers,[16] and the persons specially injured under the treble damage claim are sellers, not customers or consumers.[17] And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce, is condemned by the Act. *Stevens Co. v. Foster & Kleiser,* 311 U. S. 255, 261. And a conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. *United States v. Frankfort Distilleries,* 324 U. S. 293.

The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn., supra,* at 553.

Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned, *Indiana Farmer's Guide v. Prairie Farmer,* 293 U. S. 268, 279, *United States v. Yellow Cab Co.,* 332 U. S. 218, 225, the conspiracy being shown to affect interstate commerce adversely to Congress' policy. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States v. Darby,* 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States v. Walsh,* 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard v. Filburn, supra,* or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co. v. Labor Board,* 305 U. S. 197, 221-222.

Moreover, as we said in the *Frankfort Distilleries* case, ". . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." 324 U. S. 293, 297. That statement is as true of the situation now presented as of the one then before us, although instead of restraining trade in order to control a local market petitioners control a local market in which they purchase. For this is not a case involving only "a course of conduct wholly within a state"; it is rather one involving "conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states," and in such a case it is not material that the source of the forbidden effects upon that commerce arises in one phase or another of that program.

In view of all this, it is difficult to understand respondent's argument that the complaint does not allege that the conspiracy had any effect on interstate commerce, except on the basis of the discarded criteria discussed in Part II above. The contention ignores specific allegations which we have set forth. But apart from that fact it rests only on a single grounding, which in the circumstances of this case is little, if any, more than a different phrasing of the criteria supplanted by the *Shreveport* approach.

This is that the change undergone in the manufacturing stage when the beets are converted into sugar makes the case different, for the Sherman Act's objects, than it would be if the identical commodity were concerned from the planting stage through the phase of interstate distribution, *e. g.,* if the commodity were wheat, as was true in

[15] *United States v. Frankfort Distilleries,* 324 U. S. 293, and authorities cited.

[16] Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781; *United States v. Patten,* 226 U. S. 525; *Swift & Co. v. United States,* 196 U. S. 375. Each case involved outlawed practices by persons who were both purchasers and sellers, and forbidden effects upon sellers as well as purchasers and consumers.

[17] See note 16.

Wickard v. Filburn, supra, or raisins purchased by packers from growers and shipped interstate after packing, cf. *Parker v. Brown,* 317 U. S. 341, 350.

We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented.[18] For mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act.[19] Again, as we have said, the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry. Hence in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

Indeed that severance would not necessarily take place if the manufacturing stage had produced a much greater change in commodities than was effected here. But under the facts characterizing this industry's operation and the tightening of controls in this producing area by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed they permeated the entire structure of the industry in all its phases, intrastate and interstate.

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining, and the distribution of sugar both interstate and local.

Some of these controls have been built up by taking advantage of the opportunities afforded by the industry's unique character, both natural and in its general pattern and habits of organization; [20] others by utilizing the key positions these advantages give the refiners to put contractual restraints upon the growers by their separate actions; [21] and still greater ones by the refiners' ability, by virtue of their central and dominating place thus achieved, to agree among themselves upon further restrictions.

Even without the uniform price provision and with full competition among the three refiners, their position is a dominating one. The growers' only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market. The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet

[18] Compare *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.,* 249 U. S. 134, with *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148.

[19] *Swift & Co. v. United States,* 196 U. S. 375; *American Tobacco Co. v. United States,* 328 U. S. 781; *United States v. Aluminum Co. of America,* 148 F. (2d) 416.

[20] The natural factors include the peculiar nature of the crop in its limitation to a single primary and commercially profitable use, the necessity for immediate and nearby marketing to follow directly upon harvesting, and the well-known fact that sugar beets are grown only in widely scattered regions specially adapted to the crop in soil, climate and availability of water in large quantities during the growing season.

[21] Resulting in large part from the natural limitations stated in note 20 and the fact that extracting the sugar content from the beets is an elaborate and technical process, is the further important fact that the processing cannot be done by the growers individually or even in small cooperative groups, but requires specialized and large scale business organization, equipment and investment. All these factors and perhaps others combine to make the refining stage of the industry a specialized manufacturing one to be carried on separately from growing, to establish the refiners' key place in the entire industry, and thus to leave the growers completely at the refiners' mercy for the profitable production of beets except as the latter may compete among themselves.

through new competition practically imposible. Upon the allegations, it is absolutely so for any single growing season. A tighter or more all-inclusive monopolistic position hardly can be conceived.

When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his product. Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers.

There were indeed two distinct effects flowing from the agreement for paying uniform growers' prices, one immediately upon the price received by the grower rendering it devoid of all competitive influence in amount; the other, the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.

The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept. By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufactured, sold and shipped interstate from the northern California producing area. In substance and roughly, if not precisely, they allocated among themselves the market for California beets substantially upon the basis of quotas competitively established among them at the time the uniform price arrangement was agreed upon. It is hardly likely that any refiner would have entered into an agreement with its only competitors, the effect of which would have been to drive away its growers, or therefore that many of the latter would have good reason to shift their dealings within the closed circle. Thus control of quantity in the interstate market was enhanced.

This effect was further magnified by the fact that the widely scattered location of sugar beet growing regions and their different accessibilities to market [22] give the refiners of each region certainly some advantage over growers and refiners in other regions, and undoubtedly large ones over those most distant from the segment of the interstate market served by reason of being nearest to hand.

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar. The percentage factor of interstate receipts from sugar which the grower's contract specifies shall enter his price for beets makes that price dependent upon the price of sugar sold interstate. The uniform agreement's effect, when added to this, is to deprive the grower of the advantage of the individual efficiency of the refiner with which he deals, in this case the most efficient of the three, and of the price that refiner receives. It is also to reflect in the grower's price the consequences of the combination's effects for reducing competition among the refiners in the interstate distribution of sugar.

In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating its entire structure. This was the necessary and inevitable effect of the agreement among the refiners to pay uniform prices for beets, in the circumstances of this case. Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate; and finally by the tie-in provision they interlaced those interstate effects with the price paid for the beets.

These restrictive and monopolistic effects, resulting necessarily from the practices allegedly intended to produce them, fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent, both to the public and to private individuals.

It does not matter, contrary to respondent's view, that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combination's effects, even if that result is assumed to have followed. It is enough that

[22] See note 20.

these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner's controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.

The fact that that arrangement is the source of both effects cannot be taken to mean that neither is outlawed by the statute, in view of their interdependence and the completely unified and comprehensive nature of the scheme as respects its interstate and intrastate phases. The policy of the Act is competition. It cannot be flouted, as has been done here, by artificial nomenclatural severance of the plan's forbidden effects, any more than by such a segmentation of the integrated industry into legally unrelated phases. Nor can the severance be made in such a case merely by virtue of the fact that a refining or manufacturing process constitutes an intermediate stage in the whole.

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn, or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change, than does extracting the sugar content of beets to make raw sugar.

We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day.[23]

[*Sugar and Sugar Beets*]

IV.

Little more remains to be said concerning the amended complaint. The allegations comprehend all that we have set forth. We do not stop to restate them, leaving their substance at this point for reference to the summary made at the beginning of this opinion.

Respondent has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words "sugar and sugar beets" from one of the allegations that the refiners had conspired to "monopolize and restrain trade and commerce among the several states. . . ."[24]

Respondent takes this elision as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity. The amendment did not eliminate or affect numerous other allegations which in effect

[23] It is suggested that *Parker v. Brown*, 317 U. S. 341, is inconsistent with our conclusion here. The Court there held first that the Sherman Act did not apply because the program was sponsored by the State of California. Contrary to the present suggestion, the opinion assumes that the relation between the intrastate and the interstate commerce in raisins was sufficient to justify federal regulation, if the state-sponsored program of prorating had been "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U. S. at 350. The case therefore contains no suggestion, on the facts or on the law, contrary to the result now reached.

[24] See note 5. By way of explaining the deletion the record contains only the statement of the stipulation, cf. note 1, that the amended complaint eliminated "what the Court considered an ambiguity in the [original] complaint." With no further support from the record, it has been assumed that the ambiguity so elided was the reference to restraint of interstate trade in *sugar* and hence the petitioners in making it stated themselves out of court.

Apart from the fact that the elision did not affect numerous other like allegations, see note 6 and text, the deletion included the specifications of both "sugar and sugar beets." From this the literal inference, if any of the sort could be made, would be that the elision was

repeated the charge in various forms and with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specified trade or commerce in sugar,[25] others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar. We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer or waiver.

The allegations are comprehensive and, for the greater part specific, concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

[Dissenting Opinion]

MR. JUSTICE JACKSON with whom MR. JUSTICE FRANKFURTER joins, dissenting.

It appears to me that the Court's opinion is based on assumptions of fact which the petitioner disclaimed in the court below. These assumptions are permissible inferences from the amended complaint only if we disregard the way in which the amendments came about.

On hearing, the trial judge apparently considered that a cause of action would be stated only if the complaint alleged that the growing contracts affected the price of sugar in interstate commerce. But the contracts accompanying the pleadings indicated that the effects ran in the other direction. The market price of interstate sugar was the base on which the price of beets was to be figured. The latter price was derived from the income which respondent and others received from sugar sold in the open market over the period of a year. The trial judge therefore suggested that the references to restraint of trade in sugar in interstate commerce created an ambiguity in the complaint. Accordingly, the plaintiff, at the suggestion of the court and for the specific purpose of this appeal, filed an amended complaint which completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce, and eliminated the two other counts "to enable the Court herein to pass upon the sufficiency of the first count and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient".[1] The District Court then held that since no beets whatever moved in interstate commerce and since there was no charge in the amended complaint that the cost or quality of the product which did move in interstate

intended to withdraw all charges of monopoly or restraint of trade, whether in sugar or in beets, and thus to concede there was no case under the Sherman Act, a conclusion obviously at war with the remaining allegations of restraint of trade in both sugar and sugar beets.

But, if any difference between the two could be assumed as having been intended, it is much more likely that the supposed ambiguity deleted arose from the reference to interstate trade in *beets*, since the allegation as a whole referred only to "interstate trade and commerce" and on the facts pleaded the only trade in beets was intrastate (considered apart, as respondent would do, from its relation to and effects upon the trade in sugar).

In any event the case is to be decided upon the sum of the allegations of the amended complaint, not upon conjecture as to why a particular and, we think, immaterial amendment of one allegation was made. Indeed the entire allegation could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it.

[25] *E. g.*, in the allegation quoted in note 6, as well as others set forth in the text preceeding that note.

[1] The full text of the Stipulation and Order which was executed by counsel for both parties, and by the District Judge, is as follows:

"Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to

commerce was in any way affected, no cause of action was stated. The appeal was taken and the Circuit Court of Appeals affirmed.

This Court, however, decides the case as though the original complaint as it related to sugar had not only remained unchanged but had been proved by evidence. Despite the deletion from the complaint of the allegation concerning the price of sugar, the Court assumes, without allegation or evidence, that the price of sugar is affected and on that basis builds its thesis that the Sherman Act has been violated. I think in fairness to the litigants and the District Court, the petitioner's case should be disposed of here on the same basis on which it was pleaded to the courts below.

On the proceedings in the courts below, I would affirm the judgment of the District Court.

[¶ 62,252] Harry Ferguson and Harry Ferguson, Inc. v. Ford Motor Company, Dearborn Motors Corporation, Henry Ford II, Ernest R. Breech, Ernest C. Kanzler, Frank R. Pierce, Thomas A. Farrell, John R. Davis, Albert J. Browning, Grant Cook, Ohio Tractor & Implement Co., and Sherman Tractor & Equipment Co., Incorporated.

In the United States District Court for the Southern District of New York. Civil No. 44-482. April 21, 1948.

Sherman Antitrust Act

Motion to Dismiss—Appropriate Forum—Venue Requirements.—Motions by defendants to dismiss an action alleging a conspiracy in violation of the antitrust laws, on the ground of *forum non conveniens,* are denied. The venue provisions of the Clayton Act are special venue statutes, and Congress in enacting them intended to prohibit the application of the principle of *forum non conveniens.* It is further held that in order for the doctrine to apply, defendant must be amenable to suit in the allegedly more convenient forum. The court cannot accept defendant's stipulation waiving venue protection in the second jurisdiction, but requires that he be amenable to process on the facts themselves. Plaintiff's choice of forum should be disturbed only where the choice is vexatious and oppressive to the defendant. The court does not find that trial in this district is either oppressive or vexatious to defendants, and a dismissal of the complaint is not warranted.

See the Sherman Act annotations Vol. 1, ¶ 1640.291.

For plaintiffs: Cahill, Gordon, Zachry, & Reindel, New York, N. Y., James A. Fowler, Jr., Mathias F. Correa, of counsel; and Carlson, Pitzner, Hubbard & Wolfe, Chicago, Ill., Richard R. Wolfe of counsel.

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pass upon the sufficiency of the first count on its merits and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

"Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

"1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract in use in 1938, 1939, 1940 and 1941, and omitting the second and third counts.

"2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includible therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

"3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includible therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includible therein by amendment.

"4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

"5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the amended complaint or the filing of a separate action or actions hereinabove set forth shall continue until six months after the determination on appeal as to the sufficiency of the first count has become final."

For defendants: Simpson, Thacher & Bartlett, Whitney North Seymour, of counsel; Cravath, Swaine & Moore, Bruce Bromley, of counsel; Duncombe, Pleasants & Donovan, Samuel A. Pleasants, of counsel, all of New York, N. Y.

[*Nature of Action*]

RYAN, J.: Defendants move to dismiss the complaint on the ground that the District Court for the Southern District of New York is not the appropriate forum for the trial of this action, claiming that a determination of the issues would be had at greater convenience to the parties and witnesses if the action were brought in the United States District Court, Eastern District of Michigan, Southern Division, Detroit; and, in addition and as to the second cause of action, that this court has no jurisdiction because the venue requirements for patent infringement suits are not satisfied. The defendant, Dearborn Motors Corporation, adds as a further ground for dismissal that to require it to defend this action in the Southern District of New York would be an undue burden on interstate commerce.

We shall consider only the facts involving those defendants who have been served by plaintiffs, to wit: Ford Motor Company, Dearborn Motors Corporation and its president, Ernest C. Kanzler, Henry Ford II and Sherman Tractor & Equipment Co., Incorporated.

Ford Motor Company is a Delaware corporation qualified to do business in the State of New York, maintaining a regular and established place of business in this district. Dearborn Motors Corporation is also a Delaware corporation and transacts business regularly here. Ernest C. Kanzler and Henry Ford II are residents of Michigan. Sherman Tractor & Equipment Co., Incorporated is a New York corporation and maintains a regular and established place of business within this district. The plaintiffs are Harry Ferguson, as an individual and a British citizen, and Harry Ferguson, Inc., a Delaware corporation. The complaint alleges three claims for relief against twelve defendants.

The first cause of action alleges, in substance, that in 1938, the late Henry Ford and Harry Ferguson entered into an oral agreement terminable by either party at any time, for the production and sale of a farm tractor, invented and patented by Ferguson; that operations were continued under this agreement between Ford Motor Company and the corporate plaintiff from 1938 until the end of 1946; that it was a relationship of good faith and mutual confidence; that defendants conspired to breach the alleged agreement, to destroy plaintiffs' business and to appropriate it through defendant, Dearborn Motors. It is alleged that this conspiracy violated sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act with damages of $80,000,000. and a prayer for treble that sum under section 4 of the Clayton Act (15 USCA 1, 2, 14 and 18).

The second cause of action alleges the same facts as to the conspiracy but claims that one facet of the plan was to infringe deliberately certain patents of Ferguson's by copying the Ferguson system tractor and selling such allegedly infringing tractors in violation of these patents, with resulting damage of $3,700,000. and asking judgment in three times this amount. (35 USCA § 67).

The third cause of action is an alleged equitable claim, as well as a tort claim, based upon and incorporating the allegations of the first and second causes of action, but alleged to be ancillary to them, and does not ask for damages additional to their total of $251,100,000.

Many of the affidavits and a large portion of the briefs submitted discuss the alleged merits (as well as the lack of merit) of plaintiffs' claims. The consideration of these matters is neither proper nor necessary to the determination of the motion now before us, their appraisal is to be arrived at after trial only. Much, too, has been said by plaintiffs of the impossibility of securing a jury in Detroit "which would be wholly unbiased and without prejudice in this case," and to support this contention have submitted copies of proceedings had in a suit brought by Henry Ford, plaintiff, against The Tribune Company, et al., defendants, in the Michigan Circuit Court for the County of Wayne. An opinion of the court in that litigation in February, 1919, also submitted, held that "it would be impossible to secure a jury from the body of this County [Wayne] that would be wholly without prejudice in a case in which Henry Ford is one of the parties litigant," and granted a change of

venue to an adjoining county. We reject this finding of a local court, made almost thirty years ago, not only as remote and of no value as an indication of present bias, but upon careful review conclude that it should receive no weight whatsoever even to demonstrate conditions as alleged to have existed in Detroit in 1919.

We come then to the substantial issues presented on this motion.

[*Forum Non Conveniens*]

The Supreme Court has clearly established that federal courts do have inherent power to dismiss complaints on the ground of *forum non conveniens.* [*Gulf Oil Corp. v. Gilbert,* 330 U. S. 501 (1947)]. The Court distinguished the cases of *Miles v. Illinois Central R. Co.,* 315 U. S. 698 (1942) and *Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44 (1941) for the reason that the venue provision of the FELA was a "special venue" provision, and that Congress in enacting it intended to prohibit the application of this principle.

Plaintiffs contend that the venue provisions of the Clayton Act, under which this action is brought, are also special venue statutes and are governed by the same rule. They maintain that this court does not have authority to dismiss their first cause of action on the ground of *forum non conveniens.* Neither the Supreme Court nor any federal appellate court appears to have passed on this question. The United States District Court for the Southern District of California did first hold that civil suits under the Clayton Act fell within the special venue category [*United States v. Standard Oil Co. of California,* 7 F. R. D. 338 (July, 1947)], but later limited the classification to include only those venue sections whose legislative history and background indicated legislative intent to foreclose the question of *forum non conveniens* and not to include all venue sections drafted for particular causes of action. [*United States v. National City Lines, Inc.,* 7 F. R. D. 456 (Sept. 1947)]. It is interesting to note that although in the former case the doctrine was held inapplicable, in a subsequent criminal action involving exactly the same facts defendant was granted a change of venue to a more convenient forum under Rule 21(b) of the Federal Rules of Criminal Procedure. [*United States v. National City Lines, Inc.,* 7 F. R. D. 393 (Aug. 1947)]. The United States District Court for the Western District of Pennsylvania has held that the venue section of the "Securities Act of 1933" [15 USCA § 77v(a)] is a special venue provision for the purposes of this rule. (*Securities Exchange Commission v. Wimer,* C. C. H. Fed. S. E. C. Law Report 90,402—1948. This court in a recent antitrust case, after holding that the facts did not call for the exercise of discretion in favor of the defendant, by way of dictum expressed the thought that in any event the doctrine of *forum non conveniens* was not applicable to suits under the anti-trust laws (15 USCA §§ 15, 22). (*Fifth & Walnut Inc., et al. v. Loew's Inc., et al.,* S. D. N. Y. Jan. 23, 1948). However, with the issue now directly posed, re-examination of all relevant factors has been made. While Mr. Justice Jackson in the *Gulf Oil* case, *supra,* spoke in terms of "special venue" statutes foreclosing the doctrine of *forum non conveniens,* it is to be noted that the Supreme Court examined the particular legislative background of the FELA venue provision when passing upon this question in *Miles v. Illinois Central R. Co., supra;* and only after so doing did it conclude that the Congress deliberately chose to give plaintiff in such actions the absolute right to select any forum within the statute's scope. Following a recognized canon of statutory construction [*Moore Ice Cream Co. v. Rose,* 289 U. S. 373, 377 (1933)], the Court also looked to the circumstances under which the statute was passed and the expressions of Congress to find that as for FELA actions, that body "loaded the dice" in favor of a plaintiff.

There are other factors which persuade that the special venue statute rule is applicable only on the basis of individual legislative history.

The United States Code is replete with venue sections for particular types of suits, viz., FELA, 45 USCA § 56; Clayton Act, 15 USCA §§ 15, 22; Internal Revenue Code, 28 USCA § 105; Copyright Actions, 17 USCA § 35; Stockholders' Derivative Suits, 28 USCA § 112; Securities Act, 15 USCA § 77v(a). To exclude the doctrine of *forum non conveniens* from all such suits and from suits on similar causes of action would be to emasculate it. It seems that had the Supreme Court meant to limit the operation of the rule so much it would have done so explicitly. Finally, the Supreme

Court in the case of *Koster v. Lumbermens Mutual Co.*, 330 U. S. 518 (1947), upheld the application of the doctrine of *forum non conveniens* to a stockholder's derivative suit brought under a statute having its own venue section in language substantially similar to that of the FELA and the Clayton Act. Under § 112 (28 USCA) stockholder's derivative suits may be brought:

> ". . . in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found. * * *"

Under § 56 (45 USCA) of the FELA, an action may be brought:

> ". . . in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. * * *"

And, under § 15 (15 USCA) of the Clayton Act, suit may be brought:

> ". . . in the district in which the defendant resides . . . or has an agent . . .",

and under § 22, suit against a corporation may be brought:

> ". . . not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . . ."

It appears that the doctrine of *forum non conveniens* cannot be foreclosed in anti-trust suits merely because the statute contains its own venue section, but rather that an examination of its legislative history must be made to determine whether the doctrine is or is not applicable. Since the principal of *forum non conveniens* is applicable in the absence of legislative mandate to the contrary, the search is not for evidence that the Congress intended it to apply, but that it intended it not to apply. We find no indications, on the part of the Congress, that it intended the latter. Congress did by § 12 of the Clayton Act extend the venue allowances for anti-trust actions (51 Cong. Rec. 16274), by permitting plaintiff to sue a defendant where he transacts business [*Eastman Co. v. Southern Photo Co.*, 273 U. S. 359 (1927). But cf. *King V. Wall & Beaver Street Corporation*, 145 F. 2d 377, 380], and there is indication that it intended to deny the courts the power to decline such jurisdiction.

A gleaning of the Congressional discussions relating to the venue provisions of the Clayton Act leads to the conclusion that the Congress intended to give plaintiffs in such actions the widest possible choice of forum. The following comments concerning the scope of the venue sections is found:

> "* * * We have already broadened the provisions of the Sherman Act with reference to the bringing of suit and the service of process at any place where the corporation is an inhabitant, or wherever it has an agent. I can hardly conceive of a suit being brought otherwise than under these conditions, and it makes service by process easy . . . ." (51 Cong. Rec. 9608)

and further,

> "* * * I will say to my friend from Wisconsin that we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender. . . ." (51 Cong. Rec. 16274)

Throughout the debate the atmosphere is markedly similar to that in the discussion relative to the FELA venue provisions. Again we note legislative desire to favor plaintiffs. We have evidence of a strong legislative purpose to abolish monopolies and of a general policy to hold anti-trust violators amenable to suit in several jurisdictions despite resulting hardship. Nowhere, in the record, is there any consideration given to the possible inconvenience of defendants. In view of the circumstances leading up to these particular provisions and of the inclusive language used; and more important, analyzing the expressions of purpose found in the Congressional Records, we must conclude that Congress has made the principles of *forum non conveniens* inapplicable to suits brought under the anti-trust statutes. And, an examination of the record and the various reports (H. R. Rep. 627, Sen. Rep. 698. Cong. Rec. 1168, 63rd Cong. 2d. Sess.) further confirms this conclusion.

The Sherman Act was passed July 2, 1890. By it combinations in restraint of

trade were declared illegal, and criminal sanctions were set up to enforce it. The Government was given power to enforce it, but not much aid beyond the mere declaration of illegality of trusts and monopolies was given private plaintiffs in prosecuting their rights under the Act.

On October 15, 1914 Congress passed the Clayton Act. Fletcher (*Cyclopedia of The Law of Private Corporations,* Vol. 10, § 5041) analyzes the venue changes effected by this legislation, as follows:

> "By section 7 of the Sherman Act it is provided that anyone injured in his person or property by another person or corporation by reason of anything declared to be unlawful by that act may sue therefor 'in the district in which the defendant resides or is found.' [n. Sherman Act July 2, 1890, ch. 647, § 7, 26 Stat. 210]. But by section 4 of the Clayton Act, which supplemented the former laws against unlawful restraints and monopolies of interstate trade, the local jurisdiction of the district courts was materially enlarged in reference to suits against corporations. It was provided that any person 'injured in his business or property by reason of anything forbidden in the anti-trust laws' might sue therefor in the district 'in which the defendant resides or is found or has an agent.' [n. 15 USCA 15].
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> "Accordingly it will be seen that section 4 of the Clayton Act is similar to section 7 of the Sherman Act, but by the insertion of words 'or has an agent' in the venue clause, the plaintiff, in some circumstances, has additional districts in which to bring his suit to those permitted by section 7 of the Sherman Act. [n. *Eastman Kodak Co. v. Southern Photo Materials Co., supra; Venner v. Pennsylvania Steel Co. of New Jersey,* 250 Fed. 292].
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> "By section 12 of the Clayton Act it is clear that the jurisdictional provision of section 7 of the Sherman Act was very greatly enlarged, dealing specifically with the venue and service of process in suits against corporations. It is provided that 'any suit, action or proceeding under the anti-trust laws against a corporation may be brought not only in the district where of it is an inhabitant, but also in any district wherein it may be found or transacts business.' [n. 15 USCA 22; *Venner v. Pennsylvania Steel Co. of New Jersey, supra*]. It will be observed that section 12 of the Clayton Act deals only with corporations, and undoubtedly affords the plaintiff additional districts wherein he may sue that class of defendants. [n. *Venner v. Pennsylvania Steel Co. supra; Southern Photo Material Co. v. Eastman Kodak Co., supra*]. It is clear that as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, the necessary effect of Section 12 of the Clayton Act was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business,' although neither residing nor 'found' therein, [n. *Eastman Kodak Co. v. Southern Photo Materials Co., supra*], and a corporation is engaged in transacting business in a district within the meaning of this section, in such a sense as to establish the venue of a suit, although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process, [n. *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp.,* 46 F. 2d 623, rev'g 41 F. 2d 767], if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character. [n. *Eastman Kodak Co. v. Southern Photo Materials Co., supra; Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp., supra.* See also Cyclopedia of Federal Procedure, § 375]. This provision does not affect the general jurisdiction of the district courts, but merely establishes a personal privilege which a defendant is free to waive. [n. *General Inv. Co. v. Lake Shore & M. S. R. Co.,* 269 Fed. 235, aff'd 260 U. S. 261, 279.]
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> "Having an office and doing business within the district is 'found' within the meaning of the Sherman and Clayton Acts allowing suit against the defendant in such case irrespective of diversity of citizenship; [n. *Venner v. Pennsylvania Steel Co. of New Jersey, supra*]; accordingly the federal courts have jurisdiction even though the plaintiff is a citizen of the state, as well as an inhabitant of the district in which the defendant is found. [n. *Thorburn v. Gates,* 225 Fed. 613, 615; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.,* 190 Fed. 879]."

Congress, in passing the Clayton Act to amend the Sherman Act, showed just as much solicitude in giving private plaintiffs in anti-trust actions a choice of forum as it showed in giving plaintiffs a choice of forum under the amendment to the FELA. Nor, should we fail to give weight

to that portion of Mr. Justice Reed's opinion in *Baltimore & Ohio R. Co. v. Kepner, supra,* where he wrote of § 6 of the FELA, (at 54):

> "* * * When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative. . . ."

It should be noted that the special venue provisions of the FELA were enacted in April, 1910, and the amendments granting special venue to plaintiffs in anti-trust suits were not adopted in the Clayton Act until October, 1914. The fact that almost identical language was used is most persuasive to convince one that the same privileges were intended to be extended by both Acts.

The conclusion follows that the doctrine of *forum non conveniens* is not applicable to anti-trust suits. These motions have not been disposed of on this conclusion only, but the same result has been reached on consideration of the factual merits.

We shall first consider the position of defendant Sherman Tractor & Equipment Co.

The Supreme Court in the *Gulf Oil* case, *supra,* enumerated the following factors to be weighed in determining whether a suit should be dismissed for *forum non conveniens:* The relative case of access to the sources of proof, the availability of compulsory process for unwilling witnesses and the cost of securing the attendance of willing ones, the possibility of the need for a view of the premises which may be involved, the burden of jury duty on the forum, the onus of the trial on the court's efficient functioning, and the federal court's familiarity with the state law which will determine the controversy.

Plaintiffs allege that this defendant, Sherman, is a conspirator charged with having (1) coerced dealers to drop plaintiffs' products and to sell for Dearborn Motors Corporation, (2) caused dealers to continue to use plaintiffs' pamphlets and manuals after having ceased handling their products, (3) attempted to give the impression to Sherman's customers that Dearborn was the successor to plaintiffs, and (4) sold the Ford Tractor.

Eber C. Sherman, the motivating force of the Sherman Corporation, does not deny that his main offices are in this district, and that the Sherman Tractor & Equipment Co., is a New York corporation having carried on business in this district for many years. As a resident of this district, with most of its affairs centered here, it is quite clearly not entitled to a dismissal. It points, however, to the allegedly great inconvenience to its co-defendants and maintains that it is not an obstacle to dismissal, because it will stipulate to accept service within the Eastern District of Michigan (the most convenient district according to the defendants), and will make Eber C. Sherman, its president and alleged controlling stockholder, available there as a witness for plaintiffs.

In the *Gulf Oil* case, *supra,* the Supreme Court said that the doctrine of *forum non conveniens* should never be applied unless the defendant was amenable to process in the allegedly more convenient forum, Mr. Justice Jackson writing that, (at 507)

> "* * * In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

Defendant, Sherman, argues that by its stipulation-waiving venue protection—he is amenable to suit in Michigan. [*General Inv. Co. v. Lake Shore Ry.,* 260 U. S. 261, 279 (1922)]. It appears to be sounder policy to require that defendant be amenable to suit in the second jurisdiction, on the facts themselves, and not to accept stipulations such as that offered by defendant [*Fifth & Walnut Inc., et al. v. Loew's Inc., et al. supra; Neal v. Pennsylvania Ry. Co., et al.,* (S. D. N. Y. Jan. 2, 1948); *cf. Williams v. Palmer,* 181 Misc. 610.] Defendants suggest that if such stipulations are not accepted, a plaintiff may defeat the rule of *forum non conveniens* by joining a defendant who is not amenable to suit in the other jurisdiction. Where a defendant is enjoined for this purpose, such subterfuge may readily be ignored. Suffice it to say that this is not claimed by defendants to be the situation in this litigation. The motion by Sherman must fail, despite its offer to stipulate, which does not alter the degree of convenience to it of trial in this district, though admittedly making the Eastern District of Michigan more acceptable to

plaintiffs. [*Tivoli Realty Co. v. Interstate Circuit, Inc. et al.*, C. C. A. 5, March 18, 1948 (unreported)]. [CCH *Trade Regulation Reports* ¶ 62,229.]

Sherman is a central figure in the alleged conspiracy. Since we have found that this district is not an inconvenient forum to it, this must be considered as an important factor against the dismissal of the complaint as to the other defendants. To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration.

Concerning all the defendants the following allegations are made by the plaintiffs—

The first alleged major object of the claimed conspiracy was to take over the distributor-dealer organization developed by plaintiffs over a period of years. Plaintiffs allege (and, defendants do not deny) that of thirty-three distributors in the organization, only one was in Michigan and the other thirty-two in other states. It appears that there were only 101 dealers in Michigan and 2749 in other states. Many of them will undoubtedly be called on the trial. While New York is not so strikingly fitting a place at which to interrogate these men, neither is it so strikingly unfit, compared with the Eastern District of Michigan, as to justify a disturbance of plaintiffs' choice of forum.

It is well to remember that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," (*Gulf Oil Corp. v. Gilbert, supra*), and that only where the choice is vexatious and oppressive to defendant should it be put aside by the court. [*Williams v. Green Bay & Western R. R.*, 326 U. S. 549 (1946); *Gulf Oil* case, *supra*].

Plaintiffs also point to a series of dealer-distributor meetings throughout the United States, one of which took place in this district (at Tuckahoe, N. Y.). Defendant, Dearborn, says that this meeting was conducted by Sherman, but admits that its officials attended. It is enough for now that Dearborn admits attendance and that it is contended by plaintiffs that the incident will be important at the trial. This propinquity of relevant events tends against finding this district to be inconvenient.

Another alleged major objective of the claimed conspiracy was to take over Ferguson's source of farm implements which were utilized in his tractor system. These implements are manufactured by forty-one independent companies of which but eight are in Michigan. Again, we note that while New York would not be ideal, Michigan would be slightly less so.

Where there is a litigation as is here involved, it is pointless to search for a forum to which all relevant matters will be convenient. The best that can be done is to select a relatively convenient one and to utilize the various means for discoveries under the federal rules to alleviate the inevitable inconveniences.

Another matter alleged is plaintiffs' efforts through a financier in New York to raise capital after the split with Ford. These negotiations were had in New York; most of the relevant evidence on this issue is very likely within this district, which is the recognized investment market of the world. Therefore, as to these items of proof New York is clearly the most convenient place.

No suggestion is made that we should decline jurisdiction because of some special relief available in a Michigan court that this court cannot grant. (*Slater v. Mexican National R. Co.*, 194 U. S. 900).

It appears from the admitted occurrences at Tuckahoe, and from another similar meeting within this district at Beacon, N. Y., from the fact that Sherman, both the individual and the corporation have long been domiciled and conducted business here and that a considerable portion of the selling and advertising for the Ford tractor was effected in this district, that a substantial number of witnesses and documents will come from within and around this district.

Of the other possible witnesses, only the distributors and dealers above mentioned and the officials and employees of Ford are subject to compulsory process in Michigan out of the great number diffused throughout the country. The transportation facilities of air and rail to and from New York alleviate to a considerable extent the distance to be travelled. There is small likelihood, and defendants have not suggested, that this litigation will require a view of any points in Michigan. The bulk of the law to be applied is federal law.

The court does not find that trial in this district is either oppressive or vexatious to defendants—warranting a dismissal of the complaint.

Defendant, Dearborn, raises an additional ground for dismissal against it. It argues that it would be an undue burden on interstate commerce to compel it to defend this action in this district.

There can be no doubt but that Congress may burden and interfere with interstate commerce if it so chooses. [*Kilpatrick v. Texas & Pacific Ry. Co.,* C. C. A. 2, March 4, 1948 (unreported); *Chesapeake & Ohio Ry. Co. v. Vigor,* 90 F. (2d) 7, 8]. By the Clayton Act venue provisions, Congress clearly intended, as indicated by Congressional voicings (noted above), to allow a plaintiff to sue a defendant in any jurisdiction provided for by the Act — whether or not it burdened interstate commerce. Defendant Dearborn would require Congress to explicitly state in each venue provision that burdens on interstate commerce were thereby authorized. There is no substance to this position.

We must consider next the issue of patent infringement alleged in the second cause of action.

Plaintiffs allege that defendants conspired to deliberately infringe its patents and accuses the present Ford tractor of being an infringing article.

Defendants argue that in this the court has no jurisdiction because of improper venue, under the patent venue, which provides that,

> "* * * In suits brought for the infringement of letters patent the district courts in the United States shall have no jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. * * *" (28 USCA § 109)

Jurisdiction and venue of a cause of action for patent infringement are conferred exclusively by this section. (*Stonite Products v. Melvin Lloyd Co.,* 315 U. S. 561; *Blaw-Knox Co. v. Lederle,* 151 F. (2d) 973).

As to the defendant Sherman there is clearly jurisdiction within the first clause of this section. Sherman relies again on its proposed stipulation, and in effect, prays for a dismissal alleging *forum non conveniens* to be applicable to patent suits. [*Urquhart v. American-La-France Foamite Corporation,* 144 F. (2d) 542, cert. den. 65 S. Ct. 273 (1944)]. Assuming, arguendo, that the doctrine of *forum non conveniens* is so applicable—since the suit on the other cause of action is to proceed here and since this is part of the same alleged conspiracy, we would be constrained to deny dismissal on grounds of forum here also. The other three defendants, Ford Motor Company, Henry Ford II and Dearborn Motor Corporation, not being inhabitants of this district, must be found to come within the alternative clause to give this court jurisdiction. These defendants must be shown both to have committed acts of infringement and to have a regular and established place of business within this district. One without the other is not enough. (*Edison v. Allis-Chalmers Co.,* 191 Fed. 837, 839; *Streat v. American Rubber Co.,* 115 Fed. 634).

There are three possible ways in which one may infringe a patent: by *making* a device covered by the patent; by *using* such a device; or by *selling* a patented device (35 USCA § 40).

Plaintiffs first point to alleged occurrences within the district at Tuckahoe and Beacon, New York. In the promotion of the new tractor, as alleged, Dearborn per force had a general campaign, part of which involved holding meetings throughout the country attended by local dealers with a tractor present. One such meeting was held in Tuckahoe and another in Beacon. Defendant Dearborn maintains, however, that he sold this tractor to Sherman in Detroit, that Sherman organized the meeting and all its affairs and that some Dearborn officials attended, but only as guests. Plaintiffs maintain that these meetings were organized and motivated by defendant Dearborn, that he flew the tractor in for the meeting and that, hence, the acts of infringement were Dearborn's. Sherman is the state distributor of Dearborn's national product, and it seems unlikely that Dearborn officials would be only guests at such meetings. Defendants do not deny that Dearborn officials attended, participated in the events and that the time and place for the meeting were set by Dearborn. Certainly, the latter must in some way have aided the selling of its own product. It would seem only reasonable to conclude that Dearborn was the motivating force behind the events, and that, if it was an act of infringement, as alleged, Dearborn was chargeable with it.

While mere display alone might not constitute an act of infringement, (*Marlatt v. Mergenthaler Linotype Co.*, 70 F. Supp. 426, 431-32), it seems clear that here it was more than mere display, but rather that there was a promotion and a campaign for the marketing of this article. This necessitated a detailed explanation of the tractor and its operation and cost, and other germane subjects. While such activity might not alone amount to infringement (*Patent Tube Corporation v. Bristol-Meyers Co.*, 25 F. Supp. 776), there is a more convincing circumstance alleged to have occurred within this district, involving all defendants, from which infringement may reasonably be inferred.

Plaintiffs, quoting a bulletin of Ford Motor Company, maintain that the first 28,000 tractors produced by Ford in 1947 had transmissions which jumped out of gear or locked in two gears simultaneously. It is alleged that 8,000 of these required "field conversion." It is fairly certain, from practical considerations, that the righting of these defective tractors required work on the part of Ford Motor Company, Dearborn and Sherman in this district. We cannot, therefore, conclude that defendants have not committed acts of infringement within this district. Plaintiffs' allegations that this tractor is an infringing device are accepted as true for the purposes of this motion.

As to Henry Ford II, individually, he represents the family who holds all the voting stock of the Ford Motor Company—he is admittedly the company itself. He directs, manages, controls and speaks for this family enterprise. We might well query whether it would be of any point to dismiss the second cause of action against him and maintain it against the Ford Motor Company, and maintain the first cause of action against both. It has been held that in some situations that the cloak of corporate activity will not shield the interested individuals, and on this rationale, Ford individually would be bound by the infringement acts of the Company. Furthermore, as an alleged member of the claimed conspiracy he is liable, once the conspiracy has been established, for the acts of the other alleged conspirators committed to accomplish its alleged aims and purposes. [*United States v. Socony-Vacuum Oil Co.* 310 U. S. 150, 253-54 (1940); *Hitchman Coal v. Mitchell*, 245 U. S. 229, 249 (1917); *Original Ballet Russe v. Ballet Theatre*, 133 F. (2d) 187, 189]. He must, therefore, for this motion be considered to have committed the acts of infringement alleged within this district. Concluding that it is reasonable to infer that defendants have committed acts of infringement within this district, we must next inquire whether they have regular and established places of business in this district.

To satisfy this provision of the statute it is not enough that a party transact business in the district (*Philips v. Baker*, 121 F. (2d) 752, cert. den. 314 U. S. 688), or that it merely solicit business in it. (*Elevator Supplies Co. v. Wagner Mfg. Co.* 54 F. (2d) 937; *Erickson v. Emerson*, 40 F. Supp. 844). The ultimate distribution of a manufacturer's products within the district does not necessarily result in an act of infringement. (*Bulldog Electric Prod. Co. v. Cole Electric Prod. Co.*, 134 F. (2d) 545). On the other hand, the regular and established place of business need not be the business connected with the alleged patent infringement. (*Chadeloid Chemical Co. v. Chicago Wood Finish Co.*, 180 Fed. 770; *Shelton v. Schwartz*, 131 F. (2d) 805, 808).

The Ford Motor Company does not deny that it has been qualified to do business in New York since 1920, and that it has a regular place of business at 45 Rockfeller Plaza, New York City. The fact that in this district it deals with Ford cars and not tractors is immaterial to the issue involved. Henry Ford II must be considered, in effect, the Ford Motor Company for this purpose. Dearborn closely supervises the sales of Sherman in this district and frequently uses the latter's offices in Mount Vernon. It is alleged to be an instrumentality of Ford Motor Company; this company cannot escape liability to suit here by effecting its creations. (*Vogt Instant Freezers v. N. Y. Eskimo Pie Corp.*, 69 F. (2d) 84, 86; *Pacific Can Co. v. Hewes*, 95 F. (2d) 42; *Westinghouse Electric & Mfg. Co. v. Allis-Chalmers Co.*, 176 Fed. 362).

It is found for this motion that all the defendants have a regular and established place of business here within the meaning of the statute, and that this court has jurisdiction over the patent infringements alleged in the second cause of action. Patent suits have been dismissed where jurisdiction was doubtful. (*Candas v.*

Agnini, 14 F. Supp. 21; *General Electric Co. v. Best Electric Co.,* 220 Fed. 347). This does not appear to be the case here. Moreover, even if it were, the fact that the first cause of action will be retained here would lead us to retain jurisdiction for trial over the second. It should be noted that approximately the same proofs will be made to substantiate each of the two alleged causes of action.

Sufficient has been produced by plaintiffs on this motion to warrant the trial of the alleged infringement in this district. The ultimate determination of the jurisdictional objections to the second cause of action can best be made at trial.

The third cause of action, alleging an equitable as well as a tort claim upon the same allegations as are set forth in the first and second causes of action, will depend upon the evidence adduced in support of these allegations. With the denial of the motions covering the first and second causes of action, it follows that the motion as to the third cause of action, must also be denied.

Motions denied.

[¶ 62,253] Edward P. Paul & Co., Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the District of Columbia. No. 9457. Decided May 10, 1948.

On Petition to Review an Order of the Federal Trade Commission.

Federal Trade Commission Act

Misrepresentation of Origin of Product—Cease and Desist Order.—A Commission order requiring an importer and manufacturer of porcelain products to cease and desist from using the legend "Imported—Du Barry" or any other legend or words indicative of French origin to designate products made in whole or in substantial part in Japan, without clearly disclosing the Japanese origin, and from representing in any manner that such products are of French or British origin, is affirmed. The Commission has not exceeded its jurisdiction in preventing the use of the word "Du Barry" when the word was used to convey the impression that the product was of French origin. The dissenting opinion states that the evidence was insufficient to support a conclusion that the use of the word was misleading. The contention that the advertisement could not be misleading because of the low price at which the product was sold is held to be an admission that the words are misleading and a contention that the natural implication of the words is offset by the price. The Commission has the power to direct that representations, admitted by this argument to be in themselves deceptive, be not used in the public distribution of the product.

See the Federal Trade Commission annotations, Vol. 2, ¶ 6650.070, 6650.130.

Notice of Hearing—Right to Show Cause.—The contention of petitioner that the Commission failed to observe the requirement of the Act that a notice of hearing, giving a date and place fixed, must be given, is held to be without substance.

See the Federal Trade Commission annotations, Vol. 2, ¶ 6125.387.

Motion to Quash Report—No Error to Deny.—A motion to quash the examiner's report was properly overruled. The rules of the Commission do not require the examiner to submit his report 15 days after the close of testimony, as petitioner contends, but within 15 days after receipt by him of the transcript of testimony. The record does not disclose when the examiner received the transcript; hence there is no factual basis for the contention.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.489.

Order Not Void for Vagueness—Order Affirmed.—The contention that petitioner cannot determine with precision when a product may be made "in substantial part" in Japan, is rejected. The term "in substantial part" becomes vague only when one attempts

to come as close to the line of misrepresentation as the Commission will permit. Petitioner can avoid difficulty by merely being accurately true in its advertisements.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.470.

Affirming the order of the Federal Trade Commission in Dkt. 5202.

For petitioner: Nathan L. Silberberg.

For respondent: Donovan R. Divet, Special Attorney Federal Trade Commission; William T. Kelley, General Counsel, and Walter B. Wooden, Associate General Counsel, Federal Trade Commission, on the brief.

Before STEPHENS, CLARK and PRETTYMAN, JJ.

PRETTYMAN, J.: Petitioner is an importer and manufacturer of porcelain products sold by it principally to retail stores. It publishes and distributes from time to time to some 25,000 retailers a catalog. Among other items in this catalog was a "line" of table lamps, cigarette boxes, ash trays and candy boxes concerning which the following expressions were used as descriptive: "Imported 'Du Barry' Porcelain", "Imported Hand Decorated 'Du Barry' Porcelain", and "'Du Barry' Porcelain Table Lamps are nationally famous as reproductions of rare original French and English 'old pieces'". The respondent Commission issued a complaint, the burden of which was that by the advertising the petitioner represented and implied, and purchasers were led to believe, that the products were of British or French origin; that the representations were false, deceptive and misleading, in that the porcelain part of the products was made in Japan. After extended hearings, the Commission issued an order in which it required petitioner to cease and desist from using the legend "Imported—Du Barry" or any other legend or words indicative of French origin, to designate or describe products made in whole or in substantial part in Japan, without clearly disclosing the Japanese origin, and from representing in any manner that products made in whole or in substantial part in Japan are of French or British origin. This petition is for review of that order.

Petitioner's first point is that the Commission has exceeded its jurisdiction, because the order aims to prevent the company's use of its trademark, the word "Du Barry". The order does not purport to interfere with the use of the trademark. It merely directs that the company not represent to the public that products made in Japan are imported from elsewhere. The advertising above quoted was not a mere unadorned use of the word "Du Barry". It was an affirmative representation as to the nature of the product. There was substantial testimony that the advertising conveyed to both retailers and consumers the impression that the porcelain was of French origin. A reading of the advertisement and an observation of the products presented as exhibits lead one to conclude that this testimony was reasonable and neither strained nor improbable. A lamp, for example, is advertised as "imported 'Du Barry' porcelain, reproduction of rare original French piece," when as a matter of fact it consists of a piece of Japanese porcelain set in a metal base manufactured in this country. It is unnecessary to cite authority that in this posture of the case the court cannot disturb the findings.

The company says that the advertisement could not be misleading, because of the very low price at which the product is sold. It says that any purchaser would know that porcelain imported from France could not be sold at these low prices. But that arguments cuts both ways. Its basic assumption is that porcelain imported from France is of much greater value than that made elsewhere, so much so that any purchaser would know that fact. Thus, the premise is an admission that the words of the advertisement are misleading, and the ensuing contention is that the natural implication of the words is offset by the price. In substance, the argument is that a seller has a right to envelop a cheap article in an admittedly misleading aura of value so long as the price remains low. The answer is that the order of the Commission is merely that the terms which are misleading be eliminated. The Commission is not penalizing the company or ordering it to cease doing any business whatever. It merely directs that representations, admitted by this particular argument to be in themselves de-

ceptive, be not used in the public distribution of the product. We have no doubt of its power and duty to do so.

Petitioner next contends that the Commission failed to observe the requirement of the Act that a notice of hearing, giving a date and place fixed, must be given. It says that the Act further requires that the corporation complained of shall have the right to appear at the place and time so fixed and "show cause" why an order should not be entered by the Commission.[1] The facts are that this company was given a notice of the time and place of the hearing before an examiner; that before the date thus fixed it was notified formally and in writing that another date, of which it would be duly notified, would be fixed; that by an order of November 22, 1944, the date at which the taking of testimony would begin was fixed as November 30, 1944; that on November 30th counsel for the company announced "The respondent is ready", making no objection as to lack of notice or of opportunity to prepare; that thereafter extended hearings on notice were held, in the course of which continuances were had from time to time, the dates for reconvening being announced in advance on the record, and without objection; that the petitioner, by counsel, participated in all the hearings; that counsel for the Commission first placed in the record the evidence which its staff had gathered in support of the complaint; that thereafter the company was afforded ample opportunity to present such evidence as it desired to present; that an examiner's report was filed; and that thereafter a hearing was had before the Commission upon that report and the exceptions to it. Petitioner's contention seems to be that under the Act it was entitled, as a matter of right, to show cause why an order should not be entered, before testimony in support of the complaint was placed in the record, and also that the various continuances of the hearing violated the company's rights. The premises for these contentions are not clear in the brief. There it is said that "The time mentioned in the complaint was wholly superficial" and "There was no show-cause hearing then or at any other time." We perceive no substance in the contentions thus stated.

Petitioner's next point is that its motion to quash the examiner's report should have been granted, because, it says, Commission Rule XX (July 1, 1944) required the examiner to submit his report 15 days after the close of testimony, and this examiner made his report 164 days after the hearing ended. It is sufficient to note that the Commission's rule is not as petitioner says. Rule XX of the Commission's Rules of Practice (July 1, 1944) requires that the examiner shall, within 15 days "after receipt by him of the complete stenographic transcript of all testimony in a proceeding," file his report. There is nothing in this record to show when the examiner received the transcript. Hence there is no factual basis upon which petitioner's contention can rest.[2]

Petitioner says that the order is void because it is too vague to be followed. It says that it cannot determine with precision when a product may be made "in substantial part" in Japan. It points to articles of which the part most striking upon observation may be the porcelain but of which the more costly parts may be the metal base or other parts added in this country, or elsewhere than in Japan. It says that it has no yardstick by which to determine what is meant by "in substantial part" of Japanese origin. The answer to this contention is that the order of the Commission merely requires the company to represent accurately, or else not to represent at all, the place of origin of its products. If the porcelain portion of a product is made in Japan and the other parts are made in the United States or elsewhere, a simple indication of that fact in the catalog would satisfy the Commission's order. The company says that

[1] 38 Stat. 719 (1914), 52 Stat. 111 (1938), 15 U. S. C. A. § 45 (1941).

[2] Neither petitioner's brief nor the printed joint appendix shows the date when the actual hearings ended, except for petitioner's statement that "Here the Examiner made his report 164 days after the hearing ended." That report was dated September 17, 1945. The last date appearing in the original record (not printed) as a day of taking testimony is April 5, 1945. That record contains a formal order of the Examiner, dated August 10, 1945, "closing taking of testimony". Prior to that latter date the Rules of the Commission had been amended, and the Rules promulgated July 1, 1945, required the Examiner to file his report "not later than thirty (30) days after receipt by him of the complete stenographic transcript of all testimony and all exhibits in the proceeding".

its advertisements have not been misleading, and it thereby indicates a desire not to mislead. If that be so, it should have no objection to making its advertisements clear. If it has no desire to conceal the fact that the porcelain portion of these products is made in Japan, it could have no possible objection to so stating in its advertisements. The term "in substantial part" becomes vague only when one attempts to come as close to the line of misrepresentation as the Commission will permit. We find nothing objectionable in the use of the term in the order. The company can avoid difficulty with it by merely being accurately true in its advertisements.

The order of the Commission will be affirmed and the petitioner company directed to obey the terms of that order.[8]

Affirmed.

[Dissenting Opinion]

CLARK, J. (dissenting): I find myself completely unable to agree with the decision of the court in this case. I believe the finding of the Federal Trade Commission to be not only arbitrary and capricious in the extreme but also absurd and ridiculous.

The facts are very simple. Petitioner, Paul, had for many years manufactured and sold a line of so-called "art objects", i. e., lamps, porcelain and art ware, using as a trade name the name "Du Barry." Some of the material for this line of goods came from Italy, some from Czecho-Slovakia, some from Hungary, some from Yugoslavia, some from Japan. This importing practice had prevailed for many years.

The gist of the present action by the Commission is that an insertion was made in a catalogue intended to be and actually circulated to *retailers* only, and not to the general public, which described this line of goods as "Imported Du Barry", and further stated that it consisted of *copies* of well-known French and British specimens of the same class. Now, mark well, there is not a scintilla of evidence in the whole record concocted by the Commission that contradicts in the slightest degree the statements in the catalogue. Not one single word denies (1) that the articles were imported, (2) that they were marketed under a well recognized trade name "Du Barry," (3) that they were copies of well-recognized French and English masterpieces.

None of these facts were disputed. Moreover there was not one witness to testify that he or she had been misled into purchasing any of this line by any statement in the catalogue circulated to dealers. The proceeding was instituted on the complaint of a disgruntled retailer who had had several quarrels with petitioner on account of her singular reluctance, not to say resistance, toward paying her bills. The chief witness was the merchandise manager of a department store who neither bought nor sold goods, and was, moreover, embittered by the refusal of petitioner to give him an exclusive contract for the sale of goods. The so-called "public" witnesses, selected by the Commission, which was trying the case, were simply called in off the street and asked a hypothetical question which left out one of the most vital issues in the case—the question of the price at which the imported articles were sold. To be sure there was also the testimony of a man who qualified as an expert, on the basis of six weeks experience in the business, that someone might be misled, although he knew of no one who ever had been so misled.

It is on the basis of such testimony as this that the Commission arrives at the momentous conclusion that the term "Imported Du Barry" indicates origin from either France or *Great Britain.* Conceding the expertness of the Commission on such matters it is nevertheless incumbent on this court to check the bases of the Commission's opinion.

If, for instance, there is anything in the name Du Barry to make it a national trade mark for France or Great Britain there is no finding of fact made by the Federal Trade Commission to justify this, nor is there any justification in history so far as is known. If the specialists of the Federal Trade Commission have such evidence they were notably negligent in producing it in the trial of this case, and it is remarkable chiefly from its entire absence in the opinion and decision in the case.

To be sure, in the middle of the 18th century, a nameless waif, the illegitimate daughter of a poor washerwoman in Vaucouleurs, France, became a successful courtesan

[8] Federal Trade Commission Act, § 5 (c), 38 Stat. 719 (1914), as amended, 52 Stat. 113 (1938), 15 U. S. C. A. § 45 (c) (1941).

under the name of Mlle. Lange. Her great charm brought her under the protection of Jean, Comte du Barry, who used her as a decoy in his gambling house. Finding her very successful in this regard, he succeeded by devious means in introducing her to the notice of the King, who was captivated by her, with the result that she became his mistress. Since court etiquette forbade her introduction at court without a title and since Comte Jean was married and divorce was impracticable under French law at that time, Jean's brother Guillaume married the lady. Which of the three, the King's light of love, the erstwhile "protector" Comte Jean, or his brother, the complaisant husband, has been adopted by the Commission as a perpetual and national trade mark for both France and Great Britain does not clearly appear from the Commission's conclusion.

So far as history records the only connection that any one of them ever had with the unfortunate British to whom the Federal Trade Commission now attaches them is the final trip which Madame Du Barry made to England to try to sell her jewels, the ill-gotten gains from her affair with King Louis XV, for which she was beheaded in the French Revolution.

[¶ 62,254] Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, Enameled Metals Company, Steelduct Company and Lawrence R. Quinn, Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett and Hervey S. Walker, General Electric Company and General Electric Supply Corporation, Spang Chalfant, Inc., and H. G. Morrow v. Federal Trade Commission.

In the United States Circuit Court of Appeals for the Seventh Circuit. Nos. 8639, 8640, 8642, 8644, 8649. May 12, 1948.

Petitions for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

Conspiracy to Restrain Trade—Concurrent Use of Delivered Price System—Violation of Section 5 of Act.—A Commission order based on findings that petitioners engaged in a conspiracy to restrict and suppress actual and potential competition in the distribution and sale of rigid steel conduit in commerce, effectuated by the adoption and use of a basing point method of quoting prices for rigid steel conduit, and upon the conclusion that such conduct constitutes an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, is affirmed. The finding of conspiracy need not be based on direct proof of an agreement. Such an agreement may be shown by circumstantial evidence such as evidence herein of collective activities to promote general use of the pricing formula. The decision of the Supreme Court in the *Cement Institute* case, which held that individual conduct which falls short of being a Sherman Act violation may as a matter of law constitute an unfair method of competition prohibited by the Federal Trade Commission Act, and that the determination of what conduct amounts to unfair methods of competition was left to the Commission and the courts, is cited as authority for the decision. It is further held that in the light of the opinion in the *Cement Institute* case, it cannot be said that the Commission erred in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6380.63.

For petitioners: Morton Peyser, Hoyt A. Moore, Thurlow M. Gordon, Robert M. Bozeman, Edward H. Green, and Roy L. Steinheimer, all of New York City; W. Denning Stewart of Pittsburgh; Ferris E. Hurd of Chicago, and Earl J. O'Brien.

For respondent: Walter B. Wooden, Washington, D. C.

Affirming the decision of the Federal Trade Commission in Docket 4452.

Before SPARKS, KERNER, and MINTON, Circuit Judges.

[*Nature of Action*]

KERNER, C. J.: Petitioners, fourteen corporate manufacturers of rigid steel conduit, and five representatives of these corporations ask us to review and set aside a cease and desist order of the Federal

Trade Commission, upon a complaint in two counts, charging that petitioners collectively have violated § 5 of the Federal Trade Commission Act, 15 U. S. C. A. § 45, which declares unlawful "unfair methods of competition in commerce." Each of the corporate petitioners except Spang Chalfant was a member of Rigid Steel Conduit Association. That association was a respondent in the proceedings before the Commissioner, but is not a petitioner here. Each of the five individual petitioners was not only an official of one of the corporate petitioners but also served in an official capacity in directing the affairs of Rigid Steel Conduit Association.

In substance the first count alleged the existence and continuance of a conspiracy for the purpose and with the effect of substantially restricting and suppressing actual and potential competition in the distribution and sale of rigid steel conduit in commerce, effectuated by the adoption and use of a basing point method of quoting prices for rigid steel conduit. The second count did not rest upon an agreement or combination. It charged that each corporate petitioner and others violated § 5 of the Federal Trade Commission Act "through their concurrent use of a formula method of making delivered price quotations with the knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained." It alleged that nearby customers were deprived of price advantages which they would have naturally enjoyed by reason of their proximity to points of production, and that such course of action created in said conduit sellers a monopolistic control over price in the sale and distribution of rigid steel conduit.

Petitioners answered the complaint. They denied any agreement or combination. After extensive hearings before a trial examiner, the Commission made its findings of fact and conclusions of law therefrom. It found the charges to be fully substantiated by the evidence.

Rigid steel conduit[1] is a steel pipe, used primarily in the roughing-in stage of building construction where electrical wiring is necessary in order to furnish a continuous channel or container for the wiring. It is made from standard steel pipe and is produced in two types differing only in the nature of the coating applied to it. It is a standard commodity. It was first manufactured in America in 1897, in or near Pittsburgh, Pennsylvania, and originally was sold at delivered prices. The reason why delivered prices were used lay in the relative importance of transportation charges in the sale of the product. Points of production include Cohoes, New York and various places in Pennsylvania, Illinois, Indiana, West Virginia and Ohio. Various means were used to facilitate the calculation of delivered prices, but Youngstown was the first manufacturer to prepare a freight rate bulletin specially applicable to conduit sales. Similar bulletins were prepared by other manufacturers and later such bulletins were procured by some manufacturers from a traffic expert.

In addition to freight rate bulletins, another aid in computing delivered prices was the use of delivery charge tables, which were designed to simplify the procedure of figuring the delivered prices, and each petitioner refrained from publishing price quotations f.o.b. point of production or shipment, but used the practice and method of quoting price sheets, which it termed "Price Cards," in which it designated base prices f. o. b. Pittsburgh, Pa. and f. o. b. Chicago, Ill. About 1912 one manufacturer began announcing quotations of prices, based on Pittsburgh as a basing point, through the use of price cards which listed "Pittsburgh Basing Discounts" under which the discount was decreased—and the net price thereby increased—in proportion to the freight rate from Pittsburgh to the point of delivery. The practice thus established was followed by other manufacturers then in existence, and since then, up to 1930, by other manufacturers as they have entered the conduit business.

In 1930, petitioner National Electric shifted from the list and discount form of delivered price quotation to a quotation which specified the net base prices, with freight to be added, and during the next year or so other manufacturers likewise changed to the quotation of net base prices plus freight. In 1924, conduit began to be sold at prices based on Gary, Indiana, as a basing point. During that year petitioner Youngstown began to manufacture conduit at Evanston, Illinois, and inaugurated the

[1] Hereinafter referred to as "conduit."

practice of quoting and selling conduit at delivered prices based on Evanston, as well as Pittsburgh, as a basing point, the base price at Evanston being $4 above the current published price at Pittsburgh. Clayton Mark, during the period (1924-1930), had quoted conduit prices upon a Chicago base. Since freight rates from Chicago and Evanston were the same, Evanston ceased to be a basing point shortly after 1934. Other manufacturers followed the practices inaugurated by Youngstown and Clayton Mark.

It also appears that instead of petitioner conduit sellers using an absolute Pittsburgh plus system for all designations in their price quotations, they collectively discussed and considered the matter of maintaining and utilizing Chicago as a basing point, with its differential over Pittsburgh, and that until 1930 they followed a method of calculating delivered price quotations which provided for discounting from the Pittsburgh or Chicago base price, depending upon which base price and accompanying discount produced the lower figure at the customer's destination, and that during 1930 representatives of petitioners at a meeting of the Rigid Steel Conduit section of the National Electrical Manufacturers Association determined upon a change from that method to the one they now use. Accordingly, at the time of the hearings each of the petitioner conduit sellers quoted delivered prices for conduit based on Chicago as well as on Pittsburgh as basing points and sold at that base price.

There was testimony that the system thus used was an effective means of matching bids and price quotations, and that the quotations made by each conduit seller, irrespective of whether it had a manufacturing plant located at or near Pittsburgh or Chicago, enabled them to match their price quotations. It also appears that at times it was difficult to exactly determine the railroad tariff rate and that mistakes by some conduit sellers in the selection of a particular tariff rate to be used in a particular instance were a fruitful source of differences in the delivered prices quoted, thereby preventing a matching of such quotations. To prevent such errors, petitioners, acting through Rigid Steel Conduit Association, employed one Donley, who prepared a compilation of freight rate applicators containing the freight factor applicable from Pittsburgh to various destinations in the United States and, on a differential of $4 per ton above the Pittsburgh base price, the freight applicable from Chicago. These compilations became important adjuncts to petitioners' plans and methods in matching delivered price quotations. They were intended by petitioners to be used as their common price factors.

[*Findings*]

The findings upon which the order of the Commission is based are lengthy and of a comprehensive nature. In these findings the petitioners are identified by name in connection with the particular activities engaged in by them as part of their general plan of suppressing price competition through the combination charged. Essentially the findings are, that there was collective consideration of pricing policies on the part of representatives of petitioners in 1930 and collective considerations by such representatives of those matters through November, 1939; that by petitioners' adherence to their formula or system of pricing, their matching of bids under seal and the matching of their delivered price quotations was made effective, and a combination and conspiracy was maintained by petitioners to deprive purchasers of conduit of the benefits of competition in price, to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit, to prepare and maintain common rate factors or freight adders used and useful in determining and establishing price quotations and prices for conduit, to classify customers of conduit and determine the treatment to be accorded them, to establish and maintain uniform discounts, terms and conditions of sale, to determine and control the use of warehouses in the distribution of conduit, to prepare, adopt, and use for the purpose of aiding in price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects, and to enforce the terms of such contracts through investigations and reports thereon, to support and maintain their price structure through the conduct of investigations of sales and offers to sell, and the circulation of reports thereon; and that the acts and practices performed thereunder and in connection therewith, hindered, lessened and suppressed competition among sellers in the sale and distribution of conduit in interstate commerce.

These ultimate findings of fact are based upon subsidiary findings. It will not be

necessary in this opinion to set forth these findings, as they appear in 38 Federal Trade Commission Decisions, 534-551. Upon these findings of fact the Commission concluded that these acts and practices constituted unfair methods of competition in commerce within the meaning of § 5 of the Act, and directed petitioners, other than General Electric Supply Corporation and Spang Chalfant, to cease and desist from entering into, continuing in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of petitioners, or between any one or more of petitioners and others not parties hereto, to do or perform any of the things specifically set forth in the order. For the injunctive paragraphs covering the specific activities, see 38 F. T. C. decisions, 593.

Petitioners assert that no finding was made as to when the conspiracy was instituted, how long it continued, and which respondents (petitioners) were members thereof. They insist that the Commission has failed to make a finding as to the conspiracy charged, together with findings which would disclose how and in what manner each of the petitioners became a member thereof.

In support of their contention, petitioners argue that the finding

> "Paragraph Nineteen: (a) Pursuant to Count I of the complaint herein the Commission concludes from the evidence of record and therefore finds that the capacity tendency and effect of the combination and conspiracy maintained by the respondents [petitioners] named therein in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith * * * has been, and is, to hinder, lessen, restrain, and suppress competition in the sale and distribution of conduit * * *,"

is wholly insufficient in law, because, so they say, the finding is only a description of the "capacity tendency, and effect" of the conspiracy.

In considering this contention, it is well to remember that findings are to be construed liberally in support of a judgment or order, *Rank v. Kuhn,* 20 N. W. 2d 72. Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn, *Clyde Equipment Co. v. Fiorito,* 16 F. 2d 106, 107, and any words which fairly import a concerted action for a conniving together to restrain trade, are sufficient to charge conspiracy, *American Tobacco Co. v. United States,* 147 F. 2d 93, 117.

Pertinent and akin to the question we are now discussing are the words of Mr. Justice Douglas in his concurring opinion in the case of *United States v. Line Material Company,* rendered March 8, 1948, in which case, after stating that the Sherman Act outlaws price fixing combinations, he said: "Price fixing in any form is perhaps the most powerful of all inducements for abandonment of competition. * * *. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear." And in the case of *United States v. United States Gypsum Co.,* also decided by the United States Supreme Court on March 8, 1948, the court said that price fixing, without authorizing statutes, is illegal, *per se.* See also *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373; *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52; *United States v. Trenton Potteries Co.,* 273 U. S. 392. Any combination which tampers with price structures is engaged in an unlawful activity. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 221. And the existence of a plan or method which equalizes the delivered costs or prices of competitors having widely different freight costs to given destinations constitutes strong evidence in itself of an agreement to use such plan or system. *Milk and Ice Cream Can Institute v. Federal Trade Commission,* 152 F. 2d 478; *Fort Howard Paper Co. v. Federal Trade Commission,* 156 F. 2d 899. And price uniformity especially if accompanied by an artificial price level not related to the supply and demand of a given commodity may be evidence from which an agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. *Cement Manufacturers Protective Association v. United States,* 268 U. S. 588, 606; *Eugene Dietzgen Co. v. Federal Trade Commission,* 142 F. 2d 321. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. *United States v. Masonite Corporation,* 316 U. S. 265, 276. Moreover, the question we are

now discussing was considered and decided in the *Federal Trade Commission v. The Cement Institute,* announced by the Supreme Court on April 26, 1948. In disposing of the identical question, the court solved our problem. It said:

> "It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents, collectively maintained a multiple basing point delivered price system for the purpose of suppressing competition in cement sales. The findings are sufficient. The contention that they are not is without substance."

Petitioners also stress the point that the use of the basing point method of pricing does not have any adverse effect on competition and is not oppressive. They contend that in the event we should hold that the Commission made a finding that there was a price fixing conspiracy, such a finding is not supported by the evidence.

The argument is that there is no direct evidence of any conspiracy; that if the Commission made such a finding, it is based upon a series of inferences; and that the general use of the basing point method of pricing and the uniformity of prices does not justify an inference of conspiracy. We think there was direct proof of the conspiracy, but whether there was or was not, in determining if such a finding is supported, it is not necessary that there be direct proof of an agreement. Such an agreement may be shown by circumstantial evidence. *Milk and Ice Cream Can Institute v. Federal Trade Commission, supra,* 480.

In this case there was evidence showing collective action to eliminate the Evanston basing point, and collective activities in promoting the general use of the formula presently to be noted. The record clearly establishes the fact that conduit manufacturers controlling 93% of the industry use a system under which they quote only delivered prices, which are determined in accordance with a formula consisting of a base price at Pittsburgh or Chicago plus rail freight, depending upon which basing point price controls at any particular destination or in any particular section of the United States; that as a result of using that formula the conduit producers were enabled to match their delivered price quotations, and purchasers everywhere were unable to find price advantages anywhere; and that purchasers at or near a place of production could not buy more cheaply from their nearby producer than from producers located at greater distances, and producers located great distances from any given purchaser quoted as low a delivered price as that quoted by the nearest producer.

An example of an instance where petitioners have matched their bids appears where the Bureau of Supplies and Accounts, United States Navy Department requested bids under seal for the furnishing of one million feet of conduit for delivery at the Navy Yards in Philadelphia, Pennsylvania, Norfolk and Sewell's Point, Virginia. Seven of the petitioners submitted bids and matched their price quotations in terms of dollars per foot down to the fourth decimal point. Of course, there were other instances in the record showing identity of bids. Not only did petitioners match their bids when submitted under seal to agencies of public bodies, but each, with the knowledge of the others, did likewise—used the formula for the purpose of presenting to prospective private purchasers conditions of matched price quotations.

In this state of the record it will be enough to say that Congress has left to the Commission the determination of the facts, *Federal Trade Commission v. A. E. Staley Mfg. Co.,* 324 U. S. 746, and the weight to be attributed to the facts proved and the inferences to be drawn from them, *Corn Products Refining Co. v. Federal Trade Commission,* 324 U. S. 726, 739. See also *United States Maltsters Ass'n v. Federal Trade Commission,* 152 F. 2d 161; *Milk and Ice Cream Can Institute v. Federal Trade Commission, supra; Fort Howard Paper Co. v. Federal Trade Commission, supra;* and *Federal Trade Commission v. The Cement Institute, supra.* Our study of this record and of the applicable law has convinced us that the Commission was justified in drawing the inference that the petitioners acted in concert in a price-fixing conspiracy.

We now turn to consider petitioners' contention that the individual use of the basing point method, with knowledge that other sellers use it, does not constitute an unfair method of competition. This contention embodies the theory of the second count of the complaint and of that part of the order to cease and desist that is directed against each of the corporate petitioners.

Briefly, the argument is that individual freight absorption is not illegal *per se,* and that the Commission's order is a denial of the right to meet competition. More specifically, petitioners say that conduit is a homogeneous product; that no buyer will pay more for the product of one seller than he will for that of another; that the buyer is not interested in the seller's cost of transportation or in any other factor of the seller's cost; that effective competition requires that traders have large freedom of action when conducting their own affairs; that in any particular market, the seller must adjust his own price to meet the market price or retire from that market altogether; that it has always been the custom of merchants to send their goods to distant markets to be sold at the prices there prevailing; that there is no lessening of competition, or injury to competitors, when a seller absorbs freight traffic to meet lawful competition; and that it is for the court to decide as a matter of law what constitutes an unfair method of competition under § 5 of the Act. *Federal Trade Commission v. Gratz,* 253 U. S. 421.

On the other hand, the Commission contends that unfair methods of competition include not only methods that involve deception, bad faith, and fraud, but methods that involve oppression or such as are against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

As already noted, each conduit seller knows that each of the other sellers is using the basing point formula; each knows that by using it he will be able to quote identical delivered prices and thus present a condition of matched prices under which purchasers are isolated and deprived of choice among sellers so far as price advantage is concerned. Each seller must systematically increase or decrease his mill net price for customers at numerous destinations in order to match the delivered prices of his competitors. Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation.

In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the *Federal Trade Commission v. The Cement Institute* case, *supra.* In that case, after stating that the Commission has jurisdiction to declare what conduct is an unfair method of competition, the court said: "* * * individual conduct, * * * which falls short of being a Sherman Act violation may as a matter of law constitute an unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act * * * was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.' This general language was deliberately left to the 'Commission and the courts' for definition because it was thought that 'There is no limit to human inventiveness in this field'; that consequently, a definition that fitted practices known to lead toward an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an 'endless task'."

[*Conclusion*]

In the light of that opinion, we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition.

In their briefs and upon oral argument, petitioners have raised additional points. These, too, have been examined and considered by the Supreme Court in the *Federal Trade Commission v. The Cement Institute* case, *supra,* and were found lacking in merit. Hence they need not be discussed by us.

[*Order Affirmed*]

The Commission's order is affirmed and an enforcement decree will be entered. It is so ordered.

[¶ 62,255] United States v. Universal Button Fastening and Button Company.

In the United States District Court for the Eastern District of Michigan, Southern Division. Civil Action No. 5860. May 7, 1948.

Sherman, Clayton Antitrust Acts

Consent Judgment—Practices Enjoined—Licensing Required.—A consent judgment entered in an action charging a manufacturer of button fastening machinery with violations of the antitrust laws enjoins defendant from: leasing or selling fastening machinery or from fixing a price charged therefor, on the condition that the lessee or purchaser thereof shall not purchase, deal in, or use the fasteners of competitors of defendant; conditioning the availability of fastening machinery, parts, or repairs therefor upon the securement of fasteners from defendant or any other designated source; engaging in agreements or arrangements having the purpose or effect of continuing, reviving, or renewing violations alleged in the complaint; conditioning any license or immunity to practice any invention related to fastening machinery claimed in any United States patent by the tying of any such license or immunity to the securement of fasteners or similar products from defendant or any other designated source; and instituting or threatening to institute litigation for infringement. Defendant is directed to grant non-exclusive licenses at a uniform, reasonable royalty, under any and all existing patents, to all applicants therefor.

See the Sherman Act annotations, Vol. 1, ¶ 1270.401, 1530.50, 1540.27, 1590, and the Clayton Act annotations, Vol. 1, ¶ 2023.11.

For plaintiff: John F. Sonnett, Assistant Attorney General; Sigmund Timberg, Manuel M. Gorman, Grant W. Kelleher, Richard B. O'Donnell, Special Assistants to the Attorney General, all of Washington, D. C.; and Thomas P. Thornton, United States Attorney, Detroit, Mich.

For defendant: Angell, Turner, Dyer & Meek, Detroit, Mich.

Final Judgment

KOSCINSKI, J.: The plaintiff, United States of America, having filed its complaint in this action on July 29, 1946; defendant, Universal Button Fastening and Button Company, having appeared and filed its answer to said complaint denying the substantive allegations thereof; and the plaintiff and said defendant by their respective attorneys having consented to the entry of this final judgment herein:

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and without any admission by any party with respect to any such issue, and upon the consent of the parties hereto, the Court being advised and having considered the matter it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties to this judgment; the complaint states a cause of action against defendant, Universal Button Fastening and Button Company, under the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said Act being commonly known as the "Sherman Antitrust Act", and under the Act of Congress of October 15, 1914, as amended entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and For Other Purposes", amendatory thereof and supplementary thereto, said Act being commonly known as the "Clayton Act".

II

[*Terms Defined*]

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(a) "Fasteners" means tack-attached or staple-attached buttons, rivets, burrs, and snap fasteners for the fastening of clothing.

"(b) "Fastening machinery" means machinery and accessories for attaching fasteners to clothing.

(c) "Existing patents" means all presently issued United States letters patent owned or controlled by defendant, Universal Button Fastening and Button

Company, or under which it has power to issue licenses or sublicenses, relating to fastening machinery, consisting of the following numbered United States patents:

1,678,616	1,798,969
1,798,970	2,048,930
2,196,159	2,161,404
2,292,223	2,362,630

and renewals, reissues, divisions and extensions of any such patent.

III

[*Applicability*]

The provisions of this judgment applicable to defendant Universal Button Fastening and Button Company shall apply to each of its subsidiaries, successors, and assigns, and to each of its officers, directors, agents, nominees, employees, and to any other person acting under, through or for such defendant.

IV

[*Practices Enjoined*]

Defendant Universal Button Fastening and Button Company be and hereby is enjoined and restrained from:

A. Leasing or making any sale or contract, or adhering to any contract for the sale or lease of fastening machinery, whether patented or unpatented, for use or resale within the United States, or any territory thereof, or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or from fixing a price charged therefor or discount from or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not purchase, use or deal in the fasteners of a competitor or competitors of defendant, Universal Button Fastening and Button Company.

B. Conditioning the availability of fastening machinery or parts or repairs thereof upon the securement of fasteners from the defendant Universal Button Fastening and Button Company or any other designated source.

C. Removing fastening machinery from the premises of any lessee because such lessee purchases, uses, or deals in fasteners manufactured or sold by any person other than defendant.

D. Engaging in, or participating in, contracts, agreements, understandings or arrangements having the purpose or effect of continuing, reviving, or renewing any of the violations of the antitrust laws alleged in paragraphs 6 to 8 inclusive, in the complaint herein.

E. Conditioning any license or immunity, expressed or implied, to practice any invention related to fastening machinery claimed in any United States patent by the tying of any license or immunity for such invention to the purchase or securement of fasteners or any similar product or article from the defendant Universal Button Fastening and Button Company or any other designated source.

F. Instituting or threatening to institute or maintaining any suit, counterclaim or proceeding, judicial or administrative, for infringement or to collect charges, damages, compensation or royalties alleged to have accrued prior to the date of this judgment under any existing patent.

V

[*Licensing Required*]

Defendant Universal Button Fastening and Button Company be and hereby is directed to grant to any applicant making a written request therefor a non-exclusive, non-assignable and unrestricted license, save for and at a uniform reasonable royalty, under any or all existing patents as listed in Section II (c). Any applicant for such license who fails to agree with defendant Universal Button Fastening and Button Company upon a reasonable royalty may apply to this court upon thirty days notice to defendant Universal Button Fastening and Button Company and to the Attorney General at Washington, D. C. to determine the reasonable royalty for such license.

VI

[*Other Statutes*]

Nothing in this judgment shall prevent defendant Universal Button Fastening and Button Company from availing itself of the benefits of (a) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, (b) the Act of Congress of 1937, commonly called the Miller-Tydings Proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", or (c) save as elsewhere in this judgment provided of the patent laws.

VII

[*Compliance*]

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall upon written request of the Attorney General or an Assistant Attorney General, and upon reasonable notice to the defendant, Universal Button Fastening and Button Company, made to its principal office, be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant who may have counsel present, regarding any such matters; provided, however, that no information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings, to which the United States is a party, for the purpose of securing compliance with this judgment, or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification, or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 62,256] United States v. United States District Court for the Southern District of New York, et al.

In the United States Supreme Court. No. 527. October Term, 1947. May 24, 1948.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Sherman Antitrust Act

Jurisdiction of Special Court to Issue Writ of Mandamus—Enforcement of Mandate Obstructed by District Court.—An action brought by the government to terminate an alleged monopoly in the manufacture and sale of aluminum was dismissed by the District Court; on appeal to the Supreme Court, that body disqualified itself, and, under a 1944 amendment to the Expediting Act, certified the question to a special court of three Circuit Judges, which reversed and remanded the case. A petition by plaintiff for a writ of mandamus directing the district judge to execute the mandate of the special court to vacate so much of its judgment on the mandate as reserves jurisdiction to enable the defendant to apply for a determination whether it still has a monopoly was denied by the special court, which held that its jurisdiction to issue mandamus existed only as an incident to its jurisdiction to entertain an appeal from a judgment of the District Court, and that control over its mandate had expired with the end of the term of court in which the mandate had issued. It is held that the special court has the power to enforce obedience to its mandate. The amendment to the Expediting Act gave the Circuit Court of Appeals the full amplitude of judicial power to deal with the cause certified to it by the Supreme Court. That power does not contract with the importance or gravity of the question presented. The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it, not on the collateral repercussions which enforcement may entail.

See the Sherman Act annotations, Vol. 1, ¶ 1610.612, the Expediting Act, Vol. 1, ¶ 781, and prior opinions reported in 1941-1943 Supp. at ¶ 52,763, and at ¶ 57,342, ¶ 57,572, ¶ 57,642.

Reversing the decision of the United States Circuit Court of Appeals, reported at '44-'47 Court Decisions Supp. ¶ 57,642.

For petitioners: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General; Leonard Emmerglick, Robert L. Stern, Special Assistants to the Attorney General.

For respondents: William Watson Smith, Frank B. Ingersoll, Leon Hickman, Pittsburgh, Pa.

[*Facts of Case*]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United States brought a proceeding against the Aluminum Company of America (Alcoa) and others to prevent and restrain certain violations of the Sherman Act. 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, 4. After trial the District Court dismissed the complaint. 44 F. Supp. 97. The case came here by appeal, after which we ascertained that due to the disqualification of four Justices to sit in the case, we were without a quorum. Accordingly, we transferred the case to a special docket and postponed further proceedings in it until such time as there was a quorum of Justices qualified to sit in it. 320 U. S. 708. Thereafter Congress amended the statute which provides for a direct appeal to this Court from the District Court in antitrust cases. The Act of June 9, 1944, c. 239, 58 Stat. 272, 15 U. S. C. Supp. V, § 29, passed to meet the contingency of the lack of a quorum here, provides: [1]

> "In every suit in equity brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise.
>
> "If, by reason of disqualification, death or otherwise, any of said three circuit judges shall be unable to participate in the decision of said case, any such vacancy or vacancies shall be filled by the senior circuit judge by designating one or more other circuit judges of the said circuit next in order of seniority and, if there be none such available, he shall fill any such vacancy or vacancies by designating one or more circuit judges from another circuit or circuits, designating, in each case, the oldest available circuit judge, in order of seniority, in the circuit from which he is selected, such designation to be only with the consent of the senior circuit judge of any such other circuit.
>
> "This Act shall apply to every case pending before the Supreme Court of the United States on the date of its enactment."

Thereupon we certified the cause to the Circuit Court of Appeals for the Second Circuit. 322 U. S. 716. That court heard the case, sustained charges of monopoly against Alcoa, reversed the judgment of dismissal, and remanded the cause for further proceedings not inconsistent with its opinion. 148 F. 2d 416. It left open the question of the remedies to be applied. Nearly five years had passed since the evidence was closed, war had intervened, new plants had been constructed by the government, and their disposition under the Surplus Property Act

[1] See H. R. Rep. No. 1317, 78th Cong., 2d Sess.; Sen. Rep. No. 890, 78th Cong., 2d Sess.

of 1944, 58 Stat. 765, 50 U. S. C. A. § 1611, would affect the competitive situation in the ingot market. Petitioner had asked for Alcoa's dissolution. But that question was deferred until Alcoa's position in the industry after the war was known. 148 F. 2d pp. 445-447.

On remand of the cause the District Court entered its judgment on the mandate on April 23, 1946. It enjoined certain practices and retained jurisdiction of the cause until after the Surplus Property Administrator shall have proposed a plan for disposition of the government owned aluminum plants or facilities, in order that the Attorney General might institute proceedings for the dissolution or partial dissolution of Alcoa or for the enforcement of such plan if it will establish competitive conditions in the industry or for such other relief as will establish them; "and for the purpose of enabling Aluminum Company to apply to this court for a determination of the question whether it still has a monopoly of the aluminum ingot market in the United States."

Pursuant to the quoted provision Alcoa filed a petition in the District Court praying that a final judgment be entered adjudicating that it no longer has a monopoly of the aluminum ingot market in the United States and that as a consequence competitive conditions in the industry have been restored. The motion of the United States to dismiss the petition was denied and the question whether Alcoa still had a monopoly was set for trial. The United States thereupon filed a petition for a writ of mandamus in the Circuit Court of Appeals to require the district judge to vacate so much of its judgment of April 23, 1946, as reserved jurisdiction to enable Alcoa to apply for a determination whether it still has a monopoly, and to dismiss the petition of Alcoa.

The Circuit Court of Appeals dismissed the petition for mandamus. 164 F. 2d 159. The case is here on a petition for a writ of certiorari which we granted to settle the important question under the Act.

The Circuit Court of Appeals concluded that its power to issue the writ of mandamus exists only as an incident to its jurisdiction to entertain an appeal from a judgment of the District Court. It read the Act of June 9, 1944, as confining its jurisdiction to the determination of the appeal which it had heard under our certificate. Moreover, control over its mandate ended with the end of the term during which the mandate went down.[2] The court therefore concluded that it had no power to issue the writ.

[Circuit Court Has Jurisdiction]

We put to one side the question whether another appeal in the case would be decided by the Circuit Court of Appeals or by this Court, now that there is a quorum of Justices qualified to sit in it. No matter how that question were resolved, it is our opinion that the Circuit Court of Appeals has jurisdiction in this mandamus proceeding.

Section 262 of the Judicial Code, 28 U. S. C. § 377, provides that the federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. See *Marbury v. Madison,* 1 Cranch 137, 175; *Ex parte Crane,* 5 Pet. 190. That power protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved. *McClellan v. Carland,* 217 U. S. 268. *Ex parte United States,* 287 U. S. 241, 246. In that category will often fall cases involving issuance of mandamus requiring the lower court to enforce the judgment of the appellate court. *Delaware L. & W. R. Co. v. Rellstab,* 276 U. S. 1, 5.

But the fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate. Cf. *Chickaming v. Carpenter,* 106 U. S. 663, 665. *In re Washington & Georgetown R. Co.,* 140 U. S. 91, is a case in point. The lower court in violation of the mandate of this Court allowed interest on a judgment. The amount of the interest was too small to be the subject of a writ of error from this Court. It was held that mandamus was the proper remedy to enforce compliance

[2] The term of court in which the mandate issued expired September 30, 1945, on which day the court lost power to change it except as to matters of form. See *Fairmont Creamery Co. v. Minnesota,* 275 U. S. 70.

with the mandate. And see *City Bank v. Hunter,* 152 U. S. 512, 515. It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court. *Delaware, L. & W. R. Co. v. Rellstab, supra.* That function may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one. When Congress authorized "the case" to be certified to the Circuit Court of Appeals, it excepted none of the powers of that court which might be brought to bear on the litigation. Those powers include the power to issue mandamus to protect the mandate of the Circuit Court of Appeals, even though we assume *arguendo* that all further appeals in the case would come here.

The Circuit Court of Appeals seems to have been influenced to the other view by the feeling that the question presented by the mandamus cuts so wide a swathe in the litigation that it should hold its hand. Its position was that the issue raised by the petition for mandamus had an important relation to the reserved problem of dissolution, that the judgment on dissolution would in its view eventually come here on appeal, that any ruling by it on the mandamus would therefore limit our freedom to deal with the dissolution issue as, if, and when it got here.

[*Reversed*]

Those considerations may be of large importance in the totality of this proceeding, once we accept the premise of the Circuit Court of Appeals that it will have nothing to do with any other appeals in the case. But they do not seem to us germane to the question whether the Circuit Court of Appeals has the power to enforce obedience to its mandate. We think the Act of June 9, 1944, gave the Circuit Court of Appeals the full amplitude of judicial power to deal with the cause which we certified. That power does not contract with the importance or gravity of the question presented. The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it, not on the collateral repercussions which enforcement may entail.

Reversed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[Concurring Opinion]

MR. JUSTICE FRANKFURTER, concurring.

When this case originally came here by appeal, an extraordinarily rare, if not unique, situation in the history of the Court precluded its consideration for want of a qualified quorum. The impasse was met by the special jurisdictional Act of June 9, 1944, 58 Stat. 272, 15 U. S. C. § 29. For reasons that seem to me too obvious to need spelling out, that Act should be interpreted as transferring to the Circuit Court of Appeals *the case* and not merely a stage in its disposition if the Congressional language reasonably permits the Act to be so read. Since it can be so read I do so read it and conclude that the whole appellate process in this case was vested in the Circuit Court of Appeals, regardless of the piecemeal exercise of that process. I find such a construction of the Act of June 9, 1944, freer from difficulties than some of the technical questions pertaining to mandamus that arise on the view taken by the Court.

[¶ 62,257] Clark E. Rathke, doing business as Rathke and Company, and Clarke-Donelson Company, a corporation v. Yakima Valley Grape Growers Association, a corporation, Yakima County Processors, Inc., a corporation, Goebel-Pratt Co., a corporation, Randall S. Pratt and G. Franklin Jones.

In the Supreme Court of the State of Washington. No. 30441. Department Two. Filed April 8, 1948.

Robinson-Patman Price Discrimination Act

Sales Agreement—Payment of Brokerage to Buyer—Violation of Act.—A contract entered into by an association of grape growers and a food broker also selling food processing equipment, whereby the former agreed to sell, and the latter agreed to buy, up to fifty per cent of the association's production of grape juice, at a price to equal the seller's wholesale price less broker's discount, an additional broker's discount when an outside broker is employed, and an advertising allowance, and whereby on request of the

association, the buyer could secure orders for any portion of the remaining fifty per cent, on a brokerage basis, constitutes a contract to pay brokerage to a buyer, in violation of the Robinson-Patman Act. Such discounts and allowances would enable the buyer to undersell other purchasers from the association, and thus to engage in unfair trade practices prohibited by the Act. The sales agreement is illegal and unenforceable, and an action for specific performance of a purchase agreement for machinery and supplies, which is dependent upon the sales agreement, was properly dismissed.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2214.30, 2215.

For appellant: Cheney and Hutcheson, Yakima, Washington.

For respondents: Oscar L. Boose, Sunnyside, Washington; Grady and Grady, Yakima, Washington; Barker and Day, and William J. Walsh, Jr., all of Seattle, Washington.

JEFFERS, J.: This action was instituted by Clark E. Rathke, doing business as Rathke & Company, and Clarke-Donelson Company, a corporation, against Yakima Valley Grape Growers Association, a corporation, Yakima County Processors, Inc., a corporation, Goebel-Pratt Company, a corporation, and the principal stockholders of the latter two corporations, Randall S. Pratt and G. Franklin Jones, to recover damages for an alleged breach of two contracts and to enforce specific performance of both contracts.

One contract was between Yakima Valley Grape Growers Association, as first party, and Clark E. Rathke, doing business as Rathke & Company, of Seattle, as second party. By the terms of this contract, denominated "Purchase Agreement," first party agreed to purchase from second party all the machinery, equipment, materials and supplies to be used in producing grape juice or other products at first party's plant at Grandview, Washington, for a period of ten years.

The other contract, called "Sales Agreement," was entered into between Yakima Valley Grape Growers Association, as first party, and Clarke-Donelson Company, as second party, and under its terms first party, for a period of ten years, agreed to sell to second party so much of first party's output of grape juice or other products as second party might from time to time require or order, subject to certain restrictions contained in the contract, among which was the right of the Association to sell fifty per cent of its own output.

Yakima Valley Grape Growers Association (which will be hereinafter referred to as the Association) appeared separately and filed an answer to the amended and supplemental complaint of plaintiffs, wherein it admitted entering into the above contracts, and subsequently entering into other contracts and a lease to Yakima County Processors, Inc., whereby the latter leased the plant of the Association at Grandview, and controlled the sale of its output, thereby interfering with plaintiffs' contractual relationship with the Association. Defendant Association denied the other material allegations of the complaint, and by way of an affirmative defense, pleaded certain acts and conduct on the part of plaintiffs in justification of any alleged breach of such sales and purchase agreements.

The remaining defendants, represented by separate counsel, entered a general denial to the material allegations of the complaint.

The cause came on for trial before the court on December 17, 1946. At the close of the taking of testimony, defendants contended and argued that plaintiffs should not prevail in the action, for three reasons: (1) That the Clarke-Donelson contract (sales agreement) was illegal and void under the provisions of the Robinson-Patman Act, 15 U. S. C. A., § 13, subd. (a), (c), (d), p. 186, and § 13a, p. 200 (49 Stat. 1526 *et seq.*); (2) that the two contracts sued upon were unenforceable under the facts; and (3) that plaintiffs failed to prove any damages or any legal measure or standard by which damages could be determined.

The illegality of the contracts under the Robinson-Patman Act was not pleaded by defendants, but was raised for the first time after the conclusion of the testimony. The trial court concluded that the sales contract sued upon was in violation of the Robinson-Patman Act, and therefore illegal and void; that the purchase agreement was unenforceable, for reasons hereinafter shown; and that an action would not lie to enforce such contracts. The court therefore dismissed the action with prejudice, without deciding any of the other questions presented.

Plaintiffs' motion for judgment notwithstanding the decision, or, in the alternative,

for a new trial, was denied, and this appeal by plaintiffs followed.

Appellants' assignments of error are that the trial court erred (1) in holding that the Robinson-Patman Act applies to these contracts and this action, and requires dismissal of the action; (2) in failing and refusing to enter judgment in favor of appellants; (3) in entering judgment dismissing the action with prejudice; (4) in denying appellants' motion for judgment notwithstanding the decision; and (5) in denying appellants' motion for a new trial.

If the Clarke-Donelson contract violated the Robinson-Patman Act, rendering that contract illegal, void and unenforceable, then, in our opinion, the purchase agreement contract would also be unenforceable, as the two contracts are dependent on each other, and the other questions presented would become immaterial.

In deciding whether or not the trial court was justified in concluding that the Robinson-Patman Act was violated in the instant case, the following factual situation should be considered.

Respondent Association is a Washington corporation, organized in 1934 as a cooperative association of independent grape growers, to act as a marketing agency to sell the growers' grapes in their natural form. The Association has been managed by Homer E. Evans since its inception. In 1938, due to an increased production of grapes, the Association began to realize that there was going to be a surplus of grapes for sale on the fresh grape market, their principal outlet. As long as the grape growers had to depend on the wineries alone to take the bulk of the late surplus grapes, there was a tendency to "ride the price down." The Association perceived that they would have to have some other outlet, such as a grape juice factory, to take the surplus Concords, if they were to maintain the price.

With funds contributed by the members, the Association purchased the Wright Winery, at Grandview, in the summer of 1940. Shortly thereafter, the Association's manager, Mr. Evans, was approached by L. M. Donelson, a machinery and food salesman for Rathke & Company (hereinafter referred to as Rathke Co.).

We think it might be well to here explain the nature of the business of Rathke Co., and its relationship to the Clarke-Donelson Company. Rathke Co., owned solely by Clark E. Rathke, is engaged in the business of selling food processing equipment, machinery and supplies, and since about 1939 it has engaged in the food brokerage business. At about that time, Rathke Co. had a contract with Pomona Products Company, for the sale of cider manufactured by it. Apparently Mr. Donelson was put in charge of the sale of the cider, on a brokerage basis, and the Clarke-Donelson Company was set up so that Mr. Donelson would have more of a financial interest in his sales. The Clarke-Donelson Company (hereinafter referred to as Donelson Co.) was incorporated on October 9, 1940, with its principal place of business located at Yakima, Washington.

In 1941, Clark E. Rathke was the president and majority stockholder of Donelson Co., the balance of the stock being owned by Donelson, who was manager, and Mrs. Ayers, the office manager of Rathke Co., its secretary. Donelson Co. finances and processes food packs, and sells and acts as broker for the sale of food products.

During his examination, Mr. Rathke was asked the following question:

> "Q. Clarke-Donelson Company and Rathke and Company are actually you, arn't they? A. Well, I imagine, to a certain extent."

Shortly after the Association had purchased the Wright Winery at Grandview, in the summer of 1940, Mr. Donelson, as machinery salesman for Rathke Co., approached Mr. Evans and attempted to sell him machinery for the winery. The Association at this time was without working capital, having spent the amount raised by contribution on the purchase of the winery. After several unsuccessful attempts to sell the Association, Mr. Donelson told Evans about a man named Carl Weisbrod, who had knowledge of a European process for making grape juice at a much cheaper cost than the method ordinarily employed. Donelson introduced Weisbrod to Evans, and Weisbrod explained his process, whereby the grape juice is processed in the regular manner, except that the means by which it is stored for sixty to ninety days to let the cream of tartar settle out is different. Instead of storing the grape juice in expensive five-gallon glass carboys under the orthodox system, Weisbrod claimed it could be stored in large wooden tanks. Weisbrod was confident that his system would work, and he persuaded the Association's board of direc-

tors to undertake the manufacture of grape juice by his process. Neither the board nor the Association's manager, Evans, had the technical knowledge required to make commercial grape juice, so Weisbrod was hired to proceed with the new undertaking. A contract was entered into between Weisbrod and the Association, under which Weisbrod was to install and put into operation the entire grape juice plant.

Weisbrod specified the equipment he needed, and on July 10, 1941, the Association, as first party, and Rathke Co., as second party, entered into the written contract hereinbefore referred to as "Purchase Agreement." This contract provided in part as follows:

> "2. First Party hereby agrees to purchase from Second Party all necessary or required additional machinery and equipment and replacements for its said plant at Grandview, Washington or any other plant, wherever located.
>
> "3. First Party further agrees to purchase from Second Party, all of the materials and supplies to be used by First Party in the operation of said plant or plants or any extension thereof, for producing grape juice or other products, including but not limited to, labels, crowns, bottles, cans, cartons, sugar, machinery and equipment, and incidental materials and supplies.
>
> "4. This entire agreement shall be in effect for a period of ten (10) years from the date hereof."

The method by which the purchase of the equipment was to be financed was covered by a written agreement, designated "Machinery Agreement," entered into the same day as the purchase agreement, which, among other things, provided:

> "9. A part of the consideration for the execution of this agreement shall be the execution of an agreement between First and Second Parties, wherein and whereby First Party agrees to purchase all of its machinery, equipment and supplies for the production of grape juice or other products from Second Party, at competitive prices, for a period of ten (10) years.
>
> "It is further agreed that an additional part of the consideration for this agreement is the execution of an agreement between First Party and Clarke-Donelson Company, a Washington corporation, wherein and whereby First Party shall give said Clarke-Donelson Company a *selling agreement* covering their requirements of grape juice and other products to be produced at First Party's said plant, for a period of ten (10) years." (Italics ours.)

On July 15, 1941, the Association, as first party, and appellant Donelson Co., as second party, entered into the written agreement hereinbefore referred to as "Sales Agreement." This is the agreement referred to in the preceding agreement. It is this sales agreement which respondent contends, and the court held, violated the provisions of the Robinson-Patman Act, and we shall therefore set it out in some detail.

> "1. It is agreed that a part of the consideration for the execution of this agreement is the prior agreement of said Clark E. Rathke to furnish certain machinery and equipment to First Party, under and pursuant to a certain written agreement now existing between the First Party and said Clark E. Rathke.
>
> "2. First Party agrees that during the life of this contract to-wit: for a period of ten years from the date of this contract, it will sell the Second Party so much of First Party's entire output of grape juice or other products as Second Party may from time to time require or order, subject to following restriction:
>
> "It is understood that First Party will itself endeavor to sell its products under its own name and brand, but it is agreed that First Party will, nevertheless, furnish to Second Party all of the *grape juice or other products that Second Party may order or require,* up to fifty per cent of First Party's total season's output or manufacture. It is intended that Second Party shall have the first call upon at least fifty per cent of First Party's entire output. It is agreed that First Party shall not be required to furnish to Second Party or upon Second Party's order more than 33⅓% of its total output under a private brand whether the same be Second Party's own brand or a buyer's private brand.
>
> "3. It is understood that Second Party intends to, and will establish its own brand name for such products, and will use its best efforts to develop and establish business in First Party's products. . . .
>
> "5. It is specifically agreed that when Second Party shall procure a buyer or purchaser, either as broker, wholesaler or jobber for First Party's products, under First Party's or Second Party's brand, then thereafter all such future sales to such buyer shall be subject to the terms of this agreement, and such buyer shall be considered Second Party's customer as long as Second Party continues to sell such buyer.

"6. Nothing in this contract contained shall prevent Second Party from making sales under 'buyer's brand,' and in such sales First Party shall bottle or pack as directed by Second Party.

"7. It is understood that Second Party will be advertising its brand and calling upon customers, and that it will be selling to brokers, wholesalers and others the same as First Party, and that therefore the fixing of prices to Second Party must be adjusted so that Second Party will always be able to sell on the same basis that First Party is able to sell to the trade, including Second Party's discounts or brokerage. Therefore, the price to be paid by Second Party for First Party's grape juice and other products, shall be determined as follows:

"a. The price to Second Party shall be First Party's established wholesale price at Spokane, Portland or Seattle, less the following per case deductions: (1) A broker's discount of five per cent (5%) net to Second Party; (2) Such cash discount as is usually allowed manufacturers, jobbers and brokers; (3) An additional broker's discount of three per cent (3%) when an outside broker is employed; (4) An advertising allowance of five per cent (5%), (to be increased to First Party's advertising allowance if First Party increases its advertising allowance). In the event that the parties hereto believe it is necessary to stimulate business in a particular area with a particular broker or buyer of Second Party by giving such buyer or broker an additional allowance, then such additional allowance shall be deducted from Second Party's said advertising allowance provided, however, that such deduction shall not be made for a period greater than sixty (60) days in any season.

"b. In the event that Second Party sells First Party's products under First Party's brand, then Second Party shall be paid the regular broker's commission of five per cent (5%) on the wholesale price, which commission shall be net to Second Party, and also an additional brokerage of three per cent (3%) if an outside broker is required in the sale. Such sales shall not be charged against Second Party's fifty per cent (50%) allotment as provided in paragraph two (2) above.

"c. In addition to all other discounts or allowances hereinabove provided for. there shall be paid to Second Party by First Party an additional commission of two and one-half per cent (2½%) on all sales made by Second Party during the period from the beginning of this contract until December 31, 1943, if during said period First Party makes sufficient profit from the sale of its grape juice to enable it to pay to the farmers who furnish the grapes the sum of twenty-eight dollars ($28.00) per ton for grapes furnished.

"First Party agrees that it will make its prices so that the same are reasonably competitive with like or similar products and if necessary will adjust its prices so as to meet special circumstances or conditions existing in any particular selling point or area, or strike such area from sales territory of its products. . . .

"9. This entire agreement shall be in effect for a period of ten (10) years from the date hereof." (Italics ours.)

These contracts were all duly approved by the board of directors of the Association.

It is undisputed that the Association did not have sufficient funds to finance the purchase of the equipment and machinery for the construction of its grape juice plant, and, as stated in the machinery agreement, appellants were interested in selling to respondent Association the needed equipment only upon the condition that an agreement be entered into giving Donelson Co. certain exclusive rights for the sale of the production of the Association's plant.

The machinery and equipment for the plant were purchased by the Association from Rathke Co., pursuant to two written conditional sales contracts. Among this equipment were thirty-four 2500-gallon redwood tanks, selected by Weisbrod. The process advocated by Weisbrod and as employed in Europe used oak tanks for storing the grape juice, but, oak tanks being unavailable at the time, Weisbrod substituted redwood tanks, which he thought would work just as well as the oak tanks.

The machinery was late in arriving, and production was not commenced until October 16, 1941, which is past the middle of the season. Within seventy-two hours after the first seven tanks had been filled with grape juice, the juice had all fermented. Weisbrod attributed this to the fact that the redwood tanks were not air-tight, and bacteria thus got into the grape juice, causing it to ferment.

Not having any satisfactory means available for storing the grape juice, the Association sold the fermented juice to a winery, and closed the plant for the balance of the 1941 season. As a result of the failure of this venture, the Association was placed in a very embarassing financial condition. In

November, 1941, Rathke Co. commenced suit for the unpaid purchase price of the machinery, which it declared due when the Association failed to make an installment payment on its conditional sales contract. The suit was compromised and dismissed January 17, 1942, upon payment by the Association of $2,600, and the execution of a chattel mortgage by the Association. Rathke Co. in turn promised to remedy certain defects in the equipment sold to the Association. The purchase and sales agreements were extended for one year beyond their original expiration dates.

A large sum of money is required to finance a grape processing season on a profitable scale. The containers and supplies have to be purchased in advance, and the growers have to be paid a certain amount upon delivery of their grapes to the plant, so that they in turn can pay their laborers. With Rathke Co. having a chattel mortgage on the equipment, the Association was unable to obtain a loan from the bank to finance the 1942 operation.

In the summer of 1942, manager Evans contacted Randall S. Pratt, president of Goebel-Pratt Co., a Washington corporation, engaged in the food brokerage business, in an endeavor to have the last named company sell fifty per cent of the 1942 grape pack on a brokerage basis, and to aid the Association in financing the 1942 pack. The Goebel-Pratt Co., as stated by Mr. Pratt, "shied away" from the proposition of financing the Association, but did agree to sell fifty per cent of the 1942 pack, on a brokerage basis.

As the result of some assistance from Rathke Co. and the ability of the Association to obtain some supplies on credit, the Association in 1942 processed a small pack of 197 tons of grapes. Most of this was processed into frozen pulp. There was a total of 4,500 gallons of grape juice produced, which was sold to Safeway. Apparently Goebel-Pratt Co. sold half the pack on a brokerage basis, and Rathke Co. sold half. The portion of the 1942 pack sold by Rathke Co. was sold outside of the state, probably to the New York market. Rathke Co. was paid a brokerage of eight per cent on half the tonnage, and in addition a bonus of two and one-half per cent. Mr. Evans explained the brokerage of eight per cent as being made of five per cent plus three per cent for an outside broker, as provided for in the contract.

In the early part of 1943, Evans called upon Mr. Pratt for assistance. Mr. Pratt, being aware of the contracts the Association had with Rathke Co. and Donelson Co., was not willing to do anything for the Association, but suggested that Evans see an attorney. Apparently as a result of advice received from this attorney, and further contacts with Mr. Pratt, Evans persuaded respondent Goebel-Pratt Co. to lease the Association's plant, for which purpose Goebel-Pratt Co. organized respondent Yakima County Processors, Inc. (hereinafter referred to as Processors). Respondent G. Franklin Jones, Mrs. Patricia M. Calvert and respondent Randall S. Pratt each has a one-third interest in Processors.

On September 20, 1943, the Association leased its Grandview plant to Processors, and also entered into an agreement with Processors concerning the purchase of grapes and the sale of the manufactured product. Rathke Co. was first informed that the Association had leased its plant, by a letter written to it by Evans on October 5, 1943.

On April 30, 1945, the Donelson Co. contract (sales agreement) was assigned to Rathke Co.

As previously stated, respondents' defense, that the Donelson Co. contract is illegal and void under the provisions of the Robinson-Patman Act, was raised for the first time in the argument after the conclusion of the testimony. Appellants contend that the defense of illegality, to be available to respondents, must have been pleaded affirmatively, and cite and quote from *Wolfe v. Philippine Investment Co.*, 175 Wash. 165, 27 P. (2d) 132. It may be admitted that in the cited case we stated that the appellant, who raised the question of the invalidity of the contract there involved, was not entitled to introduce evidence upon the matter, as he had not affirmatively pleaded such illegality. However, it is apparent from the opinion that, if the illegality of that contract had appeared from the evidence introduced by the respondent, who was contending for the validity of the contract, the above rule announced as to appellant would not have been applicable. We also held that Rem. Rev. Stat. § 7077, was not applicable to the facts in the cited case. The *Wolfe* case cites *Maitland v. Zanga,* 14 Wash. 92, 44 Pac. 117, and *Vittucci Co. v. Canadian Pacific Ry. Co.*, 102 Wash. 686, 174 Pac. 981.

The opinion in *Maitland v. Zanga, supra,* was written by Judge Dunbar, and the rule therein announced is apparently the basis for the rule announced in the *Wolfe* and *Vittucci* cases, *supra.*

The *Maitland* case, *supra,* was an action for damages, founded on an agreement to convey land. The particular question with which we are here concerned was raised in that case by the appellant, Maitland, who claimed the court erred in giving the following instruction:

"'You are further instructed, gentlemen of the jury, that if you find from the evidence in this case that this contract or receipt was executed in pursuance of a contract that was entered into prior to the time of the defendant making his final proof upon this piece of land, and that he entered into a contract at that time to furnish him with supplies and money, and that this receipt was a part of and grew out of that contract, then you will find for the defendant, for such contract was void.'"

The opinion states:

"This instruction was duly excepted to by the appellant, for the reason that no issue was made by the pleadings that would justify such an instruction; that there was no allegation in the answer that the contract was made in violation of public policy or of the public laws. It is contended, however, by the respondent, that proof of the illegality of a contract may be admitted whether it is pleaded or not, and of course, if it were competent to admit testimony, it would be competent for the court to instruct upon its effect."

We quote further from the opinion:

"But, while it is true that the courts will not enforce illegal contracts, the fact that such contract is illegal must be determined like any other fact, and to be fairly determined by it must be made an issue by the pleadings, or be determined by the *admission of the plaintiff or by testimony* which, in the language of the supreme court of the United States, 'must necessarily prove the illegality of the contract,' as in the instance cited by the court, or where some public record was introduced which could not be disputed. . . .

"If, as in *Oscanyan v. Arms Co.,* 103 U. S. 261, the plaintiff sees fit, either by admissions of his attorney or by his own direct testimony, to bring to the notice of the court the accepted fact that the contract sued upon was an illegal one, of course he cannot be heard to complain that the question of the illegality of the contract was not raised by the pleadings, and that he has had no notice of such an issue in the cause, for he has seen fit to put the question in issue without notice." (Italics ours.)

From the cited cases, it may fairly be concluded that a defendant must plead affirmatively the illegality of a contract upon which suit is brought before he will be permitted to introduce evidence to establish such illegality. This, however, does not mean that, if a contract is illegal on its face, or if a plaintiff, by his evidence, brings to the notice of the court that the contract sued upon is illegal, the court cannot dispose of the case by dismissing the action.

Appellants also quote from 17 C. J. S. 1195, § 559, as follows:

". . . Evidence tending to show the illegality of the contract in suit cannot be given under a general denial or the general issue, if the contract is valid on its face, but that the defense must be specially pleaded, at least in the absence of anything in the complaint or petition disclosing illegality."

We continue the quotation where appellants left off:

"In some cases it has been held that if the invalidity of the contract is because of its contravention of a public statute intended for the protection of the parties, and the benefit of which may be waived, the defense of invalidity is not available under a general denial, but must be pleaded; but that where the general public is affected by a violation of the particular statute or the provisions of any public law, it is not necessarily essential to plead the illegality of a contract constituting such a violation."

Respondents contend that the rule is that

". . . when a contract is relied upon by a plaintiff and it appears either upon its face or from facts admitted or proven at the trial that it is an illegal contract it will not be enforced, that it matters not how its illegality is brought to the attention of the court and a plea of illegality is not necessary [citing *Reed v. Johnson,* 27 Wash. 42, 67 Pac. 381; *Lewer v. Cornelius,* 72 Wash. 124, 129 Pac. 911; *Williams v. Great Northern R. Co.,* 108 Wash. 344, 184 Pac. 340; and *Wright v. Corbin,* 190 Wash. 260, 67 P. (2d) 868]."

In the *Reed* case, *supra,* the opinion states:

"The respondents by their cross complaint were asking for a specific performance of the contract, by decreeing a

conveyance to them of the lands claimed by them under their contract. Before they are entitled to the *relief of specific performance, it must appear that the contract which they seek to enforce has all the elements of an enforceable contract.* If the contract is illegal and void for reasons of public policy, specific performance will not be enforced.

"'Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. If the nature of the contract is such that its enforcement would be in violation of public policy, specific performance will not be granted. The least taint of illegality or want of equity will preclude a decree.' 22 Am. & Eng. Enc. Law, p. 1014, par. 4. . . .

"It cannot be successfully urged that appellants have waived objection to the illegality of this contract by not specially pleading the same. The nonenforcement of illegal contracts is a matter of common public interest, and a party to such contract cannot waive his right to set up the defense of illegality in an action thereon by the other party. It is not necessary to specially plead the defense of illegality, but, when the same is made to appear to the court *at any stage of the case,* it becomes the duty of the court to refuse to entertain the action." (Italics ours.)

While *Maitland v. Zanga, supra,* is not cited in the *Reed* case, the latter case does cite *Oscanyan v. Arms Co.,* 103 U. S. 261, also cited in the *Maitland* case.

We shall not set out the facts in *Lewer v. Cornelius, supra,* for the reason that we think the following statement found in the opinion sufficiently explains the situation presented:

"A court will not knowingly aid in the furtherance of an illegal transaction. And in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. If such illegality appears in the pleadings of either party, it will not inquire into the technical accuracy of such pleading; if it appears in the statement of witnesses at the trial, it will not inquire into the technical admissibility of such statement as evidence, but will, in either case, start an inquiry of its own, and if it be found that the differences which it is called upon to adjudicate *arise out of an illegal transaction it will leave the parties where it found them,* to work out their differences as best they may." (Italics ours.)

In *Williams v. Great Northern R. Co., supra,* we stated:

"The real question here is something more than a question of *ultra vires* as a question of fact. The company was not required to plead in its answer that it intended to rely upon this statute rendering the contract void as a contract of permanent employment. The contract being void and unenforceable as a contract of permanent employment, and it being so determinable as a matter of law from the face of the contract without the determination of any issue of fact, the company was privileged to invoke such invalidity as a defense without specifically pleading it. The decision of this court in *Reed v. Johnson,* 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404, is in harmony with and lends support to this conclusion."

In *Wright v. Corbin, supra,* we stated:

"The contention of respondent, in his brief on his motion to dismiss the appeal, that this question [illegality of contract between respondent and appellant] was never raised nor presented to the lower court by appellant, is untenable. *Such a question can be raised at any time and at any stage of the case,* when it has been made to appear that a contract is illegal and unenforceable. *Reed v. Johnson,* 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; 13 C. J. 507, § 455." (Italics ours.)

In 12 Am. Jur., § 223, pp. 741 *et seq.,* will be found a discussion of the question here being considered. We quote only the following paragraph:

"But according to the weight of authority, the illegality of an agreement is available as a defense even though it is not pleaded. This is especially so where the agreement is *contra bonos mores.* [Citing, among other authority, *Reed v. Johnson, supra.*]

Without attempting to distinguish the cases decided by this court and hereinbefore discussed, we are of the opinion that, under the rules announced in *Reed v. Johnson, supra,* and the other cases cited by respondent, and under the rules announced in 12 Am. Jur., § 223, *supra,* if the grape juice contract (sales agreement) entered into between respondent Association and appellant Donelson Co. shows on its face that it is illegal and in violation of the Robinson-Patman Act, or if the illegality of such contract clearly appears from the contract and appellant's evidence, the trial court was justified in dismissing the action on that

ground, notwithstanding that respondent had not pleaded the illegality of such contract.

We come then to the main question in the case, which is whether the trial court, in the light of the evidence, was justified in holding that the Donelson Co. contract was an illegal contract, under the provisions of the Robinson-Patman Act, 15 U. S. C. A., § 13, subd. (c), which reads:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The Robinson-Patman Act of June 19, 1936, was an amendment of the Clayton Anti-Trust Act of October 15, 1914, 38 Stat. 730. Section 2 of the Clayton Act, which was the section amended, merely forbade discrimination in price, when the effect of such discrimination was to substantially lessen competition or tend to create monopoly. The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown.

Section 13, of 15 U. S. C. A., *supra,* contains subdivisions (a), (b), (c), (d), (e) and (f).

A brief discussion of § 13, contained in *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission,* 106 F. (2d) 667, is, we think, helpful to a clear understanding of the overall purpose of the act. We quote:

"Paragraph (a) deals with the selection of customers and provides that it shall be unlawful to discriminate in price between them. Then follow the cost differential provisos upon which the petitioner relies. Paragraph (b) provides that the burden of rebutting a *prima facie* case of discrimination rests upon the person charged with a violation of the Section. Paragraph (c) prohibits the payment or acceptance of commission or brokerage or other compensation, except for services rendered, as we have indicated. Paragraph (d) provides that it shall be unlawful to pay or contract for the payment of anything of value for services or facilities unless such payment or consideration is available on proportionally equal terms to all other customers competing in distribution of such products or commodities. Paragraph (e) prohibits the furnishing of services or facilities for processing or handling upon terms not accorded to all purchasers on proportionately equal terms. Paragraph (f) prohibits persons from knowingly receiving a discrimination in price prohibited by Section 13."

It is clear that the above acts are forbidden as unfair trade practices, because "of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case." *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, supra.*

It is stated in *Biddle Purchasing Co. v. Federal Trade Commission,* 96 F. (2d) 687, 692:

"One of the main objectives of section 2 (c) [15 U. S. C. A., § 13 (c)] was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers . . .

"Section 2 (c) was clearly intended to restore equality of opportunity in business by strengthening the anti-trust laws through protecting trade and commerce against unfair practices and unlawful price discrimination."

The act here under consideration is applicable only to transactions affecting interstate commerce. *Body-Steffner Co. v. Flotill Products,* 63 Cal. A. (2d) 555, 147 P. (2d) 84.

There is no question but that it clearly appears from the testimony of Mr. Rathke that the products of the grape juice plant sold by Donelson Co. would be sold to buyers outside of the state of Washington. We quote from Mr. Rathke's testimony:

"Q. Mr. Rathke, I think you said that the demand for the product you expected to receive from the Grape Growers was in excess of the supply? A. It was. Q. Now, where is this product sold, the pulp and the juice, that would have been purchased from the Grape Growers? A. Our market would have been the Middle West, the New York market in

the New York area, and the California market. Q. Would any part of it have been resold in the state of Washington? A. There might have been a limited amount, but our large market was outside the state of Washington. Q. A very insubstantial amount, then, would be sold in Washington? A. With the exception of the juice . . . Q. But had you received any in 1941 and what you did receive in 1942, that was sold into foreign markets? A. That would have gone to the New York market. Q. Most of it to the New York market? A. Yes, we had one customer who would have taken the output. Q. I see. And what did you receive in 1942 was sold outside of the state? A. Yes."

In determining whether the sales agreement is a contract to pay brokerage to a buyer in violation of the Robinson-Patman Act, we must, of course, look to the provisions of the sales agreement. We have hereinbefore set out quite fully the provisions of this contract, and we will not again set it out, but we desire to call special attention to paragraphs 2, 3, 5 and 6, and particularly to paragraphs 7, 7a, 7b and 7c.

Appellants state in their brief:

"Moreover, here in any event appellants were brokers or agents rather than purchasers. The transaction was a marketing agency rather than a sale."

We think this contention is not in accord with the testimony of Mr. Rathke, which is to the effect that he was both a purchaser and a broker under the contract. We again quote from Mr. Rathke's testimony:

"Q. In your contract, sales, agreement, with reference to the juice, which is Plaintiffs' exhibit 2, that contract in effect provides for, first, the obligation of the Grape Growers Association to hold for and sell to you up to fifty per cent of their pack, the prices to be determined by a formula in the contract. Is that your understanding? A. That would be my understanding. Q. So, as far as that part of it is concerned, you would then be a purchaser of their manufactured product, would you not? A. We could either be that or we could sell it for their account, as I understand the contract. Q. But, the first part with reference to the fifty per cent, it is their agreement to sell to you— A. That's correct. Q. —such as you required? A. That's correct. Q. So, in that case, you would then be a purchaser of that part? A. Correct. Q. In addition to that, there was also the provision that, if they requested it, you could secure orders for any portion of the remaining fifty per cent and, if they accepted those orders, they would be on a brokerage basis? A. Correct."

As Mr. Rathke testified, and as the sales agreement states, Donelson Co. had the right to purchase up to fifty per cent of the Association's production of grape juice and other products, and under the contract, the Association would be required to sell Donelson Co. that amount. The contract very carefully distinguishes between the right to brokerage and the right to purchase the products. While Donelson Co. reserves the right to brokerage the products and receive brokerage commissions, the contract states:

"7b . . . Such sales shall not be charged against Second Party's fifty percent (50%) allotment as provided in paragraph two (2) above."

While the contract provides that Donelson Co. may act as a broker, it also provides that it may act as a purchaser for fifty percent of the manufactured products. In respect to that fifty percent, it would be a purchaser for its own account. In selling such goods to others under its own brand name, for which the contract makes provision, it would not be selling such goods for the Association, from whom it purchased them, but for itself. Donelson Co., in competing with other wholesalers, would set its own price. With the broker's discounts and advertising allowances which it would receive under the sales agreement, Donelson Co. could afford to undersell other purchasers from the Association, and thus engage in unfair trade practices, which, in our opinion, are the very evils sought to be remedied by the Robinson-Patman Act.

Appellants cite *Irwin v. Pacific Fruit & Produce Co.*, 188 Wash. 572, 63 P. (2d) 382, and *Body-Steffner Co. v. Flotill Products, supra,* in support of their contention that under the contract they were brokers and not purchasers. We are unable to see that the cited cases are applicable in the instant case. In the *Irwin* case, the court held the contract was one of consignment and not of purchase. This construction was undoubtedly placed upon the contract for the following reason, as stated in the opinion:

"The contract was written upon a printed form so prepared that it could be filled out to accomplish either a contract of purchase or one of handling only. In the line left blank for the word which

should designate the class of contract to be executed, plainly appears the written word 'handle.' This, of course, indicates that the contract was one of consignment and not of purchase."

In the *Body-Steffner Co.* case, the plaintiff received judgment on the theory that all six contracts involved were contracts of purchase and sale. The defendant contended that the contracts were in fact contracts of brokerage or agency. In support of this defense, the defendant attempted to show, by the cross-examination of plaintiff's witnesses and by examination of its own witnesses, that in the trade this standard form of contract was always construed as a contract of agency and not one of sale where a provision for brokerage was inserted in the contract. Objection was sustained to all the questions and offer of proof. The court stated:

"In sustaining such objections we are convinced that the trial court committed prejudicial error."

No such situation is presented in the instant case.

It is our opinion there is no ambiguity in the contract here under consideration. Donelson Co. was given the right to purchase fifty per cent of the pack, and also the right to brokerage whatever they were able to, the contract not specifying any definite amount.

We are of the opinion that, under the plain terms of the contract, Donelson Co., *as buyer,* was given a brokerage. We are also of the opinion that the Robinson-Patman Act (15 U. S. C. A., § 13 (c)) absolutely prohibits and forbids the paying, or granting, or receiving, or accepting anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, from seller to buyer. *Oliver Bros. v. Federal Trade Commission,* 102 F. (2d) 763; *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, supra; Jarrett v. Pittsburgh Plate Glass Co.,* 131 F. (2d) 674. We quote from the last cited case:

"It [Robinson-Patman amendment of the Clayton Anti-Trust Act, 15 U. S. C. A., § 13 (c)] prohibited receipt or payment of commissions or discounts in lieu thereof in sales transactions except for services rendered."

See, also *Southgate Brokerage Co. v. Federal Trade Commission,* 150 F. (2d) 607, from which we quote:

"It is perfectly clear that this provision [Robinson-Patman Act, 15 U. S. C. A., § 13 (c)] forbids the payment of brokerage on a sale or purchase of goods to the other party to the transaction. The seller may not pay the buyer brokerage on the latter's purchases for his own account. As said in the Report of the House and Senate Conference Committee with reference to this subsection (House Rep. 2951, 74th Cong. 2nd Sess.): 'This subsection permits the payment of compensation by a seller to his *broker or agent* for services actually rendered in his behalf; likewise by a buyer to his *broker or agent* for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer . . .'" (Italics ours.)

See, also, *Merchants Service Corporation v. Libby, McNeill & Libby,* 314 Ill. App. 121, 40 N. E. (2d) 835.

Appellants contend that the Robinson-Patman Act is a penal criminal statute, and that nowhere therein is there any provision, which Congress could well have included if it so desired, that a contract in violation thereof is illegal, void and unenforceable. Appellants argue that the courts have repeatedly held that violation of the Robinson-Patman Act is not available as a defense in an action based on the contract in a state court, citing and quoting extensively from *Bruce's Juices v. American Can Co.,* 67 S. Ct. 1015, 91 L. Ed. (Adv. Op.) 875, wherein the United States supreme court affirmed the decision of the supreme court of Florida (155 Fla. 877, 22 So. (2d) 461). We are of the opinion the cited case is easily distinguished from the instant case.

The cited case was an action brought by the American Can Co. against Bruce's Juices, Inc., on renewal notes representing the purchase price of goods sold and delivered. The question presented was whether renewal notes representing the purchase of goods sold and delivered are uncollectible, if it be found that the vendor violated the Robinson-Patman Act. The United States supreme court held that while the act prescribes sanctions, it does not make uncollectibility of the purchase price one of them.

As the trial court in the instant case points out, there is a great difference between an action at law to recover on promissory notes and an action in equity to

specifically enforce an illegal contract. The trial court in the instant case, in its memorandum opinion, quoted from the *Bruce's Juices* case:

"None the less, we are urged to supply judicially the sanction of invalidating obligations to pay for goods sold and delivered because it is said otherwise the courts become parties to the enforcement of a discrimination. If, in order to prove his own case, a plaintiff proves his violation of law, *then no court will aid the plaintiff to recover.*" (Italics ours.)

Under note 4 is cited *McMullen v. Hoffman,* 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117, wherein the court refused to enforce a partnership contract which was based on an illegal and fraudulent agreement to submit collusive bids for public construction.

In view of the authority hereinbefore cited, to the effect that a contract to pay a commission or brokerage or other compensation in violation of 15 U. S. C. A., § 13(c) is illegal and unenforceable, we do not deem it necessary to discuss other cases cited by appellants on this point.

We do, however, desire to quote the following statement found in 149 A. L. R. 677:

"A contractual promise to pay a commission or brokerage or other compensation in violation of subsection (c) is illegal and void. Neither the promisor nor the promisee is bound. The rule applies to contracts existing, but not yet performed, on the date when the Robinson-Patman Act went into effect. [Citing authority heretofore set out in this opinion.]"

The sales contract here under consideration is, in our opinion, illegal and void, and unenforceable in the instant case.

Appellants contend that the Robinson-Patman Act has no application to the purchase agreement entered into between the Association and Rathke Co. to buy machinery and supplies; that this agreement is separate, distinct and independent of the sales agreement. Appellants further contend that the Association is clearly obligated to purchase its additional machinery, equipment and supplies from appellant Rathke Co., irrespective of the enforceability of the sales agreement.

An examination of the two contracts will show that the one is dependent on the other. The sales agreement states that

"Whereas, First Party has, by a separate and independent agreement, arranged to obtain certain equipment for said grape juice plant from Clark E. Rathke, doing business as Rathke and Company, and in said written agreement it is provided that First Party herein shall enter into *this agreement* as a part of the consideration for Clark E. Rathke, executing said written agreement to furnish said equipment." (Italics ours.)

It seems to us that if the sales agreement is illegal and void and cannot be enforced, there is a failure of consideration of the purchase agreement.

The general rule in regard to illegality of consideration and its effect upon a contract is stated in *Remington Rand, Inc. v. International Business Mach. Corp.,* 167 Misc. 108, 3 N. Y. S. (2d) 515, 523, as follows:

"It is well settled that a contract wholly based on an illegal consideration is wholly unenforceable. At times, however, a contract may be divisible by reason of its containing both legal and illegal provisions. A separation of the two will be attempted by the courts in a proper case, but where the illegality pervades the entire agreement, the courts will abstain from such separation and refuse affirmative relief. *Saratoga County Bank v. King,* 44 N. Y. 87; *Arnot v. Pittston & Elmira Coal Co.,* 68 N. Y. 558, 23 Am. Rep. 190; *Manson v. Curtis,* 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918E, 247."

We are of the opinion that, the sales agreement being illegal and unenforceable, the purchase agreement for the machinery and supplies, which is dependent upon it, is also unenforceable.

For the reasons herein stated, the judgment of the trial court is affirmed.

[¶ 62,258] General Electric Co. v. Monarch-Saphin Co., Inc.

In the New York Supreme Court, Special Term, Part III. 119 N. Y. L. J. 2011. May 28, 1948.

Feld-Crawford Fair Trade Act

Fair Trade Act—Price Agreement Exempting Sales to Employees—Agreement Held Uniform and Non-discriminatory.—An agreement under the New York Fair Trade Act, fixing retail prices of plaintiff's products, and providing that the prices are not to apply to sales made to plaintiff's employees, to employees of distributors and dealers, to government agencies or to consumers buying for industrial use, is not discriminatory or lacking in uniformity, and the use of such an exemption clause does not constitute an abandonment or waiver by plaintiff of the protection of the Act. A motion by plaintiff for an injunction *pendente lite* in an action for injunctive relief under the Act is granted, and a motion by defendant to dismiss the complaint is denied.

See the Feld-Crawford Act annotations, Vol. 2, ¶ 8604.20, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7220.

[*Temporary Injunction Granted*]

KOCH, J.: This is one of eight motions brought on by the same plaintiff seeking injunctive relief under the Feld-Crawford Act. There is an underlying question as to the sufficiency of the agreement relied upon. The determination made on this motion in this regard is intended to apply to all the other motions. The determination of any other questions raised will be made separately on each motion. The agreement fixing the retail prices of plaintiff's articles provided that the prices did not apply to sales made to plaintiff's employees, to employees of distributors and dealers, to government agencies or to consumers buying for industrial use. This defendant has submitted affidavits showing that two of its employees obtained articles below the market price by the simple expedient of having friends of theirs who were employees of consumers for industrial use make the purchases. Defendant's argument is that plaintiff by its exception clause has deprived the agreement of uniformity and rendered it discriminatory; that it has abandoned and waived the protection of the act, and that plaintiff is accordingly not entitled to equitable relief. Preliminarily, it is held that plaintiff's reliance on *Bristol-Meyers v. Bamberger,* (122 N. J. Eq., 559) is of no assistance to it. There the defendant was selling below cost to its own employees under a contract which did not contain an exemption clause. This distinction was made in *Burroughs Wellcome & Company (U. S. A.), Inc., v. Weissbard,* (20 Atl. 2d 445 [N. J. Chancery Court, 1941], aff'd without opinion, 23 Atl. 2d 396, 130 N. J. Eq. 60). There is nothing discriminatory in the agreement, nor is it lacking in uniformity. Under it defendant and others may sell below the fixed price to those coming within the exception clause. Were plaintiff or its subsidiary making sales to those described in the exception clause without giving defendant and others a similar opportunity to make such sales discrimination might be claimed. Defendant's contention that the sales by it were made to plaintiff's employees and so come within the exemption clause presents no ground for a denial of this motion. The affidavits strongly indicate that the defendant is mistaken in this regard, but the question of fact would only require determination if it were defendant's contention that these were isolated transactions. A reading of the answering papers discloses quite clearly, however, that defendant is not seeking the protection of the exemption clause but as a matter of policy objects to the price fixation. The transactions whereby defendant's employees obtained articles at less than the fixed price under the circumstances above described are not indicative of an abandonment or waiver of the protection of the act. Plaintiff is entitled to the relief sought. It has contracted with others to hold the price of its products. Under the applicable statutes it is accordingly entitled to the relief sought. There is no showing of any favoritism which would militate against defendant or others so situated. The application is accordingly granted. Settle order fixing the amount of the bond at $250.

[*Motion to Dismiss Denied*]

Motion to dismiss the complaint is denied. For the reasons stated in the disposition of the companion motion granting the injunction *pendente lite* the complaint

is held to be sufficient. The alternative relief is granted to this extent: Defendant may examine plaintiff by its officer or employee as to its sales at retail of price fixed products and as to its agreements with others for the sale at retail of price fixed products, such examination to be limited to the time during which plaintiff has been engaged in the policy of fixing minimum retail sales prices. At such examination, books and records shall be produced for use pursuant to section 296, C. P. A.

[¶ 62,259] United States v. National City Lines, Inc., American City Lines, Inc., Pacific City Lines, Inc. et al.

In the United States Supreme Court. No. 544. June 7, 1948.

On Appeal from the United States District Court for the Southern District of California.

Sherman Antitrust Act, Clayton Antitrust Act

Venue—*Forum Non Conveniens* Doctrine Held Inapplicable.—In an action charging a conspiracy to acquire control of local transportation companies and to restrain and monopolize interstate commerce in motorbusses, petroleum supplies, tires, and tubes sold to those companies, in violation of the Sherman Act, the choice of forums given to the plaintiff by Section 12 of the Clayton Act is not subject to qualification by judicial application of the doctrine of *forum non conveniens.* The question of whether such a choice has been given is not to be answered by such inquiries as whether the venue or jurisdictional statute is labeled a "special" or a "general" one, but is rather to be decided on the basis of the legislative purpose. The legislative purpose, and the effect of the language used to achieve it, were to vest the power of choice in the plaintiff. Whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among the courts which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine of *forum non conveniens* can have no effect.

See the Sherman Act annotations, Vol. 1, ¶ 1610.101, and the Clayton Act annotations, Vol. 1, ¶ 2032.10.

Rules of Criminal Procedure—Effect of Transfer of Criminal Case.—The transfer to the Illinois district of a criminal proceeding growing out of the same transactions is not controlling in a civil case. The dissenting opinion would affirm the decision of the lower court, inasmuch as the civil case, as well as the criminal action, was transferred "in the interest of justice."

See the Sherman Act annotations, Vol. 1, ¶ 1610.101.

Reversing the decision of the United States District Court for the Southern District of California, 7 F. R. D. 456, reported in '44-'47 Court Decisions Supp. at ¶ 57,617.

For appellant: George T. Washington, Acting Solicitor General; John F. Sonnett, Assistant Attorney General; Charles H. Weston, Robert G. Speaks, Philip Elman, Special Assistants to the Attorney General.

For appellee: C. Frank Reavis, Martin D. Jacobs.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

In *United States v. Scophony Corp.,* 333 U. S. 795, we recently considered the meaning and effect of § 12 of the Clayton Act,[1] providing for venue and service of process in civil antitrust proceedings against private corporations. This case brings before us another phase of the section's effect in like proceedings. The principal question, and

[1] "Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 Stat. 736, 15 U. S. C. § 22.

the only one we find it necessary to consider, is whether the choice of forums given to the plaintiff by § 12 is subject to qualification by judicial application of the doctrine of *forum non conveniens.*

The suit was brought by the United States against nine corporations[2] for alleged violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 15 U. S. C. §§ 1, 2. The basic charge is that the appellees conspired to acquire control of local transportation companies in numerous cities located in widely different parts of the United States,[3] and to restrain and monopolize interstate commerce in motorbusses, petroleum supplies, tires and tubes sold to those companies, contrary to the Act's prohibitions.[4] Injunctive and other relief of an equitable nature was sought.[5]

The appellees filed various motions, including the one involved in this appeal. It sought dismissal of the complaint on the ground that the District Court for the Southern District of California was not a convenient forum for the trial. This motion was supported by a showing not only of inconvenience to the defendants of trial in the California district, but also that the District Court for the Northern District of Illinois, Eastern Division (Chicago), would be the most convenient forum for them. The showing was by affidavits, executed by officers, attorneys and employees of the corporate defendants.[6] Counteraffidavits were filed in opposition on behalf of the Government.[7]

After oral argument, the District Court filed findings of fact and conclusions of law

[2] These, with the states of their incorporation and their principal places of business, are as follows:

Corporation	*State of incorporation*	*Principal place of business*
National City Lines, Inc.	Delaware	Chicago
American City Lines, Inc.	Delaware	Chicago
Pacific City Lines, Inc.	Delaware	Oakland, Calif.
Standard Oil Co. of California	Delaware	San Francisco
Federal Engineering Corp.	California	San Francisco
Phillips Petroleum Co.	Delaware	Bartlesville, Okla.
General Motors Corp.	Delaware	Detroit, Mich.
Firestone Tire & Rubber Co.	Ohio	Akron, Ohio
Mack Manufacturing Corp.	Delaware	New York

[3] Forty-four cities in sixteen states are included. The states are as widely scattered as California, Florida, Maryland, Michigan, Nebraska, Texas and Washington. The larger local transportation systems include those of Baltimore, St. Louis, Salt Lake City, Los Angeles and Oakland. The largest concentrations of smaller systems are in Illinois, with eleven cities; California with nine (excluding Los Angeles); and Michigan with four. The local operating companies were not named as parties defendant.

[4] The appellee companies fall into two groups. The largest, which may be called the supplier group, includes the six last named in note 2 above. Except Federal, they are engaged in producing and distributing the commodities purchased by the local operating companies, the sale of which is charged to be monopolized and restrained. Federal is a wholly owned subsidiary of Standard, engaged in managing investments for Standard.

The other group, including the first three companies listed in note 2, is collectively called City Lines. National is a holding company with operations directed from Chicago. American and Pacific are its subsidiaries. The three own, control or have substantial interests in the operating companies.

The complaint charges that the supplier appellees furnish capital to the City Lines for acquiring control of the local operating systems, upon the understanding that the City Lines cause all requirements of the local systems in busses, petroleum products, tires and tubes to be purchased from the supplier appellees and no other sellers.

[5] The prayer of the complaint sought complete divestiture of the supplier appellees' financial interests in City Lines; partial divestiture of City Lines' interests in local transportation companies; voiding of existing contracts between the supplier appellees and City Lines; and an injunction against purchases from those suppliers by City Lines or their operating companies, except in accordance with a competitive bidding plan to be included in the decree.

[6] In highly attenuated summary the showing was that the transactions creating the core of the charged conspiracy took place chiefly in or near Chicago; appellees' chief witnesses and documentary evidence are located there; their transportation to Los Angeles and extended presence there will cause great hardship; no defendant "resides" or has its principal office or place of business in the California district (cf. note 2); and two trials in distant cities, see text *infra* at note 41, will greatly magnify the hardship. See 7 F. R. D. 456, 465.

[7] The Government stresses that three of the five supplier defendants transact business and are "found," cf. note 1, in the California district; the volume of sales allegedly restrained is much greater on the Pacific Coast than elsewhere; substantial portions of the evidence, oral and documentary, will be produced from California, etc. Cf. 7 F. R. D. 456, 465.

together with a written opinion, substantially accepting appellees' showing and sustaining the motion. 7 F. R. D. 456. Accordingly it entered judgment dismissing the complaint, but without prejudice to the institution of a similar suit against the named defendants "in a more appropriate and convenient forum." This decision is brought to us for review on direct appeal pursuant to the statute applicable in such cases.[8]

It is not disputed that the District Court has jurisdiction in the basic sense of power to hear and determine the cause or that it has venue within the provisions of § 12.[9] Nor can it be questioned that any of the defendants can be brought personally within that court's jurisdiction by service of process made in accordance with the provisions of either § 12, or those of § 5 of the Sherman Act.[10] The only question presented concerning the court's power is whether, having jurisdiction and venue of the cause and personal jurisdiction of the defendants, the court also was authorized to decline to exercise its jurisdiction upon finding, without abuse of discretion, that the forum was not a convenient one within the scope of the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens.*

It would serve no useful purpose to review in detail the reasoning or the authorities upon which the District Court ruled the doctrine applicable in such cases as this, or therefore the further groundings upon which it proceeded in holding the forum inconvenient. For the view has prevailed without qualification during the life of § 12, thirty-four years, that the choice of venues expressly given to the plaintiff is not to be qualified by any power of a court having venue under any of the section's alternatives to decline to exercise the jurisdiction conferred. None of the decisions on which the District Court relied suggested, much less decided, that such a power exists This therefore is a case of first impression, seeking departure from long-established practice. Moreover, the analogies drawn from other types of cases in which the doctrine has been applied[11] cannot survive in the face of the section's explicit terms and the patent intent of Congress in enacting it.

In the *Scophony* case we gave attention to the history of § 12, which as there related is as pertinent to the question now presented as it was to the issues then under consideration.[12] Reference to the *Scophony* opinion, Part I, 333 U. S. at 802-810, will avoid the necessity for repeating the history here *in extenso.* But its present applicability will be accentuated by recalling that we reaffirmed the ruling in *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359, namely, that § 12 of the Clayton Act had enlarged the venue provision of § 7 of the Sherman Act, with the intent and effect to give the plaintiff the right to bring antitrust proceedings not only in the districts where the corporate defendant "resides or is found," as § 7 had authorized, but also "in any district wherein it . . . transacts business."[13]

In the *Eastman* case, as the *Scophony* opinion emphasized, the Court had rejected the argument that the addition of "or transacts business" was no more than a redundant reformulation of "is found"; instead it gave the added words broader and less technical meaning than "is found" had acquired under prior decisions.[14] This was done, as the *Eastman* opinion stated, because accepting the contrary view would have rendered the addition meaningless and defeated the plain remedial purpose of § 12. 273 U. S. at 373. That section, the Court held, supplemented "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by re-

[8] 32 Stat. 823, 36 Stat. 1167, 15 U. S. C. § 29; 43 Stat. 938, 28 U. S. C. § 345.

[9] It is conceded that three of the defendants, Standard, General Motors, and Firestone, transact business within the Southern District of California. The others apparently were served either pursuant to the concluding clause of § 12 or pursuant to § 5 of the Sherman Act. See note 10 *infra.*

[10] "Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof." 26 Stat. 210, 15 U. S. C. § 5. Section 4 of the Sherman Act (*i. e.,* "this act") refers specifically to civil actions brought by the Government. Cf. *Eastman Co. v. Southern Photo Co.,* 273 U. S. 359, 374.

[11] See note 46 *infra.*

[12] In the *Scophony* case we were concerned, not as here with any question of discretion to decline the exercise of jurisdiction, but in presently pertinent part with the tests of venue prescribed by the section and whether, on the facts presented, those tests had been met, so as to establish venue in the district of suit.

[13] See note 1.

[14] See *United States v. Scophony Corp.,* 333 U. S. 795, Part I at 802-810.

lieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—*often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence in which the corporation in fact transacts business,* and bring it before the court by the service of process in a district in which it resides or may be 'found.'" (Italics added.) 273 U. S. at 373-374.

The *Scophony* opinion reaffirmed this view: "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'—'present' — 'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." 333 U. S. at 808.

These conclusions concerning the section's intent and effect are altogether inconsistent with any idea that the defendant corporation can defeat the plaintiff's choice of venue as given, by asking for and securing dismissal of the suit, either on the ground that the venue selected within the statutory limits is inconvenient for the defendant or that another authorized venue is more convenient for it.

No such discretionary power had been exercised by any court during the twenty years of the Sherman Act's application prior to the enactment of § 12, under the narrower range of choice afforded by § 7. None had been suggested, and uniform practice had established that the plaintiff's choice was conclusive, as was true later under § 12 until the deviation in this case.

When therefore Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suits might defeat the plaintiff's choice to serve their own convenience. Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy.[15] Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs or, as was said in the *Eastman* opinion, to remove the "often insuperable obstacle" thrown in their way by the existing venue restrictions.

To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power[16] comprehended by *forum non conveniens* would have been incongruous, to say the least. In making the change Congress did not authorize plaintiffs to institute civil antitrust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by § 7. It intended trial to take place in the district specified by the statute and selected by the plaintiff.[17]

This conclusion is supported as strongly by the history of the legislative proceedings

[15] The Clayton Act hardly can be regarded as a statute for the relief of corporate defendants in antitrust proceedings from either procedural or substantive abuses. See Levy, The Clayton Law—An Imperfect Supplement to the Sherman Law, 3 Va. L. Rev. 411.

[16] "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. . . . The court will weigh relative advantages and obstacles to fair trial." *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508.

[17] The *Eastman* opinion referred to the disadvantages suffered by plaintiffs under § 7 of the Sherman Act who were injured where they resided or conducted their business, only to be forced to seek out the wrongdoing company in a distant forum to secure venue and service of process, and therefore also to transport witnesses and incur other disadvantages in trial. 273 U. S. 359, 373-374. Likewise the legislative discussions hereinafter cited uniformly treat the problem as one involving both instituting the suit and trying it. There is no hint that it was contemplated the two phases of the litigation might be separated and conducted in different places. See, *e. g.,* notes 31 and 32 *infra.*

relating to the enactment of § 12 as by the foregoing judicial constructions. Section 7 of the Sherman Act had limited venue, as we have noted, to districts in which the defendant "resides or is found." As originally introduced in the House, two sections of the Clayton Act, §§ 4 (then § 5) and 12 (then § 10) [18] perpetuated those provisions.[19] During discussion on the floor, however, various Representatives demanded broader choice of venue for plaintiffs. The demand related to both sections, and the discussion went forward now with reference to one, now the other, now both.

The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries.[20] At first they were not much concerned with the exact formulation of the language to accomplish this, several formulas being proposed from time to time.[21] But they were convinced that restricting the choice of venue to districts in which the defendant "resides or is found" was not adequate to assure that the suit could be brought where the cause of action arose, and therefore insisted on change in order to assure that result.[22]

The committee sponsoring the bill had no objection to this purpose; indeed its members expressly approved it.[23] But at first they opposed any amendment, because they thought the object fully achieved by the words "is found." [24] Over this difference

[18] Section 12 began as § 10, became § 11 in the Senate, and finally § 12 in conference. Similarly, § 4 began as § 5, changed first to § 3 and finally to § 4. Section 4 provides for recovery of treble damages in private antitrust proceedings and its venue provisions apply in terms only to such suits. Section 12 applies to "any suit, action, or proceeding under the antitrust laws against a corporation." This literally is broad enough to include the suits comprehended by § 4.

[19] The original wording of the two sections in respect to venue was slightly different but the substance was identical, both following the pre-existing provisions of § 7 of the Sherman Act.

[20] *E. g.,* Representative Dickinson urged that the language "be extended sufficiently to reach every contingency, so that these concerns may be sued in that jurisdiction where they commit the wrong, where the acts complained of may be committed, where the officers, agents, or employees, acting for their master corporation, may be found, setting aside the law, and where the witnesses are easily obtainable. . . ." 51 Cong. Rec. 9190. Later he stated that he wanted to "give the widest liberty of bringing suits where the damage is done and where the action arose." 51 Cong. Rec. 9417.

Representative Sumners spoke to the same effect: "Mr. Chairman, I believe this matter of venue is one of the most important connected with the whole subject of antitrust legislation. . . . The philosophy of legislation with regard to this subject should give the venue at the place wherein the cause of action arises." *Id.* 9467. See also *id.* 9414, 9415, 9608.

[21] "Why not at the end of the section, after the word 'found,' add other words, such as 'doing business, or violating the provisions of this law, or wherever it may do business or where its agents, officers, or employees may be found,' or other appropriate language. A dozen suggestions may be made in the way of amendment." *Id.* 9190. See also *id.* 9414-9417, 9466, 9607, 9663, 9682.

[22] "Mr. Scott. What is the gentleman's understanding of the word 'found'; what is its import as used in this section?

"Mr. Dickinson. I understand that there is some decision by some court that I am not very familiar with what may possibly cover the very thought suggested by my proposed amendment. I do not believe that it meets the situation, and if there be any doubt about it, in order that the Government may prosecute successfully and institute suits and actions and have trials the language ought to be clear and definite, and so plain that he who runs may read, so that there can not be two constructions." *Id.* 9415.

"Mr. Cullop. May I suggest . . . that every suit which has arisen under the Sherman antitrust law has been brought at the home of the corporation itself, or at its principal place of business, and therefore there was no occasion to construe this language, 'is found,' which is ambiguous and uncertain. If you are to construe 'is found,' you will have to construe that as the place of the residence of the corporation, because it is not migratory. You can not get service upon some person traveling throughout the country and hold your jurisdiction throughout that territory.

"Mr. Carlin. Why should not the suit be brought in the habitat of the corporation? We have been successful so far in that matter.

"Mr. Cullop. In this case for the very best reason, I think. The gentleman from Virginia [Mr. Carlin] now has disclosed the purpose of this language, and that is why I am combating it, and for the best of reasons, I think. I do not want to make a resident of California come to Trenton, N. J., to bring a suit for violation of this law, but I want him to sue at home in the jurisdiction where the cause of action arose." *Id.* 9416. See also *id.* 9466-9467, 9607-9608, 9663-9664.

[23] *E. g.,* Representative Floyd stated that the provisions were designed "to give the Government the widest possible scope in getting service in these cases, and the provision is right as it is written and ought not to be changed." *Id.* 9416.

[24] "Mr. Floyd. . . . The very broadest language that can be used in a statute of this kind conferring jurisdiction is to give the jurisdiction where the corporation resides or is found." *Id.* 9415. And "I think the provisions relating to service properly drafted as they appear in the bill, and that the proposed amendment and others suggested in the debate would narrow the scope of the provisions as drawn." *Id.* 9417. And see *id.* 9608.

the discussion went forward, as well as over various formulations of the proposed addition. Some were broader than was necessary to achieve the primary aim.[25] Indeed some were so broad that committee members thought their inclusion would jeopardize passage of the entire bill.[26]

To avoid this result and to satisfy those who insisted on amendment, the committee yielded and proposed a substitute amendment for one of those offered from the floor relating to § 4. The committee substitute added the words "or has an agent" after "is found" in the original committee version. 51 Cong. Rec. 9466. This amendment passed the House and later the Senate unchanged. *Id.* 9467. Section 4 thus became law in its present form, for the limited class of cases covered by its terms. Cf. note 18.

Since however the amendment affected only § 4, the problem concerning § 12 remained unresolved. Suggestions therefore were made at once for amending § 12 to bring it into conformity with § 4. *Id.* 9467, 9607. Although other proposals were again put forward, *id.* 9607, the conforming amendment was adopted by the House. *Ibid.*

After the bill passed the House, it was referred to the Senate Committee on the Judiciary. That committee reported it out with § 12 altered by the substitution of "or transacts business" in place of "or has an agent," but leaving the latter clause in § 4 untouched.[27] The Senate committee reports and the debates in that body throw little light upon the reasons underlying the committee's alteration of § 12 and its failure to alter § 4 so as to make them uniform, except for the general statement that § 12 as reported "concerns venue or the place where suits to enforce the antitrust laws against corporations may be brought and liberalizes the Sherman law to some extent upon this subject."[28] The bill finally passed the Senate with § 12 substantially as it was reported by the Committee on the Judiciary,[29] and went to conference in that form. In conference the Senate version of § 12 prevailed over that of the House, and the bill was so enacted.[30]

The short outcome was that Congress expanded the venue provisions of the Sherman Act, § 7, in two ways, *viz:* (1) by adding to "resides or is found," in § 4 of the Clayton Act, the words "or has an agent"; (2) in § 12 by adding "or transacts business." Thus strict uniformity in the two sections' venue provisions was not achieved. But whatever their differences may be, each addition was designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust prohibitions.

Moreover the discussions in Congress, particularly in the House, disclose no other thought than that the choice of forums was given as a matter of right, not as one limited by judicial discretion. There was, in fact, common agreement upon this among both the advocates and the opponents of amendment.[31] No one suggested that the courts would have discretionary power to decline

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[25] See, *e. g.*, Representative Cullop's suggestion to confer jurisdiction on state courts without a right of removal to the federal courts. *Id.* 9662-9664.

[26] In opposing the suggestion to confer jurisdiction on the state courts, Representative Floyd argued, *inter alia*, that "any friend of this legislation, as I am sure the gentleman from Indiana [Representative Cullop] is, ought not to aid those who are fighting this legislation—the trusts and the combines of this country—by loading it down with questionable amendments that will tend to defeat it and destroy it in the end." *Id.* 9663.

[27] In place of the House amendment to § 12 of "or has an agent," the Senate committee substituted this language: "or transacts any business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Sen. Rep. No. 698, 63d Cong., 2d Sess. 73.

[28] 51 Cong. Rec. 14214. See *id.* 14596, 15943, 16048-16052.

[29] An amendment providing for stockholder suits against officers of a corporation violating the antitrust laws was added by the Senate but deleted in conference. See the references cited in note 28.

[30] Sen. Doc. No. 583, 63d Cong., 2d Sess., 9. Sen. Doc. No. 584, 63d Cong., 2d Sess. 18.

[31] See notes 25, 26. The following are examples of the discussion on the plaintiff's right to choose: "Mr. Dickinson. . . . I do not ask to strike out any language of the committee, but simply to add to it, to make clear and definite and certain so that any person and any corporation may be sued not only where it has its residence as a corporation or individual, but that it can be sued wherever it is found doing business and the cause of action may arise.

"Mr. Stephens of Texas. . . . I thoroughly agree. . . ." 51 Cong. Rec. 9414.

"I will say to my friend from Wisconsin [Mr. Stafford] that we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender, as is suggested by a friend sitting near by." The quoted language is that of Representative Webb. 51 Cong. Rec. 16274. See *id.* 9467, 9607; also note 32.

to exercise the jurisdiction conferred. But since it was universally agreed that the choice of venue, to whatever extent it might be conferred, was to be given as a matter of right, several of the broader amendments were opposed and defeated as going too far.[32]

Congress therefore was not indifferent to possibilities of abuse involved in the various proposals for change. Exactly the opposite was true. For the broader proposals were not rejected because they gave the plaintiff the choice. They were rejected because the choice given was too wide, giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. In adopting § 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice. 51 Cong. Rec. 9466, 9467. But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in the districts where by a course of conduct they had violated the Act with the resulting outlawed consequences. In framing § 12 to include those districts at the plaintiffs' election, Congress thus had in mind not only their convenience but also the defendant company's inconvenience, and fixed the limits within which each could claim advantage in venue and beyond which neither could seek it. Moreover, in § 12, though not in § 4, the right of choice conferred was given designedly to the Government as well as to private suitors.[33]

In the face of this history we cannot say that room was left for judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice given by the section. That result, as other courts have concluded, would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice. *Tivoli Realty v. Interstate Circuit*, 167 F. 2d 155; *Ferguson v. Ford Motor Co.*, 77 F. Supp. 425.

In this view of Congress' action, numerous considerations of policy urged by the appellees as supporting the discretionary power's existence and applicability become irrelevant. Congress' mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts. Const. Art. III, § 2. Our general power to supervise the administration of justice in the federal courts, cf. *McNabb v. United States*, 318 U. S. 332, does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue.

It is true that the appellees made a strong showing of inconvenience, albeit by interested persons, when that matter is considered on their presentation alone. On the other hand, the Government advanced strong reasons, apart from the question of power, for not applying the doctrine.[34] But in the view we take of § 12, we need not consider whether the appellees' showing on the facts sufficiently outweighed that of the Government to justify dismissal.[35]

Two important policy considerations were advanced by the Government, however, which not only bear strongly upon that question but affect the question of power, if Congress had not concluded it. The first is that permitting the application of *forum non conveniens* to antitrust cases inevitably would lengthen litigation already overextended in the time required for its final

[32] "Mr. Scott. I could not conceive that anything would deprive the plaintiff of his right to choose the place of trial if he so desired, either in the district where found or where the corporation resides." *Id.* 9417.

"Mr. Scott. . . . The amendment enlarges the present interpretation of the word 'found' as applied to the corporate jurisdiction, and permits suit to be brought, *with absolute discretion on the part of the plaintiff*, in any district in which the defendant may have an agent, without defining the character of that agent." (Italics added.) *Id.* 9467.

[33] Representative Floyd remarked that the committee "language was used to make this section conform to the existing law and enable him [the Attorney General] to have greater liberty in bringing these suits." *Id.* 9415. And see note 23 *supra*.

[34] See notes 6 and 7.

[35] It should be noted, however, that "the mere balance of convenience" in favor of defendants would be insufficient to justify application of the doctrine of *forum non conveniens*. This has been true since the earliest Scottish and English cases applying the doctrine, although the test has been variously formulated. For example, dismissal has been authorized if suit is "vexatious and oppressive and an abuse of the process of the Court," or "only brought to annoy the defendant." See Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 909-911. Cf. also note 16 *supra*.

disposition, and thus would violate Congress' declared policy of expediting this type of litigation.[36]

The argument has merit to support the conclusion we have reached upon the statute. Antitrust suits, even with all the expedition afforded them, are notoriously though often perhaps unavoidably long drawn out. The more complex and important cases seldom require less than three to five years to conclude,[37] except possibly where consent decrees are entered. Often the time necessary or taken is much longer. To inject into this overlengthened procedure what would amount to an additional preliminary trial and review upon the convenience of the forum could not but add approximately another year or longer to the time essential for disposing of the cases, indeed for reaching the merits.[38] Although some instances of inconvenience to defendants will arise from the absence of discretionary power, that will be unavoidably true in almost any event. And it may well be doubted that the sum total of inconvenience and injustice resulting will be as great as would follow, for both private plaintiffs and the public, from allowing the inescapable delay incident to the exercise of such a discretionary power. For once the power were found to exist, it is more than likely that injection of the issue would become a common incident of antitrust suits, and create the disadvantage of delay for all concerned.

This consideration is reinforced by another, namely, the difficulty of applying the doctrine in cases such as this, in which the violations charged are nationwide or nearly so in scope and effect, and the defendants are numerous companies widely scattered in the location of their places of incorporation, principal offices, and places of carrying on business and participating in the scheme. In such a case dismissal in one authorized district cannot reinstate or transfer the cause to another. Nor can the court, within the limits of the doctrine, specify the district in which the case shall be reinstituted and tried. It can only terminate the pending proceeding, as was done here, without prejudice to commencement of a like suit "in a more appropriate or convenient forum," with whatever consequences may follow from having to begin all over again.

Further, when it is done, the result well may be in some instances to have the action commenced again, only to precipitate the same issue and consequent delay in the second forum. Conceivably this could occur from forum to forum in succession, depending upon the number of corporations named as defendants and the variety, proximity, and degree of concentration of the locations of their principal offices, places of business, and the relative advantages of other available forums for the variously situated defendants. Accordingly, in an unknown number of such cases the practical result well might be to establish a merry-go-round of litigation upon the issue, which could be used to defer indefinitely consideration of the merits. The very possibility of such a tactic would greatly hamper the institution as well as the conclusion of antitrust proceedings. Indeed, for cases of this complex type, the uncertainty concerning the outcome of an effort to apply the doctrine might go far toward defeating the Act's effective application to the most serious and widespread offenses and offenders.[39]

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[36] Congress has provided that the trial of these actions may, upon request of the Attorney General, "be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day. . . ." 32 Stat. 823, 15 U. S. C. § 28. The policy of expediting final decision of these cases is further implemented by authorizing direct appeals to this Court. 32 Stat. 823, 15 U. S. C. § 29.

[37] See, *e. g.*, *Schine v. United States*, 334 U. S. 100; *United States v. Griffith*, 334 U. S. 100, which were instituted in 1939 and have recently been remanded for further proceedings in the trial courts. And the *Eastman* case, 273 U. S. 359, though begun in 1915, was not decided by this Court until 1927.

[38] In this case, although the proceedings have advanced without unwarranted delay at any one stage, more than a year has been consumed solely on the issue of *forum non conveniens*. The complaint was filed on April 10, 1947. Motions to dismiss, supported by affidavits to show inconvenience, were filed in August and September. The trial court made findings and entered judgment of dismissal on October 15 and allowed an appeal on December 3. The Government filed its statement as to jurisdiction in this Court on January 20, 1948; we noted probable jurisdiction on February 9, heard oral argument on April 28, and today we resolve the issue. But for the intervention of the motions, the consequent dismissal and appeal, the case with appropriate expedition might now be well on the way to final decision on the merits.

[39] In this case these possibilities have been discounted, largely upon the basis that the appellees had joined in stipulating that all regarded the Illinois forum "as the proper forum for the above action" and that, in case of dismissal in the California district and filing of a like suit in the Illinois district, the defendants would not move for dismissal of the new suit

Further, even if it is taken that the appellees' activities constituting the core of the violations charged were as fully concentrated in or near the Illinois district as appellees claim, such a concentration might or might not exist in other like proceedings. And in the latter event the problem of selecting the appropriate forum well might become a highly uncertain and difficult one.[40]

The appellees also strongly urge two other considerations which deserve mention. One is that a criminal prosecution against the appellees (together with seven individuals, officers of some of them), pending in the California district simultaneously with this cause and growing out of substantially the same transactions, had been transferred to the Illinois district shortly before the District Court entered its judgment of dismissal.[41] The transfer was ordered pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure.[42] That action was taken after the District Court had made findings of fact and conclusions of law founded upon and substantially adopting the appellees' showing, which was practically identical with their showing in this case. Consequently, as the cases now stand, the criminal cause is to be tried in the Illinois district while this civil suit founded upon practically the same transactions and affecting the same corporate defendants is to be tried in the California district.

Great emphasis is placed upon this as an impelling reason for holding *forum non conveniens* applicable here, and then sustaining the order of dismissal under that doctrine and the District Court's findings. But, for the reasons above stated, we think the matter has been concluded by the terms and intent of § 12. Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case.[43] In any event, the validity of that order is not before us. We therefore express no opinion upon either of those questions. But the fact that we cannot do so goes far to nullify the effect of appellee's argument of hardship arising from the transfer. For that argument comes down, in the peculiar circumstances, to one

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on the ground of *forum non conveniens*. The stipulation perhaps would be effective in this case to avoid the complexities of repeated motions if suit were reinstituted in Chicago, but not if the Government should select any of the other venues open to it under § 12.

In any event the stipulation is wholly irrelevant to any question of the general effect of the doctrine's applicability upon antitrust proceedings. For once that were established, no defendant or group of defendants in subsequent cases would be bound, or perhaps likely, to execute such a stipulation.

[40] As the Government points out, in practically all of the more complex types of antitrust proceedings, the principal defendants are corporations doing a multistate business, and the combination or conspiracy charged seldom has a defined locus. In such situations, it is generally true that, whatever the forum chosen by the plaintiff, it will be inconvenient for some of the defendants and often for most of them. When there is such diffusion of possible venue, that fact of course would be basis for declining to apply the doctrine of *forum non conveniens*, even if applicable. It is also reason for declining to accept the view that the doctrine was intended to be applicable.

Thus, in this case, all but two of the appellees were incorporated and hence "reside" in Delaware. None are incorporated in Illinois, and only two have their principal places of business or headquarters in Chicago. The invariable practice for fifty-four years, first under § 7, then under § 12, has been that suit may be maintained and trial had at the plaintiff's election where the corporation "resides" or where it "is found." But if this suit had been brought in Delaware or at any of the principal places of business except Chicago, under the application of *forum non conveniens* made here the trial could not have proceeded in any of those other places. Cf. *Tivoli Realty v. Interstate Circuit*, 167 Fed. 2d 155. The statute, § 12, does not require trial to be had where the agreement in conspiracy takes place. Locus of coming to agreement is not the gist of the offenses proscribed.

[41] The indictment was returned on April 9, 1947; on August 14, 1947, defendants' motion to transfer the cause was granted. The civil complaint was filed on April 10, 1947, and dismissed on October 15, 1947.

[42] Rule 21 (b) provides: "Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." Cf. note 43 and text. In addition to the questions there reserved, we express no opinion on whether Rule 21 (b) applies to criminal antitrust prosecutions.

The Federal Rules of Criminal Procedure became effective March 21, 1946. It would be stretching very far the idea of utilizing legislative history, if criminal rules adopted twenty-two years after a civil statute was enacted were given any significance upon the meaning or effect of the statute.

[43] The precise point apparently has not arisen since the adoption of Rule 21 (b), but there would seem to be no statutory basis for appeal from an order of this type. See 18 U. S. C. § 682. See also *Semel v. United States*, 158 F. 2d 231, 232.

that because the District Court on appellees' application has transferred the criminal cause by a dubiously reviewable order, perforce of that action it should also dismiss this civil cause and we should sustain the dismissal.

In practical effect the outcome of accepting such an argument as ground for sustaining both the power and the dismissal would be to make Rule 21 (b) controlling in civil as well as criminal cases involving the same transactions and parties, thus overriding § 12, and at the same time depriving the plaintiff in the civil cause of anything more than perfunctory review of the District Court's order of dismissal.[44]

Hardly can it be taken that Rule 21 (b) was intended so to override the provisions of § 12, to confer power on the District Courts to do so, or to nullify the plaintiff's right of appeal from an order depriving it of the statutory privilege of choosing the venue. Yet these would be the practical results, if the consideration that the court has ordered transfer of the criminal case is to be controlling or highly influential, as it undoubtedly would be in most cases, in applying the doctrine of *forum non conveniens* in the civil cause. If matters of policy were material, these possible consequences would add force to the view that the doctrine is not applicable.

Moreover, if the transfer should result in hardship to the appellees,[45] insofar as the hardship arises from that cause it is one which was avoidable by them and will be incurred as a result of their own action in applying for it. That they have voluntarily incurred it is no good reason for depriving the plaintiff of its statutory right of choice under the terms and policy of § 12 in the entirely distinct civil suit.

Finally, both appellees and the District Court have placed much emphasis upon this Court's recent decisions applying the doctrine of *forum non conveniens* and in some instances extending the scope of its application.[46] Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. *Baltimore & O. R. Co. v. Kepner,* 314 U. S. 44; *Miles v. Illinois Central R. Co.,* 315 U. S. 698. The question whether such a right has been given is usually the crux of the problem. It is one not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a "special" or a "general" one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice

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[44] All that defendants would have to do, in any practical sense, in order to secure dismissal, would be to convince the District Court that transfer of the criminal cause should be made, and then demonstrate the self-evident fact that trial of the two causes in different districts would be inconvenient.

[45] In view of our decision in this civil case, there would be nothing to prevent appellees from making a motion under Rule 21 (b) of the Criminal Rules to have the criminal cause retransferred to the Southern District of California, if in the changed outlook arising from this decision that should be their pleasure.

The Government argues further that as a practical matter there is little likelihood that appellees will be forced to defend both actions. For its distinctly footnote value we quote from its brief:

"When the Government believes that there has been a violation of the Sherman Act, it sometimes seeks corrective relief by way of a civil suit filed after, or simultaneously with, the return of a criminal indictment, but when companion proceedings are thus instituted it is only rarely that both are ultimately brought to trial. If it is held on the present appeal that dismissal of the civil complaint was erroneous, the Government will not seek to bring the criminal and the civil cases to trial simultaneously and, in any event, it is highly unlikely that it will be found necessary to bring both cases to trial.

"If the Government obtains a decree in a civil suit, the defendants in a related criminal case usually file pleas of *nolo contendere.* If the criminal case is tried first and verdicts of guilty are returned, there is nothing left for trial in the civil case except the question of relief (*Local 167 v. United States,* 291 U. S. 293, 298-299), and the parties are customarily able to reach an agreement on this question and dispose of the civil case by the entry of a consent decree."

[46] *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501; *Koster v. Lumbermen's Mutual Co.,* 330 U. S. 518. See also *Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44; *Miles v. Illinois Central R. Co.,* 315 U. S. 698; *Williams v. Green Bay & W. R. Co.,* 326 U. S. 549.

in the plaintiff or to confer power upon the courts to qualify his selection.

This is a case in which the pertinent factors make clear that the courts were given no such power. Accordingly the judgment is

Reversed.

[Concurring Opinion]

MR. JUSTICE JACKSON, concurring.

I agree with the conclusion of the Court but arrive at it by a shorter and different route.

We have just had occasion to review and to decide, by a divided Court, cases involving the doctrine of *forum non conveniens. Gulf Oil Corp. v. Gilbert,* 330 U. S. 501; *Koster v. Lumbermen's Mutual Casualty Co.,* 330 U. S. 518. We there held that, in cases where the plaintiff was in court in an ordinary civil suit only by reason of the venue statutes that apply generally, the court could exercise discretion in dismissing complaints to prevent imposition on its jurisdiction if the circumstances of the particular case showed an abuse of the option vested in plaintiff by the general venue statutes. But we also pointed out that, where the choice of forum was authorized by a special venue statute, this discretion to dismiss would not be implied. The distinctions there made between general and special venue statutes may have been overly simple from the viewpoint of the dialectician. But as working tools of everyday craftsmen they do serve to point out a difference that I think governs here.

Congress made some rather unusual provisions as to venue in antitrust cases. Had it stopped there, it might have been permissible for the courts to devise their own limitations to prevent abuse of their process. But Congress did not stop there. Not only once but three times it has enacted almost identical provisions which check any abuse or oppression from compelling defendants to defend in places remote from their habitat. 15 U. S. C. § 5 (1890), 15 U. S. C. § 10 (1894), 15 U. S. C. § 25 (1914).

The scheme of the statutes, as I see it, is that the Attorney General may lay the venue in any district where he may properly serve one or more of his defendants. He may go ahead with his action against them, whether he is allowed to bring in others or not. Before he can bring in other parties than those properly served in the district, *i. e.,* those "inhabitant," "transacting business," or "found" there, it must be made to appear to the court that the ends of justice require that they be brought before the court, in which case they may be summoned from any district.

Congress has here provided a practice by which any defendant, who has not subjected himself to suit in the district, may obtain the same protections which the *forum non conveniens* doctrine would afford.

In this case, the defendants, who might be entitled to urge the doctrine, have not resisted or contested the order bringing them into the suit. It was by so doing that they could have shown that the ends of justice would not be served by such action. Instead, they desire to submit to being brought in and then use their position to throw the whole case out. This, I think, cannot be done.

The special provision Congress has made, both to establish venue and to protect against its abuse, whether the exact equivalent of *forum non conveniens* or not, seem to me to preclude its application by the courts to this class of cases.

For this reason I concur in the result.

[Dissenting Opinion]

MR. JUSTICE FRANKFURTER, dissenting.

This is an equity suit for violation of §§ 1 and 2 of the Sherman Law brought in the United States District Court for the Southern District of California. The same defendants were indicted in the same court for the same transactions under the criminal provisions of the Sherman Law. That court transferred the criminal proceedings from the Southern District of California to the District Court for the Northern District of Illinois because it was "in the interest of justice" to order the transfer. In doing so, the court below was obedient to Rule 21 (b)[1] of the Federal Rules of Criminal Procedure, formulated by this Court and having the force of law. 327 U. S. 823 *et seq.* With convincing particularity the District Court set forth its reasons for making this trans-

[1] "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

fer.[2] After the transfer of the criminal case, the court granted the motion now before us, dismissing the equity suit "in the interest of justice, just as the same facts in the companion criminal prosecution required its transfer to another district." 7 F. R. D. 456, 465.

Is it not incongruous that that which "the interest of justice" demanded in the criminal prosecution is beyond the power of a court in a civil suit against the same defendants on the same transactions?[3]

Of course Congress may leave no choice to a court to entertain a suit even though it is vexatious and oppressive for the plaintiff to choose the particular district in which he pursues his claim. But such limitation upon the power of courts to administer justice ought not to be lightly drawn from language merely conferring jurisdiction. The manner in which jurisdictional provisions are appropriately to be read is illustrated by our decision in *Massachusetts v. Missouri,* 308 U. S. 1, where this Court recognized "considerations of convenience, efficiency and justice" even when a State invoked the Court's original jurisdiction in what was concededly a justiciable controversy. 308 U. S. at 19. I do not find in the scheme of the anti-trust acts and of their relevant legislative history the duty to exercise jurisdiction so imperative as to preclude judicial discretion in refusing to entertain a suit where "the interest of justice" commands it.

Defendants in an anti-trust suit may no doubt attempt to resort to delaying tactics by motions claiming unfairness of a particular forum. Neither must we be indifferent to the potentialities of unfairness in giving the Government a wholly free hand in selecting its forum so long as technical requirements of venue are met. See, *e. g., The Railway Shopmen's Strike* case, 283 F. 479. All parties to a litigation tend to become partisans, and confidence in the fair administration of justice had better be rested on exacting standards in the quality of the federal judiciary. Federal judges ought to be of a calibre to be able to thwart obstructive tactics by defendants and not be denied all power to check attempted unfairness by a too zealous Government.

I find nothing in the anti-trust acts comparable to the considerations which led this Court to conclude that the provisions of the Federal Employers Liability Act were designed to give railroad employees a privileged position in bringing suits under that Act. See, especially, concurring opinion in *Miles v. Illinois Cent. R. Co.,* 315 U. S. 698, 705.

I am of opinion that the District Court had power to entertain the motion on the basis of which it entered the judgment.

MR. JUSTICE BURTON joins this dissent. here.

[¶ 62,260] United States v. Columbia Steel Company, Consolidated Steel Corporation, United States Steel Corporation and United States Steel Corporation of Delaware.

In the United States Supreme Court. No. 461. June 7, 1948.

On Appeal from the United States District Court for the District of Delaware.

Sherman Antitrust Act

Acquisition By Major Steel Company of Steel Fabricating Company—No Unreasonable Restraint of Trade.—The proposed acquisition, by a subsidiary of a major steel company, of a company engaged in steel fabrication will not unreasonably restrain trade, and is not an attempt to monopolize trade, in violation of Sections 1 and 2 of the Sherman Act. The conclusions of the District Court that the competition between the unit being acquired

[2] "I do not question the motive of the Government in instituting the prosecution in this district.

"But I am satisfied that a trial here would impose unnecessary hardships on the defendants and entail unjustifiable expense which it is the object of the new rules of criminal procedure, and especially of the rule under discussion, to avoid. Altogether the facts spell out the vexatiousness and oppressiveness which the Supreme Court has warned us to eschew in matters of this character." 7 F. R. D. 393, 402-403.

[3] Cf. L. Hand, J., in *United States v. Aluminum Co. of America,* 148 F. 2d 416, 429: "In *United States v. Hutcheson,* 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788, a later statute in *pari materia* was considered to throw a cross light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court."

and units of the parent corporation which are engaged in comparable fabrication is too insubstantial to render the removal of such competition prejudicial to the public interest, and that the loss of the acquired unit as a potential customer for steel products of competitors in the field of steel production is too insubstantial to constitute a restraint of trade or attempted monopoly, are held supported by the evidence. The so-called vertical integration resulting from the acquisition does not unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product. On the basis of the situation here presented, the court is unwilling to hold that possibilities of interference with future competition are serious enough to justify it in declaring that the merger will bring about unlawful restraint. The government has failed to establish a specific intent to monopolize by means of the proposed merger. Mr. Justice Douglas, with whom three Justices concur, states in the dissenting opinion that the requisite purpose or intent to monopolize is present if monopoly or restraint of trade results as a direct and necessary consequence of the acts done, and that the effect of the proposed acquisition is to give to the parent corporation control of a market for which it has in the past had to compete, and which will result in the elimination of competition in that market.

See the Sherman Act Annotations, Vol. 1, ¶ 1210.201.

Affirming the decision of the United States District Court for the District of Delaware, reported in '44-'47 Court Decisions Supp. at ¶ 57,639.

For appellant: Philip B. Perlman, Solicitor General; John F. Sonnett, Assistant Attorney General.

For appellee: Alfred Wright, Los Angeles, California; Aaron Finger, Wilmington, Delaware.

MR. JUSTICE REED delivered the opinion of the Court.

The United States brings this suit under § 4 of the Sherman Act to enjoin United States Steel Corporation and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the West Coast on the ground that such acquisition would violate §§ 1 and 2 of the Sherman Act.[1] The complaint, filed on February 24, 1947, charged that if the contract of sale between United States Steel and Consolidated Steel Corporation were carried out, competition in the sale of rolled steel products and in fabricated steel products would be restrained, and that the contract indicated an effort on the part of United States Steel to attempt to monopolize the market in fabricated steel products. After a trial before a single judge in the district court, judgment was entered in favor of the defendants, and the government brought the case hereby direct appeal. 32 Stat. 823, 15 U. S. C. § 29.

The underlying facts in the case are set forth in the findings of the trial court, and with a few exceptions those findings are not disputed by the government. We rely chiefly on the findings to indicate the nature of the commerce here in question and the extent to which competition would be affected by the challenged contract.

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[1] Sections 1, 2 and 4, 15 U. S. C., read, so far as applicable, as follows:

§ 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 4. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ."

The steel production involved in this case may be spoken of as being divided into two stages: the production of rolled steel products and their fabrication into finished steel products. Rolled steel products consist of steel plates, shapes, sheets, bars, and other unfinished steel products and are in turn made from ingots by means of rolling mills. The steel fabrication involved herein may also be divided into structural fabrication and plate fabrication. Fabricated structural steel products consist of building framework, bridges, transmission towers, and similar permanent structures, and are made primarily from rolled steel shapes, although plates and other rolled steel products may also be employed. Fabricated plate products, on the other hand, consist of pressure vessels, tanks, welded pipe, and similar products made principally from rolled steel plates, although shapes and bars are also occasionally used. Both plate and structural fabricated products are made to specifications for a particular purpose; fabricated products do not include standard products made by repetitive processes in the manufacture of general steel merchandise such as wire, nails, bolts, and window frames. The manufacture of such standardized finished products is not involved in this case. The facilities required for structural fabrication are quite different from those required for plate fabrication; the former require equipment for shearing, punching, drilling, assembling, and riveting or welding structural shapes whereas the latter require equipment for bending, rolling, cutting, and forming the plates which go into the finished product.

The complaint lists four defendants: Columbia Steel Company, Consolidated Steel Corporation, United States Steel Corporation, and United States Steel Corporation of Delaware. United States Steel and its subsidiaries engage in the business of producing rolled steel products and in structural fabrication, but do no plate fabrication work. Consolidated Steel, the sale of whose assets the government seeks to enjoin, is engaged only in structural fabrication and plate fabrication. United States Steel with its subsidiaries is the largest producer of rolled steel products in the United States, with a total investment of more than a billion and a half dollars. During the ten-year period 1937-1946 United States Steel produced almost exactly a third of all rolled steel products produced in the United States, and average sales for that period were nearly a billion and a half dollars. In the five-year period 1937-1941, average sales were a little over a billion dollars. Consolidated, by contrast, had plants whose depreciated value was less than ten million dollars. During the five-year period 1937-1941, Consolidated had average sales of only twenty million dollars, and the United States Steel committee which negotiated the terms of the purchase of Consolidated estimated that Consolidated's sales in the future would run to twenty-two million dollars annually and agreed with Consolidated on a purchase price of slightly in excess of eight million dollars. During the war Consolidated produced over a billion and a half dollars worth of ships with government furnished facilities. Consolidated no longer possesses any facilities for building ships.[2]

Columbia Steel, a wholly-owned subsidiary of United States Steel, has been the largest rolled steel producer in the Pacific Coast area since 1930, with plants in Utah and California, and has also served as selling agent for other rolled steel subsidiaries of United States Steel, and for two subsidiaries of that company engaged in structural fabrication, the American Bridge Company at Pittsburgh and the Virginia Bridge Company at Roanoke, Virginia, though neither it nor any other subsidiary of United States Steel in the Consolidated market area was a fabricator of any kind. National Tube Company, another United States Steel subsidiary, sells pipe and tubing. Consolidated has structural fabricating plants near Los Angeles and at Orange, Texas, and plate fabricating facilities in California and Arizona. Consolidated has sold it products during the past ten years in eleven states, referred to hereafter as the Consolidated market: Arizona, California,

[2] An uncontested statement of Consolidated's ship building activities during the war years appears in Consolidated's brief:

"During the war years, acting under Government sponsorship, Consolidated constructed ships for defense and war purposes for various Government procurement agencies but it is no longer engaged in this field. Consolidated's war work was confined to ship and ordnance construction with Government furnished facilities, all of which have now been abandoned. Consolidated Shipyards, Inc., a Consolidated subsidiary operating a small boat yard, has disposed of its plant to a group of real estate speculators. There is, therefore, no competition between U. S. Steel and Consolidated in the shipbuilding business."

Idaho, Louisiana, Montana, Nevada, New Mexico, Oregon, Texas, Utah and Washington. It is that market which the government views as significant in determining the extent of competition between United States Steel and Consolidated. It is not the usual Pacific and Mountain States groups employed by the Census.[3] United States Steel Corporation of Delaware is a subsidiary of United States Steel which renders technical assistance to other subsidiaries engaged in steel production.

Rolled steel products have traditionally been sold on a basing point system.[4] Prior to World War II rolled steel was sold on the West Coast at a price computed on the basis of eastern basing points, even though both United States Steel and Bethlehem Steel produced rolled steel products in California. Fabricators such as Consolidated thus did not get the full benefit of their proximity to the western market. The competitive disadvantages under which western fabricators worked is illustrated by the fact that United States Steel has been the largest seller of fabricated structural steel in the Consolidated market, even though it has no fabricating plants in the area. During the ten-year period ending in 1946, 100 different concerns bid successfully in competition with United States Steel for the sale of fabricated structural products in the Consolidated market; 50 of those concerns are located outside the area. United States Steel's principal competitor as measured on a national basis, Bethlehem Steel, does have fabricating facilities in California, however, and prior to World War II United States Steel had prepared plans for the erection of fabricating facilities in California. The war made it necessary to postpone the plans. This use of eastern basing points makes past figures on rolled steel product sales from producers in the Consolidated market unreliable in determining effective competition for the future sales of rolled steel in that market. United States Steel now uses Geneva as a basing point.

The urgent wartime demand for steel prompted the government to construct new rolled steel plants in the West. The largest of these plants was erected at Geneva, Utah, at a cost of nearly $200,000,000, and was designed, constructed, and operated by United States Steel for the account of the government. The plant had an annual capacity of more than 1,200,000 tons if ingots, which in turn could be employed to make 700,000 tons of plates and 250,000 tons of shapes. Another large plant was erected by the government at Fontana, California. This is now operated through arrangements of private parties with the government. In January 1945 United States Steel considered the acquisition of the Geneva plant, but because of the speculative nature of the venture and attacks by people within and without the government, United States Steel decided not to submit a bid and notified the Defense Plant Corporation to that effect on August 8, 1945. Shortly thereafter the Surplus Property Administrator wrote to Benjamin F. Fairless, President of United States Steel, advising him that a bid by United States Steel would be welcomed. On May 1, 1946, United States Steel submitted a bid for the Geneva plant of $47,500,000. The terms of the bid provided that United States Steel would spend not less than $18,000,000 of its own funds to erect additional facilities at Geneva, and $25,000,000 to erect a cold-reduction mill at Pittsburg, California, to consume 386,000 tons of hot rolled coils produced at Geneva.[5] The bid estimated that a sufficient market could be found to absorb an annual production ranging from 456,000 to

[3] Louisiana and Texas, which are included in the Consolidated market, are not listed in the census grouping, whereas Colorado and Wyoming, which are listed in the census, are excluded from the Consolidated market. Sixteenth Census of the United States, 1940, Areas of the United States 1940, Bureau of the Census, p. 3.

[4] In 1924 the Federal Trade Commission entered an order which concluded that United States Steel had violated § 2 of the Clayton Act and § 5 of the Federal Trade Commission Act by its so-called "Pittsburgh plus" method of pricing, according to which all rolled steel products were sold at a delivered price including freight from Pittsburgh to the destination, regardless of the actual point of shipment. *Matter of United States Steel Corp.*, 8 F. T. C. 1. United States Steel was ordered to cease and desist from selling its products on that basis, or from employing any basing point other than the point of manufacture or shipment. In 1938 United States Steel filed a petition tor eview that order in the Third Circuit Court of Appeals admitting that United States Steel had never complied with the latter part of the order. No decision has yet been reached in that proceeding.

[5] Cold rolling is the name given to the process of rolling steel products at temperatures ranging from 50° F. to 240° F. Coils which have been produced by the hot rolling process are fed into a cold-reduction mill and rolled into strip and sheets which are of much higher quality than hot rolled strip and sheets. See Camp and Francis, *The Making, Shaping and Treating of Steel* (5th ed., 1940), pp. 1227-1245.

600,000 tons. The bid stipulated that Geneva products would be sold with Geneva as a basing point. This would offer possibilities for a reduction in the price of rolled steel products to West Coast purchasers and their customers. The variation between 456,000 and 600,000 tons depended on the consumption of rolled steel products by users other than United States Steel's new Pittsburg plant. The bid noted that additional steel consuming manufacturing plants might be located in the West which would provide a market for additional rolled steel products. Apart from the cold-reduction mill to be erected at Pittsburg, the bid was silent as to the acquisition of fabricating facilities by United States Steel to provide a market for Geneva products.

On May 23, 1946, the War Assets Administration announced that the bid of United States Steel was accepted. An accompanying memorandum discussed in detail the six bids which had been received, and concluded that United States Steel's bid was the most advantageous. The other bids were found unacceptable for a number of reasons; either the bidder could offer no assurance of his financial responsibility or his ability to operate the plant, or the price offered was too low, or the bidder requested the government to lend the bidder large sums for the erection of additional facilities or to erect such facilities at government expense.[6] The memorandum noted that the successful bid would "foster the development in the West of new independent enterprise" by encouraging the location of steel-consuming manufacturing plants in the Western states.

On June 17, 1946, the Attorney General advised the War Assets Administration that the proposed sale did not in his opinion constitute a violation of the antitrust laws, and the sale was consummated two days thereafter. The opinion of the Attorney General was requested in accordance with § 20 of the Surplus Property Act of 1944, 58 Stat. 765, 775, which requires such procedure when government plants costing more than $1,000,000 are being sold. That section provides that nothing in the Surplus Property Act "shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons" who buy property under the Act. The Attorney General noted that the ingot capacity of United States Steel had declined from 35.3 per cent of the total national capacity in 1939 to 31.4 per cent in 1946, and that if the Geneva plant were acquired, the percentage would be increased to 32.7 per cent. Considering only the Pacific Coast and Mountain states, the acquisition of Geneva, the Attorney General said, would increase United States Steel's percentage of capacity in that area from 17.3 per cent to 39 per cent. United States Steel, however, estimated that on acquisition of Geneva it would have 51 per cent of ingot capacity in the Pacific Coast area. On the basis of these figures construed in the light of *United States v. Aluminum Co. of America,* 148 F. 2d 416, and *American Tobacco Co. v. United States,* 328 U. S. 781, the Attorney General concluded that the proposed sale, as such, would not violate the antitrust laws. The letter added that no opinion was expressed as to the legality of any acts or practices in which United States Steel might have engaged or in which it might engage in the future. See for a comparable situation *United States v. United States Steel Corp.,* 251 U. S. 417, 446.

Prior to the sale of the Geneva plant, Alden G. Roach, President of Consolidated, approached Fairless of United States Steel and indicated that he would like to sell the business of Consolidated. Roach also had conversations with representatives of Bethlehem and Kaiser with regard to the same end. Roach mentioned the subject again to Fairless in February or March of 1946, and Fairless replied that United States Steel was restudying its decision not to bid on the Geneva plant, and did not want to discuss the purchase of Consolidated until the Geneva issue was decided. After the sale of Geneva was affected in June, Fairless spoke again with Roach and arranged to have a committee from United States Steel make an investigation of the Consolidated plants in August. The committee reported that it would cost $14,000,000 and take three years to construct plants equivalent to those owned by Consolidated, and that the Con-

[6] The bid of Colorado Fuel & Iron Corp. proposed that the government spend $47,935,000 for the erection of additional facilities, including over $25,000,000 for the erection of a sheet and tin-plate mill. The bid of Pacific-American Steel Iron Corp. proposed that the government lend the bidder $25,000,000 for the erection of a tin-plate mill. The bid of Riley Steel Co. proposed that the government lend the bidder $28,844,000 for the construction of a sheet mill, tube mill, and additions to the structural mill.

solidated properties had a depreciated value of $9,800,000. After further negotiations the parties agreed on a price of approximately $8,250,000, and a purchase agreement was executed on December 14 according to which Columbia agreed to buy the physical assets of Consolidated and four subsidiaries. Fairless testified on the witness stand that United States Steel's purpose in purchasing Consolidated was to assure a market for plates and shapes produced at Geneva, and Roach testified that Consolidated's purpose was to withdraw the stockholders' equity from the fabrication business with its cyclical fluctuations at a time when a favorable price could be realized.

I.

The theory of the United States in bringing this suit is that the acquisition of Consolidated constitutes an illegal restraint of interstate commerce because all manufacturers except United States Steel will be excluded from the business of supplying Consolidated's requirements of rolled steel products, and because competition now existing between Consolidated and United States Steel in the sale of structural fabricated products and pipe will be eliminated. In addition, the government alleges that the acquisition of Consolidated, viewed in the light of the previous series of acquisitions by United States Steel, constitutes an attempt to monopolize the production and sale of fabricated steel products in the Consolidated market. The appellees contend that the amount of competition which will be eliminated is so insignificant that the restraint effected is a reasonable restraint not an attempt to monopolize and not prohibited by the Sherman Act.[7] On the record before us and in agreement with the trial court we conclude that the government has failed to prove its contention that the acquisition of Consolidated would unreasonably lessen competition in the three respects charged, and therefore the proposed contract is not forbidden by § 1 of the Sherman Act. We further hold that the government has failed to prove an attempt to monopolize in violation of § 2.

We turn first to the charge that the proposed purchase will lessen competition by excluding producers of rolled steel products other than United States Steel from supplying the requirements of Consolidated. Over the ten-year period from 1937 to 1946 Consolidated purchased over two million tons of rolled steel products, including the abnormally high wartime requirements. Whatever amount of rolled steel products Consolidated uses in the future will be supplied insofar as possible from other subsidiaries of United States Steel, and other producers of rolled steel products will lose Consolidated as a prospective customer.

The parties are in sharp dispute as to the size and nature of the market for rolled steel products with which Consolidated's consumption is to be compared. The appellees argue that rolled steel products are sold on a national scale, and that for the major producers the entire United States should be regarded as the market. Viewed from this standpoint, Consolidated's requirements are an insignificant fraction of the total market, less than ½ of 1 per cent. The government argues that the market must be more narrowly drawn, and that the relevant market to be considered is the eleven-state area in which Consolidated sells its products, and further that in that area by considering only the consumption of structural and plate fabricators a violation of the Sherman Act has been established. If all sales of rolled steel products in the Consolidated market are considered, Consolidated's purchases of two million tons represent a little more than 3 per cent of the total of 60 million tons. The figure is not appreciably different if the five-year period 1937-41 or 1946 alone are used

[7] This was not a purchase of stock of a competing company. See § 7, Clayton Act, 38 Stat. 730, 731; *Federal Trade Comm'n v. Western Meat Co.*, 272 U. S. 554. It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints. See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Col. L. Rev. 179, 266.

In 1941 the Temporary National Economic Committee proposed that § 7 be amended to apply to acquisition of assets and to require prior approval by the Federal Trade Commission. See Comment, 57 Yale L. J. 613, for a description of the bills which have been introduced before Congress to carry out these recommendations.

as the measuring periods.[8] If the comparable market is construed even more narrowly, and is restricted to the consumption of plates and shapes in the Consolidated market, figures for 1937 indicate that Consolidated's consumption of plates and shapes was 13 per cent of the total. Data are offered by the government for 1946 which are too uncertain to furnish a reliable guide.[9]

The government realizes the force of appellees' argument that rolled steel products are sold on a national scale, and attempts to demonstrate that during the non-war years 80 per cent of Consolidated's requirements were produced on the West Coast; Consolidated resorts to data not in the record to demonstrate that in fact only 26 per cent of Consolidated's rolled steel purchases were produced in plants located in the Consolidated market area.[10] Whether we accept the government's or Consolidated's figures, however, they are of little value in determining the extent to which West Coast fabricators will purchase rolled steel products in the eastern market in the future, since the construction of new plants at Geneva and Fontana and the creation of new basing points on the West Coast will presumably give West Coast rolled steel producers a far larger share of the West Coast fabricating market than before the war.

Another difficulty is that the record furnishes little indication as to the propriety of considering plates and shapes as a market distinct from other rolled steel products. If rolled steel producers can make other products as easily as plates and shapes, then the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products. The record suggests, but does not conclusively indicate, that rolled steel producers can make other products interchangeably with shapes and plates, and that therefore we should not measure the potential injury to competition by considering the total demand for shapes and plates alone, but rather compare Consolidated's demand for rolled steel products with the demand for all comparable rolled steel products in the Consolidated marketing area.

We read the record as showing that the trial court did not accept the theory that the comparable market was restricted to the

[8] The following table was accepted by the trial court as correct:

Year	Industry production all rolled steel products	U. S. Steel subsidiaries production all rolled steel products	Estimated consumption all rolled steel products 11 states	U. S. Steel subsidiaries shipment of all rolled steel production into the 11 states	Consolidated's purchases all rolled steel products
1937	38,345,158	14,097,666	4,362,900	1,556,085	103,286
1938	21,356,398	7,315,506	2,670,000	1,046,287	44,050
1939	34,955,175	11,707,251	3,630,000	1,434,383	69,862
1940	45,965,971	15,013,749	4,337,990	1,686,129	117,644
1941	60,942,979	20,416,604	6,008,757	2,441,840	163,428
1942	60,591,052	20,615,137	8,489,204	3,181,358	339,711
1943	62,210,261	20,147,616	10,124,831	3,706,886	404,180
1944	63,250,519	21,052,179	9,587,503	3,495,231	390,532
1945	56,602,322	18,410,264	7,232,590	2,378,112	225,273
1946	48,993,777	15,181,719	6,000,000	1,810,982	178,669
Total	493,213,612	163,957,691	62,443,775	22,737,293	2,036,635

[9] The government notes that United States Steel in its bid for the Geneva plant estimated that the postwar market in seven Western states would be 227,000 tons of plates and 213,000 tons of shapes per year, and compares with these figures the 1946 purchases of Consolidated of 107,128 tons of plates and 43,770 tons of shapes. Apart from the fact that the figures for estimated consumption included only seven states as against eleven in the Consolidated market, Consolidated's purchases in 1946 were principally devoted to finishing up war contracts. The figures for estimated consumption were based on the assumption that the level of activity would be considerably lower than during the war.

[10] The table from which the government derives this figure of 80 per cent is inconclusive. It refers to "Purchases from West Coast Producers" and does not indicate whether the producers themselves produced the rolled steel products or were acting as agents of eastern producers. There is no challenge to Consolidated's statement that during the years 1937-41 and 1946 deliveries to it from the rolled steel production of the West Coast totaled 208,093 tons as against 495,848 tons from eastern producers.

demand for plates and shapes in the Consolidated area, but did accept the government's theory that the market was to be restricted to the total demand for rolled steel products in the eleven-state area. On that basis the trial court found that the steel requirements of Consolidated represented "a small part" of the consumption in the Consolidated area, that Consolidated was not a "substantial market" for rolled steel producers selling in competition with United States Steel, and that the acquisition of Consolidated would not injure any competitor of United States Steel engaged in the production and sale of rolled steel products in the Consolidated market or elsewhere. We recognize the difficulty of laying down a rule as to what areas or products are competitive, one with another. In this case and on this record we have circumstances that strongly indicate to us that rolled steel production and consumption in the Consolidated marketing area is the competitive area and product for consideration.

In analyzing the injury to competition resulting from the withdrawal of Consolidated as a purchaser of rolled steel products, we have been considering the acquisition of Consolidated as a step in the vertical integration of United States Steel. Regarded as a seller of fabricated steel products rather than as a purchaser of rolled steel products, however, the acquisition of Consolidated may be regarded as a step in horizontal integration as well, since United States Steel will broaden its facilities for steel fabrication through the purchase of Consolidated. In determining the extent of competition between Consolidated and the two structural fabrication subsidiaries of United States Steel in the sale of fabricated steel products, we must again determine the size of the market in which the two companies may be said to compete. The parties agree that United States Steel does no plate fabrication, and that competition is restricted to fabricating structural steel products and pipe. Consolidated makes pipe by bending and welding plates, whereas National Tube, a United States Steel subsidiary, makes seamless pipe through a process which the parties agree does not fall under the heading of steel fabrication.

We turn first to the field of fabricated structural steel products. As in the case of rolled steel, the appellees claim that structural fabricators sell on a national scale, and that Consolidated's production must be measured against all structural fabricators. An index of the position of Consolidated as a structural fabricator is shown by its bookings for the period 1937-1942, as reported by the American Institute of Steel Construction. During that period total bookings in the entire country were nearly 10,000,000 tons, of which Consolidated's share was only 84,533 tons. The government argues that competition is to be measured with reference to the eleven-state area in which Consolidated sells its products. Viewed on that basis, total bookings for the limited area for the six-year period were 1,665,698, of which United States Steel's share was 17 per cent and Consolidated's 5 per cent. The government claims that Consolidated has become a more important factor since that period, and alleges that bookings for 1946 in the Consolidated market were divided among 90 fabricators, of which United States Steel had 13 per cent and Consolidated and Bethlehem Steel each had 11 per cent. The next largest structural fabricators had 9 per cent, 6 per cent and 3 per cent of the total.[11] Although the appellees

[11] *10 largest structural steel fabricators in the 11 Western States, 1946.*

Company	Location	Bookings (net tons)	Per cent of total
All companies		336,717	100.0
United States Steel Corp.	Pittsburgh, Pa.	44,083	12.9
Consolidated Steel Corp.	Los Angeles, Calif.	36,142	10.6
Bethlehem Steel Co.	Bethlehem, Pa.	36,047	10.6
Mosher Steel Co.	Houston, Tex.	29,814	8.7
Chicago Bridge & Iron Co.	Chicago, Ill.	21,588	6.3
Isaacson Iron Works	Seattle, Wash.	10,656	3.1
Kansas City Structural Co.	Kansas City, Kans.	10,051	2.9
Midwest Steel & Iron Works Co.	Denver, Colo.	9,306	2.7
Northwest Steel Rolling Mills, Inc.	Seattle, Wash.	9,000	2.6
Structural Steel & Forge Co.	Salt Lake City, Utah	8,300	2.4
Total 10 companies		214,987	63.0
Remaining 80 companies		121,730	37.0

The table quoted includes a correction as to Consolidated's bookings which was made after the exhibit was introduced.

challenge the accuracy of the government's 1946 figures, and the district court made no reference to them in the findings, we accept them as sufficiently reliable for our present purpose. The figures on which the government relies demonstrate that at least in the past competition in structural steel products has been conducted on a national scale. Five out of the ten structural fabricators having the largest sales in the Consolidated market perform their fabrication operations outside the area, including United States Steel and Bethlehem Steel. Purchasers of fabricated structural products have been able to secure bids from fabricators throughout the country, and therefore statistics showing the share of United States Steel and Consolidated in the total consumption of fabricated structural products in any prescribed area are of little probative value in ascertaining the extent to which consumers of these products would be injured through elimination of competition between the two companies.

As in the case of rolled steel products, however, wartime developments have made prewar statistics of little relevance. The appellees urge three reasons why eastern fabricators will be at a competitive disadvantage with western fabricators for the western market: the availability of rolled steel products from the Geneva plant and other West Coast plants at a lower price, the increase in commercial freight rates on fabricated products, and the abolition of land grant rates. The increase in freight rates has made it less profitable for eastern fabricators to sell in the West, and the elimination of land grant rates on government shipments has made it less profitable for eastern fabricators to sell to government agencies in the West. Whatever competition may have existed in the past between Consolidated and the two bridge company subsidiaries of United States Steel, the appellees urge, will exist to a much lesser extent in the future.[12] Consequently, even though the government may be correct in claiming that the eleven-state area is the proper market for measuring competition with Consolidated, the government may not at the same time claim that prewar statistics as to United States Steel's share of that market are of major significance.

Apart from the question of the geographical size of the market, the appellees urge that the bookings for fabricated structural steel products are of little significance because Consolidated and United States Steel make different types of structural steel products. In view of the fact that structural steel jobs are fabricated on an individual basis, it is difficult to compare the output of United States Steel with that of Consolidated, but the appellees argue that in general Consolidated does only light and medium fabrication, whereas United States Steel does heavy fabrication. The appellees support their argument with an elaborate statistical analysis of bids by the two companies. Those figures show that Consolidated and United States Steel submitted bids for the same project in a very small number of instances.[13] Such figures are not conclusive of lack of competition; the government suggests that knowledge that one party has submitted a bid may discourage others from bidding. The government has introduced very little evidence, however, to show that in fact the types of structural steel products sold by Consolidated are similar to those sold by United States

[12] The trial court found that the fabricating subsidiaries of United States Steel would be eliminated from the West Coast market in the future except for specialized products which they are equipped to fabricate economically and which sell at higher prices per ton of product.

Since the record was made up in this case, United States Steel has announced that the mill price for Geneva steel products has been reduced $3 per ton, effective May 1, 1948. That amount represented the previously existing mill price differential of Geneva steel products over products produced at Pittsburgh, Chicago, Gary, and Birmingham. U. S. Steel Quarterly, Vol. 2, No. 2, May 1948, p. 6.

[13] During the ten-year period ending in 1946 United States Steel bid on 2,409 jobs in the Consolidated area and was successful in 839. Consolidated bid on 6,377 jobs and was successful in 2,390. There were only 166 jobs, however, on which both companies bid. Forty of these jobs on which both companies bid were awarded to United States Steel, 35 were awarded to Consolidated, and 91 were awarded to competitors. Reducing these figures to a tonnage basis, United States Steel was awarded bids covering 499,605 tons out of a total tonnage on which bids were submitted of 1,273,152 tons. Consolidated bid on jobs involving 578,847 tons and was awarded 157,997 tons. The tonnage involved in the 166 common bids was 122,353 tons, of which United States Steel's share was 38,920, Consolidated's 24,162, and other competitors 59,271.

The above figures indicate that Consolidated customarily bid on lighter types of work; the average tonnage for Consolidated's bids was 90 tons, whereas the average tonnage for United States Steel was 528 tons. The 166 jobs on which both companies submitted bids were considerably larger in volume, averaging 737 tons.

Steel. The appellees further urge that only a small proportion of Consolidated's business fell in the category of structural steel products, and that as to plate fabrication and miscellaneous work there was no competition with United States Steel whatsoever. The trial court found on this issue that 16 per cent of Consolidated's business was in structural steel products and 70 per cent in plate fabrication. On the basis of the statistics here summarized, the trial court found that competition between the two companies in the manufacture and sale of fabricated structural steel products was not substantial.

The government also argues that competition will be eliminated between Consolidated and National Tube in the sale of pipe. In this field we have no difficulty in determining the geographical scope of the market to be considered in determining the extent of competition, since the government claims that Consolidated and National Tube compete on a nation-wide scale in the field of large diameter pipe for oil and gas pipelines. Other types of pipe made by the two concerns are apparently not competitive as the government does not contest this assertion of the appellees.[14] Consolidated in the past has specialized in comparatively light walled pipe for low pressure purposes, such as irrigation and water transmission, whereas National Tube has made a heavy walled pipe for high pressure purposes which is used chiefly in the oil and gas industry. National Tube pipe is substantially cheaper to produce. The record does show, however, that in the last few years Consolidated has supplied large diameter pipe for oil and gas pipelines on at least four occasions in three of which National Tube also supplied part of the pipe requirements.[15] Although the record does not show the extent of Consolidated's business in this field, one of the witnesses estimated that Consolidated's contract to furnish 90 per cent of the pipe for the Trans-Arabian pipeline would run to almost $30,000,000. The appellees seek to minimize the importance of competition in this field by pointing out that the pipe to be used for the Trans-Arabian pipeline is 30 and 31 inches in diameter, which is too large a size to be made by the seamless process employed by National Tube. The record is barren on the comparative production between Consolidated and its competitors, other than United States Steel, in the manufacture of large pipe. The record does show that other major companies, not connected with any of the parties to this proceeding, do manufacture welded and seamless pipe.[16] The appellees further claim that under normal circumstances Consolidated and National Tube would not compete in this field because Consolidated pipe sells for $30 a ton more than National Tube pipe, and that Consolidated is able to sell its pipe only because of the inability of National Tube and other concerns to take on additional orders. The government argues in reply that Consolidated may be able to

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[14] The following extract from the record summarizes the evidence on this question:

"A. The type of pipe made by Consolidated is electric weld pipe known as fusion weld or arc weld pipe in sizes from 4-inch up to say 30-inch. We don't make any electric weld pipe. The pipe that Consolidated make other than the pipe larger than 26-inch is made primarily for and sold to the water works industry, and our pipe is sold primarily to the oil and gas industry. We don't make the same type of pipe, and the sizes which we manufacture and the gages and the lengths are in general quite different from those made by Consolidated Steel. They only overlap at a very small part of the field insofar as the physical dimensions of the pipe are concerned.

"Q. You have spoken of pipe made by Consolidated for water conveyance. Are those what have been referred to as penstocks?

"A. No, sir. Well, yes, to a certain extent penstocks, and many other types of low-pressure water pipe. It is true that penstocks are included in that as far as Consolidated is concerned. National Tube Company do not make any penstock pipe. They have not made any for ten years.

"Q. And none of what you term light-pressure pipe?

"A. We don't compete with that. We make high-pressure pipe only."

[15] Roach testified that the first order which Consolidated had filled for such pipe was for the Southern Counties and Southern California gas line, but he did not indicate the size or date of the order. The president of National Tube testified that Consolidated contracted in 1946 to furnish 100 miles of 26-inch pipe for the El Paso Natural Gas Co., National Tube contracted to supply 230 miles, and a third competitor 400 miles. The same witness also testified that National Tube contracted in 1946 to supply a small amount of 24-inch pipe to the Pacific Gas and Electric Co., and that Consolidated in 1947 also agreed to furnish a quantity of pipe for the same pipeline. As of November 30, 1946, Consolidated had unfilled orders for "heavy pipe" of $9,830,079, a figure which does not include the Pacific Gas and Electric or Trans-Arabian order.

[16] *E. g.*, Republic Steel Corp., A. O. Smith Corp., Youngstown Sheet and Tube Co. There are other producers in the West.

reduce its costs of production if a sufficiently large volume of orders is obtained, but no evidence is adduced to support such a conclusion.

The opinion of the trial court summarized the facts outlined above, and concluded that there was no substantial competition between National Tube and Consolidated in the sale of pipe; one of the findings went even further, stating that the two companies "do not compete" in the sale of their pipe products.

The trial court also concluded that the government had failed to prove that United States Steel had attempted to monopolize the business of fabricating steel products in the Consolidated market in violation of § 2. The trial judge apparently was of the opinion that since the purchase of Consolidated did not constitute a violation of § 1, it could not constitute a violation of § 2, since every attempt to monopolize must also constitute an illegal restraint. In his findings the trial judge concluded that the purchase agreement was entered into "for sound business reasons" and with no intent to monopolize the production and sale of fabricated steel products.

II.

In support of its position that the proposed contract violates § 1 of the Sherman Act, the government urges that all the legal conclusions of the district court were erroneous. It is argued that without regard to the percentages of consumption of rolled steel products by Consolidated just considered, the acquisition by United States Steel of Consolidated violates the Sherman Act. Such an arrangement, it is claimed, excludes other producers of rolled steel products from the Consolidated market and constitutes an illegal restraint *per se* to which the rule of reason is inapplicable. Or, phrasing the argument differently, the government's contention seems to be that the acquisition of facilities which provide a controlled market for the output of the Geneva plant is a process of vertical integration and invalid *per se* under the Sherman Act. The acquisition of Consolidated, it is pointed out, would also eliminate competition between Consolidated and the subsidiaries of United States Steel in the sale of structural steel products and pipe products, and would eliminate potential competition from Consolidated in the sale of other steel products. We also note that the acquisition of Consolidated will bring United States for the first time into the field of plate fabrication.

A. We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. In *United States v. Yellow Cab Co.*, 332 U. S. 218, we sustained the validity of a complaint which alleged that the defendants had monopolized the cab operating business in four large cities.[37] It is the volume in the area which the alleged restraints affect that is important. In *United States v. Griffith*, — U. S. —, we found restraint of trade by a chain of motion picture exhibitors covering a small area. Although our previous discussion has indicated the difficulties in accepting the eleven-state area in which Consolidated sells its products as the relevant competitive market, we accept for the purposes of decision the government's argument that this area is the one to be considered in measuring the effect on competition of the withdrawal of Consolidated as a market for other rolled steel producers and of the bringing together under common control of Consolidated and

[37] 332 U. S. at 226:

"Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in *Indiana Farmer's Guide Co. v. Prairie Farmer Co.*, 293 U. S. 268, 279, 'The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce.' It follows that the complaint in this case is not defective for failure to allege that CCM has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States. Its relative position in the field of cab production has no necessary relation to the ability of the appellees to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient."

the fabricating subsidiaries of United States Steel.

B. The government relies heavily on *United States v. Yellow Cab Co., supra,* to support its argument that the withdrawal of Consolidated as a possible consumer for the goods of other rolled steel producers constitutes an illegal restraint. The complaint in the *Yellow Cab* case charged that there was a plan, an intent, to monopolize the cab business, from manufacture through operation in the four large cities, by acquiring cab operating companies or interests therein; tying those companies into a cab manufacturing company and requiring the operating companies to purchase their cabs from the manufacturer at a price above the prevailing market. There was no allegation that the volume of cab production which was thus excluded as a market for rival cab manufacturers was a substantial proportion of the total volume of cabs produced, and the government concludes that the case stands for the proposition that it is illegal *per se* for a manufacturer to preempt any market for his goods through vertical integration provided that an "appreciable" amount of interstate commerce is involved.[18]

We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor producers to market their rolled steel.[19] In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing,[20] or have concertedly refused to deal with nonmembers of an association,[21] or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device,[22] then the amount of commerce involved is immaterial because such restraints are illegal *per se*. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*.

A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists. That this is the teaching of the *Yellow Cab* case is indicated by the following quotation:

> "And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the

[18] The government relies particularly on the following excerpt, 332 U. S. at 226-27:

"Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act. . . . In addition, by preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce."

[19] The general language of §§ 1 and 2 of the Sherman Act has been construed as prohibiting only unreasonable restraints, not all possible restraints of trade. *Standard Oil Co. v. United States*, 221 U. S. 1. In this it differs somewhat from the more specific language of the Clayton Act, 38 Stat. 730, or the Federal Trade Commission Act, 38 Stat. 717. See *Federal Trade Comm'n v. Morton Salt Co.*, No. 464, 1947 Term, slip opinion p. 7, and *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356.

[20] *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

[21] *Associated Press v. United States*, 326 U. S. 1; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38. See *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457.

[22] *International Salt Co. v. United States*, 332 U. S. 392.

alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States v. Reading Co.,* 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred." 332 U. S. at 227-28.

That view is in accord with previous decisions of the Court.[23]

The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.

In *United States v. Paramount Pictures,* — U. S. —, we were presented with a situation in which the government charged that vertical integration was illegal under the Sherman Act. We held that control by the major producer-distributors over nearly three-quarters of the first-run theaters in cities with population over 100,000 was not of itself illegal, and we remanded the case to the district court for further findings. In outlining the factors which we considered to be significant in determining the legality of vertical integration, we emphasized the importance of characterizing the nature of the market to be served, and the leverage on the market which the particular vertical integration creates or makes possible. A second test which we considered important in the *Paramount* case was the purpose or intent with which the combination was conceived. When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act. Compare *United States v. Griffith,* — U. S. —, —.[24]

It seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act. It is an in-

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[23] Compare our statement in *United States v. Paramount Pictures,* — U. S. —, —, slip opinion, p. 36:

"Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se.* But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs."

The legality of contractual arrangements for exclusive dealing was sustained in *United States v. Bausch & Lomb Co.,* 321 U. S. 707, 728-29. Compare *Federal Trade Comm'n v. Curtis Publishing Co.,* 260 U. S. 568.

[24] Slip opinion, pp. 6-7:

"Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. *Standard Oil Co. v. United States,* 221 U. S. 1, 61. But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade. Section 2 is not restricted to conspiracies or combinations to monopilize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States v. Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 811, 814."

definite term without explicit meaning. Even in the iron industry where could a line be drawn—at the end of mining the ore, the production of the pig-iron or steel ingots, when the rolling mill operation is completed, fabrication on order or at some stage of manufacture into standard merchandise? No answer would be possible and therefore the extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases. Technological advances may easily require a basic industry plant to expand its processes into semi-finished or finished goods so as to produce desired articles in greater volume and with less expense.

It is not for courts to determine the course of the Nation's economic development. Economists may recommend, the legislative and executive branches may chart legal courses by which the competitive forces of business can seek to reduce costs and increase production so that a higher standard of living may be available to all. The evils and dangers of monopoly and attempts to monopolize that grow out of size and efforts to eliminate others from markets, large or small, have caused Congress and the Executive to regulate commerce and trade in many respects. But no direction has appeared of a public policy that forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nation-wide or country-wide. On the other hand, the courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed. The basic industries, with few exceptions, do not approach in America a cartelized form. If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts.

Applying the standards laid down in the *Paramount* case, we conclude that the so-called vertical integration resulting from the acquisition of Consolidated does not unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product. We accept as the relevant competitive market the total demand for rolled steel products in the eleven-state area; over the past ten years Consolidated has accounted for only 3% of that demand, and if expectations as to the development of the Western steel industry are realized, Consolidated's proportion may be expected to be lower than that figure in the future. Nor can we find a specific intent in the present case to accomplish an unreasonable restraint, for reasons which we discuss under heading III of this opinion.

[*Acquisition of Competitors*]

C. We turn now to a discussion of the significance, as to possible violation of the Sherman Act, of the fact that Consolidated has been a competitor of United States Steel in structural steel fabrication and in the manufacture of pipe. The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor.[26] The relative effect of percentage command of a market varies with the setting in which that factor is placed.

The United States makes the point that the acquisition of Consolidated would preclude and restrain substantial potential competition in the production and sale of other

[26] Compare *United States v. Aluminum Co. of America*, 148 F. 2d 416, 424; Handler, *supra*, note 7, tables, p. 245. See also Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. of Chicago L. Rev. 567, 575-86.

steel products than fabricated structural steel and pipe. Force is added to this contention by the fact, adverted to above at pages 3 and 15, that United States Steel does no plate fabrication while Consolidated does. By plate fabrication Consolidated produces many articles not now produced by United States Steel. We mention, as examples, boilers, gas tanks, smoke stacks, storage tanks and barges. Attention is also called to the war activities of Consolidated in steel shipbuilding as indicative of its potentialities as a competitor. We have noted, page 2, *supra,* that this construction was under government direction and financing. We agree that any acquisition of fabricating equipment eliminates some potential competition from anyone who might own or require such facilities. We agree, too, with the government's position that potential competition from producers of presently non-competitive articles as well as the possibility that acquired facilities may be used in the future for the production of new articles in competition with others may be taken into consideration in weighing the effect of any acquisition of assets on restraint of trade.[26]

The government's argument, however, takes us into highly speculative situations. Steel ship construction for war purposes was an enterprise undertaken at government expense. We know of nothing from the record that would lead Consolidated or United States Steel to branch out into the peacetime steel ship industry at their own risk. The necessary yards have been sold. It is true that United States Steel might go into plate fabrication. The record shows nothing as to production or demand in the Consolidated trade area for plate fabricated articles. Nothing appears as to the number of producers of such goods in that territory. What we have said in other places in this opinion as to the growing steel industry in this area is pertinent here. Eastern fabricators will find it difficult to meet competition from western fabricators in the western market. Cheaper western rolled steel and freight rates are a handicap to eastern fabricators. Looking at the situation here presented, we are unwilling to hold that possibilities of interference with future competition are serious enough to justify us in declaring that this contract will bring about unlawful restraint.

We conclude that in this case the government has failed to prove that the elimination of competition between Consolidated and the structural fabricating subsidiaries of United States Steel constitutes an unreasonable restraint. If we make the doubtful assumption that the United States Steel could be expected in the future to sell 13 per cent of the total of structural steel products in the Consolidated trade area and that Consolidated could be expected to sell 11 per cent, we conclude that where we have the present unusual conditions of the western steel industry and in view of the facts of this case as developed at pages 15 to 19, of this opinion, it can not be said there would be an unreasonable restraint of trade. To hold this does not imply that additional acquisitions of fabricating facilities for structural steel would not become monopolistic. Notwithstanding some differences as to the business of Consolidated and United States Steel in respect to the character of structural steel products fabricated by each, there is competition between the two for both light and heavy work. The western steel industry is developing. Fontana and Geneva as well as other producers are making available for fabricators larger supplies of rolled steel so that the West is becoming less dependent on eastern suppliers. We are of the opinion, moreover, in view of the number of West Coast fabricators (see page 6) and the ability of out-of-the-area fabricators to compete because of the specialized character of structural steel production in regard to orders and designs, that this acquisition is permissible.

We likewise conclude that the elimination of competition between Consolidated and National Tube (a United States Steel subsidiary) does not constitute an unreasonable restraint. Competition at the time of the contract was restricted to the sale of large diameter pipe for oil and gas pipelines, see pages 19 to 21, *supra,* and the only indication in the record that competition in pipe would exist in a broader field in the future is contained in the suggestion, without proof or specification that Consolidated, through technological advances or business expansion might produce a wider range of pipe sizes and types. This is not enough to persuade us that the purchase will unduly restrain trade in pipe. The record does show that in three instances Consolidated and Na-

[26] *United States v. Southern Pacific Co.,* 259 U. S. 214; *United States v. Reading Co.,* 253 U. S. 26.

tional Tube each supplied pipe for a new pipeline. It is clear that these line pipe contracts were obtained by Consolidated in a seller's market. We are given nothing as to the national production of oil and gas trunkline pipe or the relation of the pipe sold by Consolidated and National Tube to this production. The government does not contest appellees' statement that Consolidated pipe for this purpose is substantially more expensive than seamless pipe, and in the absence of a showing that welded pipe has advantages over seamless pipe to compensate for the increased cost or that Consolidated's production costs may be expected to decline with an increase in volume, it does not seem to us that it has been shown that competition in this field between the parties to this contract is so substantial that its elimination under these circumstances constitutes an unreasonable restraint.

The government cites four antitrust cases involving railroads to support its argument that control by one competitor over another violates the Sherman Act, even though the percentage of business for which they compete may be small.[27] The appellees cite cases from this Court and lower courts in which acquisition by one competitor of another was held not to violate the antitrust laws.[28] We do not stop to examine those cases to determine whether we would now approve either their language or their holdings. The factual situation in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief requested by the government.[29]

III.

We turn last to the allegation of the government that United States Steel has attempted to monopolize the production and sale of fabricated steel products in the Consolidated market. We think that the trial court applied too narrow a test to this charge; even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown.[30] To show that specific intent the government recites the long history of acquisition of United States Steel and argues that the present acquisition when viewed in the light of that history demonstrates the existence of a specific intent to monopolize. Although this Court held in 1920[31] that United States Steel had not violated § 2 through the acquisition of 180 formerly independent concerns, we may look to those acquisitions as well as to the eight acquisitions from 1924 to 1943 to determine the intent of United States Steel in acquiring Consolidated.

We look not only to those acquisitions, however, but also to the latest acquisition—the government-owned plant at Geneva. We think that last acquisition is of significance in ascertaining the intent of United States Steel in acquiring Consolidated.[32] The bid of United States Steel for the Geneva plant emphasized the importance of erecting finishing facilities to assure a market for Geneva's production, and we think it a fact of weight that many of the other bids were conditioned upon the government lending money or making grants for erecting such facilities at no cost to the bidder. No objection was interposed when United States Steel indicated that it proposed to spend $25,000,000 to erect a cold reduction mill at Pittsburg, and it is doubtful whether objections could be raised if United States Steel proposed to build instead of to buy from a competitor fabricating facilities similar to those possessed by Consolidated. The reasons given by Consolidated and United States Steel for the purchase and sale of the assets here involved seem not to involve any action condemned by the Sherman Act. Granting that the sale will to some extent affect competition, the acquisition of a firm outlet to absorb a portion of Geneva's rolled steel production seems to reflect a normal business purpose rather than a scheme to circumvent the law. United States Steel, despite its large sales, many acquisitions and leading position in the

[27] *United States v. Southern Pacific Co.*, 259 U. S. 214; *United States v. Union Pacific R. Co.*, 226 U. S. 61; *United States v. Reading Co.*, 253 U. S. 26; *Northern Securities Co. v. United States*, 193 U. S. 197.

[28] *International Shoe Co. v. Federal Trade Comm'n*, 280 U. S. 291; *United States v. United States Steel Corp.*, 251 U. S. 417; *United States v. United Shoe Machinery Co.*, 247 U. S. 32; *United States v. Standard Oil Co. of New Jersey*, 47 F. 2d 288; *United States v. Republic Steel Corp.*, 11 F. Supp. 117.

[29] See Handler, *supra*, note 7, at 269-71.

[30] *United States v. Griffith, supra*, note 24.

[31] *United States v. United States Steel Corp.*, 251 U. S. 417.

[32] *Id.*, at 446.

industry, has declined in the proportion of rolled steel products it manufacturers in comparison with its early days. In 1901 it produced 50.1 per cent; in 1911, 45.7 per cent; in 1946, 30.4 per cent.[33] For the period 1937-1946, it produced 33.2 per cent.[34] Its size is impressive. Size has significance also in an appraisal of alleged violations of the Sherman Act. But the steel industry is also of impressive size and the welcome westward extension of that industry requires that the existing companies go into production there or abandon that market to other organizations.

We have dealt with the objections to this purchase because of the exclusion of other rolled steel producers from supplying Consolidated's demand for that product and because of the alleged restraint of trade involved in the extension of United States Steel's fabricating and pipe commerce. It has been necessary to treat these arguments separately so as to isolate the facts and figures which convince us that these objections do not rise to the level of proving a violation of law. It only need be added that we have also considered the various items of objection in the aggregate and in the light of the charge of intent to monopolize. But even from that point of view, the government has not persuaded us that the proposed contract violates our public policy as stated in the Sherman Act.

The judgment of the District Court is affirmed.

[Dissenting Opinion]

Mr. JUSTICE DOUGLAS, with whom Mr. JUSTICE BLACK, Mr. JUSTICE MURPHY, and Mr. JUSTICE RUTLEDGE, concur, dissenting.

This is the most important antitrust case which has been before the Court in years. It is important because it reveals the way of growth of monopoly power—the precise phenomenon at which the Sherman Act was aimed. Here we have the pattern of the evolution of the great trusts. Little independent units are gobbled up by bigger ones. At times the independent is driven to the wall and surrenders. At other times any number of "sound business reasons" appear why the sale to or merger with the trust should be made.[1] If the acquisition were the result of predatory practices or restraints of trade, the trust could be required to disgorge. *Schine Chain Theatres Inc. v. United States*, 333 U. S. —. But the impact on fu-

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[33] The figures for 1901 and 1911 are taken from *United States v. United States Steel Corp.*, 223 Fed. 55, 67.

[34] The record includes an unchallenged table showing the proportion of total national production of steel ingots and steel for casting attributable to United States Steel from 1901 through 1946. It is taken from the statistical reports of the American Iron and Steel Institute and United States Steel. It may be summarized by saying it shows an irregular reduction from over 60 per cent to less than 33⅓ per cent.

[1] The most frequent reasons given for mergers are that they prevent waste and promote efficiency, reduce overhead, dilute sales and advertising costs, spread risks, etc. Compare, New Mergers, New Motives, Business Week, Nov. 10, 1945, p. 68; Growth of Business Units: Effect of War and Shortages, United States News, May 10, 1946, p. 48. But that these advantages are largely illusory has long been recognized. See, *e. g.*, Relative Efficiency of Large, Medium-sized, and Small Business (TNEC Monograph 13, 1941) pp. 111, 128, 132, 398. The theory was never more forcefully exploded than by Brandeis in The Curse of Bigness:

"The only argument that has been seriously advanced in favor of private monopoly is that competition involves waste, while the monopoly prevents waste and leads to efficiency. This argument is essentially unsound. The wastes of competition are negligible. The economies of monopoly are superficial and delusive. The efficiency of monopoly is at the best temporary.

"Undoubtedly competition involves waste. What human activity does not? The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it more efficient than absolutism. So it is with competition. The waste is relatively insignificant. There are wastes of competition which do not develop, but kill. These the law can and should eliminate, by regulating competition.

"It is true that the unit in business may be too small to be efficient. It is also true that the unit may be too large to be efficient, and this is no uncommon incident of monopoly." P. 105.

". . . no monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the processes of manufacture or distribution as to enable it to control the market solely by reason of its superiority." P. 114-15.

"The Steel Trust, while apparently free from the coarser forms of suppressing competition, acquired control of the market not through greater efficiency, but by buying up existing plants and particularly ore supplies at fabulous prices, and by controlling strategic transportation systems." P. 115.

"But the efficiency of monopolies, even if established, would not justify their existence unless the community should reap benefit from the efficiency; experience teaches us that whenever trusts have efficiency, their fruits have been absorbed almost wholly by the trusts themselves. From such efficiency as they have developed the community has gained substantially nothing. For instance: . . . *The Steel Trust*, a corporation of reputed efficiency. The high prices maintained by it in the industry are matters of common knowledge. In less than ten years

ture competition and on the economy is the same though the trust was built in more gentlemanly ways.

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices.[2] Control of prices in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression—an economy of abundance or scarcity. Size in steel should therefore be jealously watched.[3] In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrevelant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

The Court forgot this lesson in *United States v. United States Steel Corp.*, 251 U. S. 417, and in *United States v. International Harvester Co.*, 274 U. S. 693. The Court today forgets it when it allows United States Steel to wrap its tentacles tighter around the steel industry of the West.

This acquisition can be dressed up (perhaps legitimately) in terms of an expansion to meet the demands of a business which is growing as a result of superior and enterprising management.[4] But the test under the Sherman Act strikes deeper. However the acquisition may be rationalized, the effect is plain. It is a purchase for control, a purchase for control of a market for which United States Steel has in the past had to compete but which it no longer wants left to the uncertainties that competition in the West may engender. This in effect it concedes. It states that its purpose in acquiring Consolidated is to insure itself of a market for part of Geneva's production of rolled steel products when demand falls off.

But competition is never more irrevocably eliminated than by buying the customer for whose business the industry has been competing. The business of Consolidated amounts to around $22,000,000 annually. The competition purchases by Consolidated are over $5,000,000 a year. I do not see how it is possible to say that $5,000,000 of commerce is immaterial. It plainly is not *de minimis.* And it is the character of the restraint which § 1 of the Act brands as illegal, not the amount of commerce affected. *Montague & Co. v. Lowry,* 193 U. S. 38; *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 225, n. 59; *United States v. Yellow Cab Co.,* 332 U. S. 218, 225. At least it can be said here, as it was in *International Salt Co. v. United States,* 332 U. S. 392, 396, that the volume of business restrained by this contract is not insignificant or insubstantial. United States Steel does not consider it insignificant, for the aim of this well-conceived project is to monopolize it. If it is not insubstantial as a market for United States Steel, it certainly is not from the point of view of the struggling western units of the steel industry.

It is unrealistic to measure Consolidated's part of the market by determining its proportion of the national market. There is no safeguarding of competition in the theory that the bigger the national market the less protection will be given those selling to the

it accumulated for its shareholders or paid out as dividends on stock representing merely water, over $650,000,000." Pp. 120-121.

[2] See Relative Efficiency of Large, Medium-sized, and Small Business (TNEC Monograph 13, 1941) p. 132.

[3] In 1911 when the original antitrust suit against United States Steel was instituted, the company had already absorbed 180 formerly independent concerns. See *United States v. United States Steel Corp.*, 223 F. 55, 162. Since then it has absorbed at least 8 additional independent companies, including Columbia which prior to 1930 was operated by an independent producer and maintained the only integrated steel operation west of the Rockies.

[4] See note 1, *supra.*

smaller components thereof. That theory would allow a producer to absorb outlets upon which small enterprises with restricted marketing facilities depend. Those outlets, though statistically unimportant from the point of view of the national market, could be a matter of life and death to small, local enterprises.

The largest market which must be taken for comparison is the market actually reached by the company which is being absorbed. In this case Consolidated's purchases of rolled steel products are a little over 3 per cent of that market. By no standard—United States Steel's or its western competitors—can that percentage be deemed immaterial. Yet consideration of the case from that viewpoint puts the public interest phase of the acquisition in the least favorable light. A surer test of the impact of the acquisition on competition is to be determined not only by consideration of the actual markets reached by Consolidated but also by the actual purchases which it makes. Its purchases were predominantly of plates and shapes—76 per cent from 1937-1041. This was in 1937 13 per cent of the total in the Consolidated market. That comparison is rejected by the Court or at least discounted on the theory that competitors presently selling to Consolidated can probably convert from plates and shapes to other forms of rolled steel products. But a surer test of the effect on competition is the actual business of which competitors will be deprived. We do not know whether they can be sufficiently resourceful to recover from this strengthening of the hold which this giant of the industry now has on their markets. It would be more in keeping with the spirit of the Sherman Act to give the benefits of any doubts to the struggling competitors.

It is, of course, immaterial that a purpose or intent to achieve the result may not have been present. The holding of the cases from *United States v. Patten,* 226 U. S. 525, 543, to *United States v. Griffith,* 333 U. S. —, is that the requisite purpose or intent is present if monopoly or restraint of trade results as a direct and necessary consequence of what was done. We need not hold that vertical integration is *per se* unlawful in order to strike down what is accomplished here. The consequence of the deliberate, calculated purchase for purpose of control over this substantial share of the market can no more be avoided here than it was in *United States v. Reading Co.,* 253 U. S. 26, 57, and in *United States v. Yellow Cab Co., supra.* I do not stop to consider the effect of the acquisition on competition in the sale of fabricated steel products. The monopoly of this substantial market for rolled steel products is in itself an unreasonable restraint of trade under § 1 of the Act.

The result might well be different if Consolidated were merging with or being acquired by an independent west coast producer for the purpose of developing an integrated operation. The purchase might then be part of an intensely practical plan to put together an independent western unit of the industry with sufficient resources and strength to compete with the giants of the industry. Approval of this acquisition works in precisely the opposite direction. It makes dim the prospects that the western steel industry will be free from the control of the eastern giants. United States Steel, now that it owns the Geneva plant, has over 51 per cent of the rolled steel or ingot capacity of the Pacific Coast area. This acquisition gives it unquestioned domination there and protects it against growth of the independents in that developing region. That alone is sufficient to condemn the purchase. Its serious impact on competition and the economy is emphasized when it is recalled that United States Steel has one-third of the rolled steel production of the entire country.[5] The least I can say is that a company that has that tremendous leverage on our economy is big enough.[6]

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[5] See note 8 of the Court's opinion.

[6] "United States Steel is the giant of the industry. Its manufacturing capacity is 'greater than that of all German producers combined. It is more than twice that of the entire British steel industry and more than twice that of all the French mills combined.' In addition to its facilities for producing pig iron, steel ingots, and all forms of finished and semifinished steel products, the corporation owned and operated through some 150 subsidiaries, in 1937, nearly 2,000 oil and natural gas wells, 89 iron ore mines, 79 coal mines, some 40 limestone, dolomite, cement rock, and clay quarries, a number of gypsum and fluorspar mines, 2 zinc mines, a manganese ore mine in Brazil, over 5,000 coking ovens, several water-supply systems with reservoirs, filtration plants, and pumping stations, over 100 ocean, lake and river steamers, 500 barges and tugs, railroads, fire brick plants, and mills producing 12,000,000 barrels of cement. By virtue of its tremendous size and its high degree of integration, the corporation is in a position to dominate the field." Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1940) p. 120.

[¶ 62,261] **United States v. Standard Oil Company of California and Standard Stations, Inc.**

In the United States District Court for the Southern District of California, Central Division. No. 6159-Y Civil. Filed June 7, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Exclusive Dealing Contracts—Service Stations—Contracts in Restraint of Trade.—Agreements between a corporation engaged in the business of producing, transporting, refining and marketing petroleum and petroleum products in eight Western states and operators of independent service stations in those states, which agreements confine the operators to the purchase, use and re-sale of the products of the petroleum corporation, and of automotive accessories handled or sponsored by it constitute an unreasonable restraint of trade, in violation of the Sherman Act, and result in a substantial lessening of competition and tend to create a monopoly, in violation of the Clayton Act. The agreements are found to lock out dealers from sources of competitive products originating in interstate commerce, to deny to dealers access to such competitive products, to deny to manufacturers or suppliers of such products access to the outlets controlled by the independent contractors who operate the stations, and to affect a substantial number of outlets and a substantial amount of products. Such agreements are held to be illegal in their effect and are ordered enjoined.

See the Sherman Act annotations, Vol. 1, ¶ 1220.521, and the Clayton Act annotations, Vol. 1, ¶ 2023.36.

For plaintiff: William C. Dixon, W. Alan Thody, Special Assistants to the Attorney General; Lawrence W. Somerville, Theodore Driscoll, Special Attorneys, Antitrust Division; Tom C. Clark, Attorney General; James M. Carter, United States Attorney.

For defendants: Lawler, Felix & Hall, by John M. Hall; Pillsbury, Madison & Sutro, by Everett A. Mathews.

[*Nature of Action*]

YANKWICH, D. J.: By this suit in equity, the Government seeks a decree adjudging that certain practices engaged in by the defendants and certain contracts entered into by them, unreasonably restrain interstate trade and commerce in violation of Section 1 of the Sherman Antitrust Act,[1] and substantially lessen competition and tend to create a monopoly in a line of commerce, in violation of Section 3 of the Clayton Act.[2] The Government asks us to declare the exclusive supply provisions in the contracts and the practices flowing from them to be void and of no effect.

In addition, we are asked to enjoin the defendants, in perpetuity, from entering into or enforcing any contract, agreement, or understanding, express or implied, with any independent service station operator or garage operator, or from inducing or compelling, or attempting to induce or compel, any such person from entering into any contract, agreement or understanding, which has any of the following requirements:

(a) That the Independent Service Station Operator or Garage Operator shall secure all his requirements of petroleum products from defendant Standard, or shall not handle the petroleum products of any other company;

(b) That the Independent Service Station Operator, or Garage Operator shall secure all his requirements of any one or more types of automobile accessories from or through defendants Standard and Standard Stations, Inc., or will not handle accessories competitive with those distributed or sponsored by defendants, Standard and Standard Stations, Inc.

(c) That the sale of any petroleum product or automotive accessories to any Independent Service Station Operator, or Garage Operator shall be conditional on the sale of other petroleum products or automotive accessories.

The action was instituted on January 2, 1947. Many proceedings have taken place before the trial and an extensive file has been built up. However, as a case of this character must be determined on the basis of facts existing at the time of the trial, it is not necessary to give a detailed analysis of the pleadings in the case or the proceedings before the court.

[1] 15 U. S. C. A., Sec. 1.

[2] 15 U. S. C. A., Sec. 2.

What precedes is sufficient for the purpose of the discussion to follow.

I

The Proved Facts

Notwithstanding the lengthy trial and the large number of exhibits introduced, the issues in the case are rather narrow, as will appear further on in the opinion when we expound the legal principles which control the case.

There is, therefore, no need to review elaborately the facts proved. A brief summary will suffice.

The defendant Standard Oil Company of California is a Delaware corporation with its principal place of business at San Francisco, California. It is engaged in the business of producing, transporting, refining and marketing petroleum and petroleum products, principally in the states of California, Oregon, Washington, Arizona, Nevada, New Mexico, Idaho and Utah.

The defendant Standard Stations, Incorporated, is a corporation organized under the laws of Delaware with its principle place of business at San Francisco. It is a wholly-owned subsidiary of Standard Oil Company of California, and is engaged in the business of managing service stations in the seven states just mentioned. The number of these stations is 1063.

As the issues have narrowed themselves by the proof, no further reference need be made to these stations so operated which have been referred to in the evidence as "employe operated stations." The Government does not question (indeed, it could not) the right of the Standard Oil Company of California to operate its own stations and sell therein any product it manufactures or distributes. Hence when we refer to "Standard" in what follows, it will be understood that the reference is to Standard Oil Company of California, the parent company, actually engaged in what, for brevity, we shall call "the oil business."

The evidence in the cases shows that, as of March 12, 1947, Standard, in addition to the company operated service stations, had contractual arrangements with 7145 stations in the area. The relationship of Standard to these stations was governed by the five types of agreements entered into with the operators of the stations. They were:

(1) "Dealer Agreements," of which there were 1656, containing the following clause:

> "1. Standard Oil Company of California, a corporation hereinafter called 'Company' agrees to sell to ...... hereinafter called 'Dealer,' and Dealer agrees to buy from Company, all of Dealer's requirements of petroleum products used or sold or bought to be used or sold by Dealer at .... The petroleum products to meet Dealer's requirements hereunder shall be those brands of gasoline, lubricating oils, and other petroleum products sold by Company to its dealers generally in Dealer's vicinity."

(2) "Distributor Agreements," of which there were 556, containing the following:

> "Company agrees to sell to Distributor, and Distributor agrees to buy from Company and stock and offer for sale all of Distributor's requirements of petroleum products used or sold or bought to be used or sold by Distributor in the conduct of his business on the premises hereinafter described. The petroleum products to meet Distributor's requirements hereunder shall be those brands of gasoline, lubricating oils and other petroleum products currently sold at service stations operated by Standard Stations, Inc. in Distributor's vicinity, and Distributor agrees not to store, handle, distribute, or sell any other brand or brands of petroleum products at or from the station."

(3) "Petroleum Products and Equipment Agreements," of which there were 912, containing this clause:

> "1. Standard Oil Company of California, a corporation, hereinafter called 'Company,' agrees to sell to ..... hereinafter caller 'Dealer,' and Dealer agrees to buy from Company, all of Dealer's requirements of petroleum products used or sold or bought to be used or sold by Dealer at ..... The petroleum products to meet Dealer's requirements hereunder shall be those brands of gasoline, lubricating oils, and other petroleum products sold by Company to its dealers generally in Dealer's vicinity."

(4) "Dealer Agreement TBA," of which there were 2221, having this clause:

> "1. Standard Oil Company of California, hereinafter called 'Company,' agrees to sell to ...... hereinafter called 'Dealer,' and Dealer agrees to buy from Company, all Dealer's requirements of petroleum products used, sold, or bought to be used or sold, by Dealer at ......, hereinafter called 'said premises.' The petroleum products to meet Dealer's requirements hereunder shall be those brands of such products generally sold by Company to its Dealers."

(5) "Sublease Agreements," of which there were 1800, containing the following clause:

"Lessee shall handle and sell on the leased premises only such petroleum products as are sold Lessee by Lessor, and Lessee agrees not to store, handle, sell, or distribute on or from said premises any petroleum products of any description other than those petroleum products sold to Lessee by Lessor. The price payable by Lessee to Lessor for said petroleum products shall be Lessor's posted price for the same or similar products to its Dealers generally in Lessee's vicinity at time and place of delivery."

The choice of the type of agreement was the dealer's. And the agreements were terminable by him on six months' notice. Each of these agreements contained provisions which, both by the language used and the limitations of liability, stressed the character of the agreement as seeking to establish the dealer as an independent contractor. Dealer Agreements (Class I) contained the most elaborate provisions. They are here given in full:

"6. Dealer acknowledges that he has thoroughly inspected the pumps, tankage, containers, pipers, and other facilities on the premises and that the same are in good condition, and while this agreement is in force Dealer agrees to so keep the same at Dealer's own cost and expense; provided, however, that Company may, at its discretion, maintain and repair said facilities. Dealer further agrees to protect, defend, and hold harmless the Company against all claims for damage to property (including Dealer's property), or injury to or death of persons, directly or indirectly resulting from any acts or omissions of Dealer or Dealer's employees in or about said premises, either in the maintenance or operation of the tanks, containers, pipes, pumps and other facilities thereon, or in the vending therefrom of the products and goods handled by Dealer hereunder.

"7. In the performance of this agreement Dealer is engaged in an independent business and nothing contained shall be construed as reserving to Company any right to control Dealer with respect to his conduct in the performance of this agreement. Company reserves no right to exercise any control over any of Dealer's employees and all employees of the Dealer shall be entirely under the control and direction of Dealer who shall be responsible for their actions and omissions. Dealer will, at his own expense, during the term hereof, maintain full insurance under any Workmen's Compensation Laws effective in said state covering all persons employed by and working for him in connection with the performance of this agreement, and upon request shall furnish Company with satisfactory evidence of the maintenance of such insurance. Dealer accepts exclusive liability for all contributions and payroll taxes required under Federal Social Security Laws and State Unemployment Compensation Laws as to all persons employed by and working for him in connection with the performance of this agreement.

"8. Any tax, or the amount thereof, now or hereafter imposed, levied, or assessed by any governmental authority upon, measured by, incident to, or as the result of the transaction herein provided for, or the transportation, production, or manufacture of the goods, the subject matter of this agreement, shall, if collectible or payable by the Company, be paid by the Dealer on demand by the Company, as tax collectible or as an increase in the prices otherwise herein provided for."

The other types of agreement aimed to achieve the same result.

The history of the use of the various types of agreement shows that, in 1938, the dealer agreements begun to supersede the authorized distributor agreements which had obtained before that date, and that, beginning with the year 1944, Type 4 (TBA) came into almost exclusive use. There is duplication of agreements in that a single station may operate under several types of agreement. Hence the actual number of gas station outlets is 5197. The number of stations operating under Form 2 has since been reduced to 232. In addition to this, Standard had 742 open accounts and 1063 company-operated stations, or, as they have been called in this case, employe-operated stations.

The evidence in the record shows beyond cavil that the effect of these agreements was to limit the dealer operating under any of them to the handling of petroleum products of Standard and also to the marketing of tires, tubes, batteries and accessories controlled or handled by Standard. If they handled others, they did not do so openly. The agreements were so interpreted by those operating them, as various operators from various states testified. Indeed, witnesses of the defendant very forthrightly stated that the operators were expected to confine themselves to Standard products and accessories, the exception being only those rare cases—especially during the War

—when they were unable to supply the quantity asked, in which event, the supervising employes of Standard would "shut their eyes" to the infractions.

The record also shows that, as to tires, tubes, batteries and accessories, Standard reserved the right to determine the amounts it would furnish. As to the other accessories,—which included spark plugs, sun visors, fan belts, hub caps, and all small parts of automobiles, which can easily be replaced at a service station—the requirement was up to the dealer himself. Tires, tubes and batteries were not, as a rule, sold to operators of stations other than those under contract with Standard,—especially during the time of shortage. Its petroleum products and accessories were sold to other station operators, particularly after the war scarcity ended. The representatives of other companies manufacturing petroleum products, tires, tubes, batteries and other accessories, testified that they could not sell their products to stations under contract with Standard, except in rare instances, and that, surreptitiously. When a station was converted into a Standard station, whatever custom in non-Standard products they had before ceased. To maintain the goodwill of the operators of the stations, Standard assisted them financially, made loans which were later discounted, furnished many valuable services, and expended large sums of money in advertising, in educating the operators in the manner of handling the products, in building the stations, adding facilities to them, repairing and improving them,—all of which meant large expenditures of money. As a result, Standard has a sixteen and one-half million dollar capital investment in the dealer stations.

When salesmen or supervisors of Standard found competitive products, they "urged," —as they testified—or, as the operators testified, showed their displeasure, and, practically "ordered" their discontinuance or substitution. Many of the competitive products so offered for sale and shut out of the stations under contract with Standard were produced outside of the States in which the stations were located, or were shipped in interstate commerce.

So there cannot be any question that, at least so far as these products are concerned, the practice of which the Government complains, affected the flow of goods and products in interstate commerce.[3] The character of the result and its legality, as well as the legality of the restrictive clauses themselves are questions of law.

To them we now direct our attention.

II

The Law Today

(A) Exclusive Supply Provisions: The case does not require an extended review of the principles which courts have evolved in interpreting the Sherman Anti-Trust and Clayton Acts. I have had occasion to discuss the scope and nature of anti-trust legislation and its application both to activities which are local and to those which transcend state limits, in several opinions.[3]

There is another reason for confining ourselves to the more recent decisions of the Supreme Court: They have modified, to a great extent, some of the legal norms declared in prior cases.[4] And the problem in this case can be narrowed down to two rather simple inquiries. They are: (a) Are agreements of the type involved in this case, as summarized briefly in the preceding portion of the opinion violative of either or both the statutes. Which, in reality, comes down to this: Is an agreement by an oil company, engaged in the production and distribution of petroleum products, and the sponsoring and distribution of automobile parts and accessories, which obligates a gasoline station operator to supply his full requirements of petroleum products, tires, tubes, batteries, and other accessories, from the company, *of itself,* a violation of either of the Acts? If the answer to this question is in the affirmative, the inquiry is at an end. (b) If in the negative, we must determine whether the effect of the agreement as a restraint on commerce makes it invalid under either or both Acts.

Seeking an answer to these inquiries, I begin with the assumption that the *General*

[3] *Walling v. Jacksonville Paper Co.,* 1943, 317 U. S. 564; *United States v. South-Eastern Underwriters Association,* 1944, 322 U. S. 546-553; *United States v. Frankfort Distilleries, Inc.,* 1945, 324 U. S. 293, 296-298; *United States v. Yellow Cab Co.,* 1947, 332 U. S. 218, 224-226.

[4] *United States v. Heating & Piping & Air Conditioning Contractors Ass'n,* 1940, D. C. Calif., 33 Fed. Sup. 978; *United States v. Food & Grocery Bureau of So. Calif.,* 1942, D. C. Calif., 43 Fed. Sup. 966; *United States v. Food & Grocery Bureau of So. Calif.,* 1942, D. C. Calif., 43 Fed. Sup. 974; *United States v. San Francisco Electrical Contractors Ass'n,* 1944, D. C. Calif., 57 Fed. Supp. 57.

Motors exclusive supply case [5] is still the law. Which means that, at least under the Clayton Act, an agreement by a dealer, in consideration of being permitted to deal in a certain product, that he will not sell or offer to sell any products not manufactured or handled by the particular manufacturer, is not *per se* illegal. The opinion in the *General Motors* case states the question involved tersely. The Court had before it an agreement which, not only indirectly forbade the handling of the products of other manufacturers, but *prohibited* specifically their use or sale in these words:

> "'Dealer agrees that he will not sell, offer for sale, or use in the repair of Chevrolet motor vehicles and chassis second-hand parts or used parts or any parts not manufactured by the Chevrolet Motor Company. . . .'" [6]

This eliminated not only parts not manufactured by them, but also second-hand and used parts. A complete monopoly was achieved. At the same time, the dealer was not granted exclusive selling rights in new parts and accessories. General Motors was, therefore, free to grant to other dealers in the same territory the same rights. The trial court dismissed the bill for want of equity. Affirming the decree, the Supreme Court said:

> "Upon the evidence adduced at the trial the District Court found that *the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce.*" [7]

I take this language to mean that, even when we are confronted with a contract which shuts out competition, we must, under the Clayton Act, determine its effect on the line of commerce.

Under the Sherman Act, the reasonableness or unreasonableness of the restraint is, —since the first *Standard Oil* decision in 1911, —an element to be considered.[8] *Both are questions of fact, the solution of which rests upon the conditions obtaining in each particular case.*

The *Socony-Vacuum* case [9] and other cases which followed it expressed the view that the economic wisdom or unwisdom, or the economic benefit or detriment, of a restriction on commerce is not material, especially when we are dealing with a practice, such as price-fixing, which is illegal *per se.* But, at the same time, economic effect becomes material if we are dealing with a restraint other than price-fixing, a restraint which is monopolistic. Because, when this is the situation, it must appear that there is substantial lessening of competition or monopoly under the Clayton Act, before we can place a judicial interdict on it. We find this language in the *Socony-Vacuum* case:

> "Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. *For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying program would have been a factor in determining the going prices on those markets.* But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a surplus. As we have said, this was a well-organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that the distress gasoline would not overhand the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the midwestern area paid more for their gasoline than they would have paid but for the conspiracy.
>
> "Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.
>
> "The elimination of so-called competitive evils is of no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed resulted when distress gasoline was removed

[5] *Pick Manufacturing Co. v. General Motors Corp.*, 1936, 299 U. S. 3.

[6] *Pick Manufacturing Co. v. General Motors Corp., supra,* at pp. 3-4.

[7] *Pick Manufacturing Co. v. General Motors Corp., supra,* at p. 4. (Italics added)

[8] *Standard Oil Co. v. United States*, 1911, 221 U. S. 5, 55-62.

[9] *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 220-225; See, *Fashion Originators' Guild v. Federal Trade Commission*, 1941, 213 U. S. 457, 468.

from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price-cutting and the like, appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." [10]

(B) Effect of Restriction: What Mr. Justice Douglas says applies with greater force to a restrictive practice other than price-fixing. The fact that it may be beneficial is not material, if, in effect, it is an unreasonable restraint.[11]

Judge Learned Hand stressed these very points in the *Fashion Originators' Guild* case,[12] He applied the reasoning of the *Socony-Vacuum* case to a case not involving price-fixing. And, with that clarity of language so characteristic of his writing, he showed that economic benefits cannot be taken into consideration if, in fact, there be substantial restriction of commerce. The opinion says:

> ". . . Many trade combinations which affect competition are lawful, when they are designed to prevent trade 'abuses'; they are 'reasonable' though perhaps to say so is no more than to state the problem. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 374, 53 S. Ct. 411, 77 L. Ed. 825; *Sugar Institute v. United States,* 297 U. S. 553, 598, 56 S. Ct. 629, 80 L. Ed. 859. Certainly it is not true that the lawfulness of every combination depends upon whether it 'reasonably' corrects trade 'abuses'; there are some combinations that nothing will excuse. The accepted rubric for this is that when the means are unlawful *per se,* the purpose of the confederates will not justify them. *Sugar Institute v. United States, supra,* 297 U. S. 553, page 599, 56 S. Ct. 629, 80 L. Ed. 859. *The most recent example of this is the Supreme Court's reaffirmation of the unconditional illegality of price-fixing in spite of the probability that the combination in fact benefited the industry. United States v. Socony-Vacuum Oil Co.,* 210 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. However grave the industrial disorders, that remedy was not permissible; the industry may restore itself by many devices, but not by all. * * * Price-fixing is not, however, the only means unlawful *per se. The interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade'. It is also unlawful to exclude from the market any of those who supply it —assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain. W. W. Montague & Co. v. Lowry,* 193 U. S. 38, 47, 24 S. Ct. 307; 48 L. Ed. 608; *Eastern States Retail Lumber Dealers Association v. United States,* 234 U. S. 600, 611, 34 S. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; *Binderup v. Pathe Exchange,* 263 U. S. 291, 311, 312, 44 S. Ct. 96, 68 L. Ed. 308; *Anderson v. Shipowners Association,* 272 U. S. 359, 363, 47 S. Ct. 125, 71 L. Ed. 298, *Bedford Cut Stone Co. v. Journeymen Stone Cutter's Association,* 274 U. S. 37, 54, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791; *Paramount Famous Corp. v. United States,* 282 U. S. 30, 43, 44, 51 S. Ct. 42, 75 L. Ed. 145. *United States v. First National Pictures, Inc.,* 282 U. S. 44, 54, 51 S. Ct. 45, 75 L. Ed. 151; *National Harness Association v. Federal Tr. Comm.* 6 Cir., 276 F. 705, 712; *Wholesale Grocers Ass'n v. Federal Tr. Comm.* 5 Cir., 277 F. 657, 663; *Butterick Publishing Co. v. Federal Tr. Comm.* 2 Cir., 85 F. (2) 522. There is another reason supporting this conclusion. A successful combination among a part of the producers to exclude others, even when not accompanied by an agreement fixing prices, puts into their hands collectively the power to control the supply and with it the price. The fact that the power is not at the moment exercised is of no assurance that it may not be; if the effort succeeds and the combination is not disrupted, it may at any time be used, and there will then be no protection to the consumer.
>
> *"Finally, it is of no consequence that the Guild does not supply the whole market for women's dresses; it aims at a monopoly however small its share of total sales.* The reason is as follows: Although all dresses made after one design are fungibles, the different designs themselves are not fungibles. Each has its own attraction for buyers; each is unique, however trifling the basis for preferring it may be. Hence to attempt to gather to oneself all possible

[10] *United States v. Socony-Vacuum Oil Co., supra,* at pp. 220-221. (Italics added)

[11] See, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 1948, slip decision No. 75, decided on May 10, 1948, pp. 22 *et seq.*

[12] *Fashion Originators' Guild v. Federal Trade Commission,* 1940, 2 Cir., 114 F. (2) 80.

reproductions of a given design is to attempt to create a monopoly, as at once appears from the fact that a copyright for it—and a fortiori a design patent upon it—would be ranked as a monopoly. It is true that the sanction of that monopoly may be very weak; it depends upon the design's attractions above other designs, often not a very important margin of advantage. But the same is true of nearly all monopolies, for there are substitutes for most goods. As to each design therefore the Guild is seeking to establish a monopoly; and *it is unimportant whether its gross sales are large or small, as compared with those of all women's dresses. For these reasons, the combination was unlawful per se;* the commission was right in refusing to hear any evidence in its excuse, for it could have no excuse; the case is the same as *Millinery Creators' Guild v. Federal Trade Commission, supra,* 2 Cir., 109 F(2) 175." [13]

The teaching of these cases is this: When we are dealing with price fixing, we are dealing with a contract which is invalid *per se* and violative of the Act. However, when we consider any other restrictions, their legality must be determined *by the nature of the contract in relation to the line of commerce which it may affect.* A contract by a manufacturer of a product which binds an agent who is used as an outlet to the exclusive use of his product *is not necessarily* a violation of either the Sherman Act or the Clayton Act. But it *may be* so under the Sherman Act, if it result in an unreasonable restraint of trade, and under the Clayton Act, if it result in a monopoly in a line of commerce or lessens competition substantially.[14]

The more recent decisions of the Supreme Court reaffirm these principles.[15] To quote from *Federal Trade Commission v. Morton Salt Company:* [16]

"The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Co. v. Federal Trade Comm'n,* 324 U. S. 726, 742. Hence the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

"Fourth. It is urged that the evidence is inadequate to support the Commission's findings of injury to competition. As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition. That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by evidence."

The following quotation from the *American Crystal Sugar* case is also enlightening:

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn. supra,* at 553.

"Nor is the amount of the nation's sugar industry which the California refiners control relevant, *so long as control*

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[13] *Fashion Originators' Guild v. Federal Trade Commission, supra,* at pp. 84-85. (Italics added)

[14] See cases under Notes 8 to 12, inclusive. And see, Restatement of Contracts, Section 516; *Wilder Mfg. Co. v. Corn Products Refining Co.,* 1915, 236 U. S. 165; *Federal Trade Commission v. Sinclair Refining Co.,* 1923, 261 U. S. 463: *Twin City Co. v. Harding Glass Co.,* 1931, 283 U. S. 353; *Associated Oil Co. v. Myers,* 1933, 217 Cal. 297; *General Petroleum Corp. v. Longhead,* 1933, 218 Cal. 554; *B. S. Pearsall Butter Co. v. Federal Trade Commission,* 1933, 7 Cir., 292 Fed. 720; *Excelsior Motor Mfg. & Supply Co., v. Sound Equipment,* 1934, 7 Cir., 73 F. (2) 725.

[15] *United States v. Yellow Cab Co.,* 1947, 332 U. S. 218; *United States v. National Lead Co.,* 1947, 332 U. S. 319; *International Salt Co., Inc. v. United States,* 1947, 332 U. S. 392; *United States v. National Lead Co.,* 1947, 332 U. S. 319; *United States v. Line Material Co.,* 1947, 333 U. S. 287, 308-310; *United States v. United States Gypsum Co.,* 1948, 333 U. S. 364, 388-393. And see, *International Machines Corp. v. United States,* 1936, 298 U. S. 130, 137-140; *Oxford Varnish Corp. v. Ault & Wiborg Corp.,* 1936, 6 Cir., 83 F. (2) 764; *Signode Steel Strapping Co. v. Federal Trade Commission,* 1942, 4 Cir., 132 F. (2) 48, 52-54.

[16] *Federal Trade Commission v. Morton Salt Company,* 1948, slip decision, No. 464, pp. 7-8.

is exercised effectively in the area concerned. Indiana Farmer's Guide v. Prairie Farmer, 293 U. S. 268, 279, *United States v. Yellow Cab Co.,* 332 U. S. 218, 225, *the conspiracy being shown to affect interstate commerce adversely to Congress' policy.* Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States v. Darby,* 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States v. Walsh,* 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard v. Filburn, supra,* or *that it contains a threat to the interstate economy that requires preventive regulation.*" [17]

(C) The Meaning of "Unreasonable" and "Substantial": What precedes calls for a further inquiry into what is or what is not unreasonable restraint and what is or what is not a substantial lessening of competition.

The words "reasonable" or "unreasonable" do not occur in the Sherman Anti-Trust Act.[17] They were read into the Act by the decisions of the Supreme Court.[18]

The phrases which forbid practices which result in substantial lessening of competition or monopoly occur in the Clayton Act.[19]

All these terms have a pragmatic content. The Courts, in applying them, have sought to evolve concrete criteria by which the effect of a particular practice on competition should be gauged. Their scope and limit was stated by the Court in *Fashion Originators' Guild of America v. Federal Trade Commission:*

"If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. From its findings, the Commission concluded that the petitioners, 'pursuant to understandings, arrangements, agreements, combinations and conspiracies entered into jointly and severally' had prevented sales in interstate commerce, had 'substantially lessened, hindered and suppressed' competition, and had tended 'to create in themselves a monopoly.' And paragraph 3 of the Clayton Act (15 U. S. C. A. Sec. 14) declares 'It shall be unlawful for any person engaged in commerce, . . . to . . . make a sale or contract for sale of goods, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that *the buyers will not use or deal in textiles which are copied from the designs of textile manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs.* And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.

"Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act make illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Sec. 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act 'competition not combination should be the law of trade.' *National Cotton Oil Co. v. Texas,* 197 U. S. 115, 129. And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: *it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy. (Montague & Co. v. Lowry,* 193 U. S. 38, 45; *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn. v. United States,* 234 U. S.

[17] *Mandeville Island Farms, Inc. et al. v. American Crystal Sugar Company,* 1948, slip decision No. 75, p. 16.

[18] *Standard Oil Co. v. United States,* 1911, 221 U. S. 5, 55-62.

[19] 15 U. S. C. A., Sec. 14.

600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States v. American Linseed Oil Co.*, 262 U. S. 371, 389); *and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs* (*United States v. American Linseed Oil Co., supra*, at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribed rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' (*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 242.)

"Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For *'it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'* (*United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 237." [20]

The approach to the problem has changed, as later cases indicate.[21] But the test of reasonableness is the same which the court laid down in the first case.[22] As there stated, while the Act defines the boundaries which could not be transgressed, it leaves the application of the standard laid down

"to be determined by the light of reason guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." [23]

And the test under the Clayton Act is equally practical. The validity or invalidity of a contract or practice is determined by a consideration of the methods of restraint which the particular contract or practice impose and effect which they may have.[24] The more recent cases interpret the language of the statute to include not only probable effects but also possible effects.[25]

In summary, when we are asked to determine unreasonableness of restraint under the Sherman Act, or substantiality in lessening competition or tendency to create a monopoly in a line of commerce under the Clayton Act, we must envisage the entire situation affected by the practices, and relate it to the object of both statutes, which is to maintain freedom in interstate commerce and trade and to prevent all attempts to monopolize them.[26] At times, courts speak of the "detriment" to the public resulting from a practice.[27] But they do not intend to legalize restraints which *may be* beneficial to the public. As said by Judge Learned Hand:

"Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad ones'; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one

[20] *Fashion Originators' Guild of America v. Federal Trade Commission*, 1941, 312 U. S. 457, 463-466 (Italics added); And see, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 1914, 234 U. S. 600; *Standard Fashion Co. v. Magrane-Houston Co.*, 1922, 258 U. S. 346, 357; *Apex Hosiery Co. v. Leader*, 1940, 310 U. S. 469, 489-497.

[21] *Federal Trade Commission v. Morton Salt Co., supra; Mandeville Island Farms Co. v. American Crystal Sugar Co., supra.*

[22] *Standard Oil Co. v. United States*, 1911, 221 U. S. 5.

[23] *Standard Oil Co. v. United States, supra*, at p. 64. And see, *Dr. Miles Medical Co. v. Park & Sons Co.*, 1911, 220 U. S. 373, 406-407; *Apex Hosiery Co. v. Leader*, 1940, 310 U. S. 469; *Boro Hall Corp. v. General Motors*, 1942, 2 Cir., 124 F(2) 822; *United States v. Aluminum Co. of America*, 1945, 2 Cir., 148 F(2) 416, 427-430; *United States v. General Motors*, 1941, 7 Cir., 121 F(2) 376.

[24] *Judson L. Thompson Mfg. Co. v. Federal Trade Commission*, 1945, 1 Cir., 150 F(2) 952, 955-958.

[25] *Wickard v. Filburn*, 1942, 317 U. S. 111, 118-125; *Federal Trade Commission v. Morton Salt Co., supra*, at pp. 7-8; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra*, at pp. 14-19; compare *Standard Fashion Co. v. Magrane-Houston Co.*, 1922, 258 U. S. 346, 356-357; *Corn Products Refining Co. v. Federal Trade Commission*, 1945, 324 U. S. 726, 738.

[26] *Parker v. Brown*, 1943, 317 U. S. 338, 351; *United States v. Heating, Piping & Air Conditioning Contractors*, 1940, D. C. Calif., 33 Fed. Sup. 978, 979; *United States v. San Francisco Electrical Contractors' Ass'n*, 1944, 57 Fed. Sup. 57, 60.

[27] *Standard Oil Co. v. Federal Trade Commission*, 1922, 2 Cir., 282 Fed. 81; *Federal Trade Commission v. Sinclair Refining Co.*, 1923, 261 U. S. 463, 474-475; *International Shoe Company v. Federal Trade Commission*, 1930, 280 U. S. 291, 297-298; *United States v. Standard Oil Co. of New Jersey*, 1931, D. C. Mo., 47 Fed. (2) 288. *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 220-221.

in which the great mass of those engaged must accept the direction of a few. These considerations which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes. It is settled, at least as to Sec. 1, that there are some contracts restricting competition which are unlawful, *no matter how beneficent they may be; no industrial urgency will justify them; they are absolutely forbidden.* Chief Justice Taft said as much of contracts dividing a territory among producers, in the often quoted passage of his opinion in the Circuit Court of Appeals in *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 Fed. 271, 46 L. R. A. 122.[28]

The harm to the public is gauged by the effect of the practices on the free flow of goods in interstate commerce of the practices on the free flow of goods in interstate commerce and the maintenance of competition in that field. Consequently, practices which are likely to curtail or affect injuriously a measurable or sizeable part of commerce are prohibited under both Acts. As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by the evidence, restricts the stations not employe-operated to the sale and use of petroleum products and accessories produced or supplied by standard is illegal *per se.* We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it results in a substantial lessening of competition or the creation of monopoly in the line of commerce.[29] Indeed, the opinion of the Court in one of the latest cases on the subject indicates clearly that, to use the language of Mr. Justice Douglas,—

"the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage or to destroy a competitor,* is unlawful." [30]

The phrase "line of commerce" in the Clayton Act is to be given a broad and not a narrow meaning. It should be interpreted, not with relation to a particular outlet, but with relation to the entire "picture," —if one may be permitted to use the best colloquial equivalent to the German word *gestalt* (configuration). So the determination of monopoly in any "line of commerce" cannot be made to rest *solely* on the fact that certain outlets are closed. For, without indulging in a *reductio ad absurdum,* if we say that interfering with *any* outlet is, in itself, a monopoly, we find ourselves in the position of contending that, assuming one controlled one station outlet, we have a monopoly as to it. To amplify: It is common knowledge that national merchandising firms like Sears, Roebuck & Company, or Montgomery Ward, own establishments the country over. It is also well known that they control the type of goods which are sold in the branches, which they use as outlets, and which they own. But, assume that they did not own the branches, and that they operated some of them, under one of these various contract arrangements used here,—say a TBA contract. To my mind, it would be unrealistic to contend that, under such circumstances, the control of one or several such outlets would constitute a monopoly. For this reason, I take the words "in any line of commerce" to mean a complete line of activity, not a *small* segment. This interpretation finds support in the following language of the Supreme Court:

"The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. *The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.*" [31]

We must, therefore, ascertain the *actual* effect of the challenged clause on interstate commerce.

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[28] *United States v. Aluminum Company of America,* 1945, 2 Cir., 148 F(2) 416, 427.

[29] *Donovan v. Pennsylvania Co.,* 1905, 199 U. S. 279, 296-302; (cited with approval in *United States v. Yellow Cab Co.,* 1947, 332 U. S. 218, 229); *Pick Mfg. Co. v. General Motors Corp.,* 1936, 299 U. S. 3; *Pick Mfg. Co. v. General Motors Corp.,* 1935, 7 Cir., 80 F(2) 641; *Boro Hall Corp. v. General Motors Corp.,* 1942, 2 Cir., 124 F(2) 822; *International Salt Co. v. United States,* 1947, 330 U. S. 392; *United States v. Griffith etc.,* slip decision No. 64, decided May 3, 1948, p. 7.

[30] *United States v. Griffith, supra,* at page 7.

[31] *National Labor Relations Board v. Fainblatt,* 1939, 306 U. S. 600, 606; and see, *Signode Steel Strapping Co. v. Federal Trade Commission,* 1942, 4 Cir., 132 F(2) 48, 54.

(D) Intrastate and Interstate Activities: Before doing so, we refer to the contention that the activities of Standard are local in character. Recent cases have obliterated the rigid distinction between intrastate and interstate activities. Activities purely local which interfere with interstate commerce come under the interdiction of the anti-trust statutes.[32] The control of a commodity originating in interstate commerce, although exercised after it comes to rest in a state, does not take it out of the purview of the Sherman or Clayton Acts, if the flow is continuous, and if the restrictions affect it.[33] The latest decisions give effect to the broad definition of commerce contained in one of the older and leading cases on the subject:

> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. *Public Utilities Comm'n v. Landon,* 249 U. S. 237, 245; *Missouri v. Kansas Gas Co.,* 265 U. S. 298, 309; *East Ohio Gas Co. v. Tax Comm'n,* 283 U. S. 465, 470-471. But we need not decide when interstate commerce ends and that which is intrastate begins. The *control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."* [34]

Without detailing the distributive system used by Standard, it is evident that there is constant interstate flow of the products it produces and distributes. And the interstate origin of the many competitive products, automobile supplies and accessories is also established.[35]

This satisfies fully the requirement of the statutes. For, if the exclusive supply agreements complained of by the Government be unreasonable or monopolistic in effect, they would affect the flow of commerce in several ways: (1) by channeling the products of Standard, regardless of interstate or intrastate source, through an exclusive group of outlets; (2) by denying to dealers the right to buy them; and (3) by denying to manufacturers of competitive products the right to sell to the controlled outlets.

Whether they actually have such effect is our final inquiry.

III

The Consequences of the Exclusive Supply Provisions

(A) The "Appreciable Segment" Test: In the *Associated Press* case[36], the Supreme Court has set out criteria for determining the forbidden character of restrictive outlets under the Sherman Act, which are pertinent to the facts in this case:

> "The restraint on trade in news here were no less than those held to fall within the ban of the Sherman Act with reference to combinations to restraint trade outlets in the sale of tiles, *Montague & Co. v. Lowery,* 1932 U. S. 38; or enameled ironware, *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20, 48-49; or lumber, *Eastern States Lumber Dealers' Ass'n v. United States,* 234 U. S. 600, 611; or women's clothes, *Fashion Originators' Guild v. Federal Trade Commission, supra;* or motion pictures, *United States v. Crescent Amusement Co.,* 323 U. S. 173. Here as in the *Fashion Originators' Guild* case, *supra,* 465, 'the combination is in reality an extragovernmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extrajudicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute."' *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 242. By the restrictive By Laws each of the publishers in the combination has, in effect, 'surrendered himself completely to the control of the association.' *Anderson v. Shipowners' Assn.,* 272 U. S. 359, 362, in re-

[32] See cases cited in *United States v. Heating, Piping & Air Conditioning Contractors' Ass'n.,* 1940, D. C. Calif., 33 Fed. Sup. 978, and *United States v. San Francisco Electrical Contractors' Ass'n,* 1944, D. C. Calif., 57 Fed. Sup. 57.

[33] *Mandeville Island Farms Co. v. American Crystal Sugar Co.,* 1948, slip decision, pages 14-15.

[34] *Local 167, National Brotherhood of Teamsters v. United States,* 1934, 291 U. S. 286, 297 (Italics added); See, *Allen Bradley v. Local Union No. 3,* 1945, 325 U. S. 797, 810-811; *United Brotherhood of Carpenters v. United States,* 1947, 330 U. S. 395.

[35] See end of Part I and cases cited in Note 3. See also, *United States v. Yellow Cab Co.,* 1947, 332 U. S. 218, 224-228; *McComb v. Herlihy,* 1947, 4 Cir., 161 F(2) 568, 570-571; see my opinion in *Devine v. Handy,* 1948, D. C. Calif., 76 Fed. Sup. —. And for a comprehensive survey of the recent broadening of the concept of commerce, see, Stern, The Commerce Clause and The National Economy, 1933-1946, 59 Harvard Law Review, 1946, pp. 645, 883.

[36] *Associated Press v. United States,* 1945, 326 U. S. 1.

spect to the disposition of news in interstate commerce. Therefore this contractual restraint of interstate trade, 'designed in the interest of preventing competition', cannot be one of the 'normal and usual agreements in aid of trade and commerce which may be found not to be within the (Sherman) Act . . .' *Eastern States Lumber Dealers' Assn. v. United States, supra,* 612, 613."[37]

This is anticipatory of the criterion of "appreciable segments" as a test of unreasonableness or monopolistic substantiality, established in later cases.[38]

Some writers have expressed the view that the more recent decisions, and especially the *Yellow Cab* decision,[39] substitutes a new and uniform concept or standard of illegality for the older ones under the Sherman Act, which considers the effect on "an appreciable segment" of commerce the test. They see in this the abandonment of the older, "quantitative" postulate which related the amount of the commerce involved to the whole commerce in the nation.[40] But I find the nucleus of this norm not only in the *Associated Press* case[41], but in older cases.[42] Thus, in a case involving control of advertising media in a certain field as the basis for a damage action under the Sherman Anti-Trust law, the Supreme Court held that it was invalid, although it applied to a limited geographic area or to a part of the commerce only. The Court used this language:

"The record contains no suggestion by respondents or by either court that petitioner's allegations are not sufficient to charge a violation of Sec. 1 and 2. Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of Secs. 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce. *Standard Oil Co. v. United States,* 221 U. S. 1, 61."[43]

And there is one lower court, well considered decision which found an illegal restriction in a limitation to a particular large customer,—the United States Government.[44]

It was insisted at the oral argument that the late cases, especially the *Yellow Cab* case,[45] having arisen under the Sherman Act, do not control here. Granted that these rulings interpret that Act, they are, nontheless, applicable to the present case for the obvious reason that the violations which the Government in this case charges are violations of both the Sherman and Clayton Acts.

As a rule, language used in interpreting one statute is not conclusive of the meaning of other kindred statutes. However, the history of Anti-Trust legislation shows that less is required to prove illegality under the Sherman Act than under the Clayton Act. Rightly. For the object of the Clayton Act was to declare illegal, in their incipiency, acts which would only be illegal under the Sherman Act *in their full fruition.* Differently put, what, *in its result,* is an unreasonable restraint under the Sherman Act is, *in its beginning,* a substantial restraint under the Clayton Act, *if it is of a nature* likely to achieve such result.

It is argued that to apply this criterion would result in anomalous situations: If the operators of stations, instead of agreeing to buy their "requirements" of petroleum products, agreed to buy a definite quantity over a period of time, sufficient to satisfy their needs, this arrangement would, just as effectively, shut out competition. And yet, it is insisted that, although such arrangement would achieve the same result, it would not fall within any of the prohibitions of the anti-trust statutes.

But there is a distinction between the two situations. When a dealer agrees to take a specific amount of a product, there is a likehood that *he may,* in case of failure

[37] *Associated Press v. United States, supra,* pp. 18-19.

[38] *United States v. Yellow Cab Co.,* 1947, 332 U. S. 218, 224-228.

[39] *United States v. Yellow Cab Co., supra,* at p. 218.

[40] See, Zlinkoff & Barnard: The Supreme Court and a Competitive Economy, 1947, 47 Columbia Law Review, pp. 914, 926-932.

[41] *Associated Press v. United States,* 1945, 326 U. S. 1.

[42] *Indiana Farmer's Guide Co. v. Prairie Farmer Publishing Co.,* 1934, 293 U. S. 268.

[43] *Indiana Farmer's Guide Co. v. Prairie Farmer Publishing Co., supra,* at p. 278. And see, *United States v. Bausch & Lomb Optical Co.,* 1944, 321 U. S. 707, 720-724.

[44] *United States v. Clear Flax Linen Looms, Inc.,* 1945, D. C. Minn. 63 Fed. Sup. 32.

[45] *United States v. Yellow Cab Co.,* 1948, 332 U. S. 218.

of the supplier to comply with the agreement, or unexpected shortages or increased demands, or a desire to anticipate such shortages or demands, by overstocking,—seek competitive products. There is thus a possibility of access by competitors to the particular outlets.

Under the "requirements" contracts, the chance is completely cut off. Briefly stated, without a "requirements" contract, competitors may, in time, induce dealers to handle their products. With a contract, they never can. There is opportunity to deal with the competitors, and, hence, possibility, nay, probability, of freedom of action, when there is no restrictive contract. There is complete and final absence of freedom of dealing during the life of a contract, when it calls for exclusion. The shut-out is just as effective as an agreement to boycott products originating in interstate commerce.[46] Both "restraint or control the supply entering and moving in interstate commerce".[47]

(B) Restraint: Entire or Fractional:

(1) Comparative Figures:

The turn which our consideration of the case has taken calls for a statement of additional facts which, in fairness to the defendants, should be referred to, because they are the foundation for the contention that the practices here under attack do not violate either statute. They also serve to point to the fact that, in this case, the problem which confronts the court is to determine, in the light of the latest cases of the Supreme Court, which of the two methods of assaying specific facts which, in the main, are not in dispute, should control.

The facts to be alluded to present one facet of the problem. The practices which the Government seeks to prohibit are not of recent origin. To the contrary, they have been in effect for over 15 years. They are employed not only by Standard, but by its competitors in the Western Area, especially the "majors,"—Associated, Shell, General Petroleum, Texas Co., Union Oil Co., Richfield,—as their representatives have so forthrightly admitted. The following statistical data, culled from the record, shows the comparative position of Standard in relation to its major competitors, omitting, for brevity, the comparative number of stations:

GASOLINE SALES

State	Year	State Total	Retail Gallonage S. S. Inc.	Retail Gallonage Dealers	% of Total S. S. Inc.	% of Total Dealers
California	1931	1,401,545	65,149	71,251	4.6	5.1
	1946	2,640,651	209,587	135,455	7.9	5.1
Oregon	1931	170,357	4,782	25,633	2.8	15.0
	1946	376,288	18,467	36,198	4.9	9.6
Washington	1931	270,901	8,232	26,266	3.0	13.4
	1946	491,301	23,021	43,606	4.7	8.9
Arizona	1931	99,564	1,210	11,994	1.2	12.0
	1946	170,075	11,973	16,526	7.0	9.7
Nevada	1931	22,549	303	3,576	1.3	15.9
	1946	55,079	3,785	8,287	6.9	15.0
Idaho	1931	59,293	150	5,396	0.3	9.1
	1946	143,304	2,417	14,576	1.7	10.2
Utah	1931	60,731		4,114		6.8
	1946	146,644	4,649	13,920	3.2	9.5
7 Western States	1931	2,084,940	79,825	158,299	3.8	7.6
	1946	4,023,342	273,899	268,568	6.8	6.7

[46] See, *Coronado Coal Co. v. United Mine Workers*, 1925, 268 U. S. 295, 310; *Bedford Cut Stone Co. v. Stone Cutter's Ass'n*, 1927, 284 U. S. 37, 49; *Local 167 v. United States*, 1934, 291 U. S. 293, 297; *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 212-218; *United Brotherhood of Carpenters v. United States*, 1947, 330 U. S. 395; and see my opinion in *United States v. Heating, Piping & Air Conditioning Contractors' Ass'n*, 1940, D. C. Cal., 33 Fed. Sup. 395.

[47] *Coronado Coal Co. v. United Mine Workers*, *supra*, at p. 310.

TIRE REPLACEMENT SHIPMENTS

State	Year	Total	Retail Sales S. S. Inc.	Retail Sales Dealers	% of State Totals S. S. Inc.	% of State Totals Dealers
California	1933	2,706,750	94,366	3,441	3.5	.1
	1946	5,985,786	130,079	79,502	2.2	1.3
Oregon	1933	328,189	15,750	1,041	4.4	.3
	1946	890,664	14,296	29,073	1.5	3.4
Washington	1933	588,141	15,750	2,557	2.7	.4
	1946	1,244,310	14,296	30,688	1.1	2.5
Arizona	1933	123,477	6,220	4,538	5.0	3.7
	1946	307,803	10,060	16,152	3.3	4.4
Nevada	1933	38,993	1,059	1,442	2.7	3.7
	1946	98,235	3,000	4,307	3.1	4.4
Idaho	1933	133,225	397	11	.3	2.4
	1946	327,450	2,294	9,511	.7	2.9
Utah	1933	136,475	132	21	.1	.0
	1946	327,450	3,530	10,229	1.1	3.1
7 Western States	1933	4,055,250	132,350	10,523	3.3	.3
	1946	9,181,698	176,496	179,462	1.9	2.0

REPLACEMENT BATTERY SALES

State	Year	Total	Retail Sales S. S. Inc.	Retail Sales Dealers	% of State Totals S. S. Inc.	% of State Totals Dealers
California	1933	718,108	17,670	58	2.5	..
	1946	1,601,511	51,328	21,281	3.2	1.3
Oregon	1933	87,070	1,455	17	1.7	..
	1946	238,299	4,376	5,083	1.8	2.1
Washington	1933	156,036	2,240	42	1.4	
	1946	332,918	6,042	7,366	1.8	2.2
Arizona	1933	32,759	806	33	2.5	0.1
	1946	82,353	3,542	3,877	4.3	4.7
Nevada	1933	10,345	134	24	1.3	0.2
	1946	26,383	1,459	1,120	5.6	4.3
Idaho	1933	35,345	68		0.2	..
	1946	87,610	1,042	2,369	1.2	2.7
Utah	1933	36,207	22		0.1	..
	1946	87,610	1,667	1,982	1.9	2.3
7 Western States	1933	1,075,870	22,395	174	2.1	..
	1946	2,456,584	69,456	43,078	2.8	1.8

Certain general inferences were drawn from these facts, at the argument. They are: The actual increase in the sale of petroleum products corresponds to the rise in the whole industry. The number of outlets over a period of ten years has been reduced from an average of 7650 to 6000. Between 1936 and 1946, Standard sales of gasoline increased 58.8 per cent. The industry increase for the same period was 64.7 per cent. For lubricating oil, Standard's increase was 62.9 per cent, the industry increase, 104.8 per cent. As to batteries, the increase in units for Standard was 46.5 per cent, for the industry, 41.8 per cent. The comparative figures, as to the increase for some of the other companies are: *Gasoline:* Union Oil Company, 90 per cent; General Petroleum, 165 per cent; and Tidewater Associated, 34 per cent. *Lubricating Oil:* Union Oil Company, 98.2 per cent; General Petroleum, 174.9 per cent; and Tidewater Associated, 54.8 per cent.

Macmillan dispense their lubricating oil through some 10,000 accounts in the seven Western states. For Pennoil Company, the outlets in 1916 were 2000, in 1946, 12,000. For Arthur Haven Company, the outlets were 3500 in 1946, in 1947, 7,000. During this period, the number of outlets for Standard was 5197. During the same period, the number of independent stations which handle gasoline of different companies, or, what has

been referred to as "split pump" accounts, has increased, although they represent only 1.6 per cent of all the stations. Between 1931 and 1941,—a ten-year period,—Standard constructed only 8 per cent of the newly constructed service stations upon vacant sites. Between 1942 and 1947, Standard's proportion of new construction was 8.7 per cent.

(2) The Other Side of the Shield:

The other aspect of the problem must take into consideration the following facts: The gallonage of gasoline marketed has risen and the value of the commerce in petroleum and other products was $68,000,000.00 in 1947. The following statistical data bear on the extent of this commerce.

TOTAL GROSS QUANTITIES OF GASOLINE SHIPPED FROM STANDARD OIL COMPANY OF CALIFORNIA REFINERIES (RICHMOND, EL SEGUNDO AND BAKERSFIELD)

Year	Calif.	Ariz.	Nevada	Oregon	Wash.	Utah	Idaho
1946	15,371,753	698,933	391,715	3,289,260	3,827,403	45,351	2,254
1947	18,106,788	931,199	418,062	3,707,282	3,161,576	36,551	920

Note: Gasoline shipped above is in general delivered to Company's storage. Requirements of all classes of trade are filled from such storage, and the Company has no records which would show what part of the above gasoline was received for distribution or sale to retail outlets.

TOTAL GROSS QUANTITIES OF AUTOMOBILE LUBRICATING OILS SOLD BY STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC. SUCH OILS WERE SHIPPED FROM RICHMOND AND EL SEGUNDO REFINERIES (42 Gal. Barrels)

Year	Calif.	Ariz.	Nevada	Oregon	Wash.	Utah	Idaho
1946	492,226	27,012	9,569	63,525	79,982	17,016	14,177
1947	570,012	26,549	9,503	62,002	81,153	18,665	14,955

Note: Company records are not kept showing shipments by state of destination. Above represents sales by States—export sales are not shown.

TOTAL GROSS QUANTITIES OF GASOLINE PURCHASED OR ACQUIRED BY STANDARD OIL COMPANY OF CALIFORNIA (OTHER THAN FROM ITS OWN CALIFORNIA REFINERIES)

1946

State from which shipped

Calif.	Ariz.	Nev.	Ore.	Wash.	Utah	Idaho	N. M.	Texas
......	......	......	......	......	639,458	......	4,032	233,570

State of destination

Calif.	Ariz.	Nev.	Ore.	Wash.	Utah	Idaho	N. M.	Texas
......	237,602	......	......	......	471,735	168,083	......	......

1947

State from which shipped

......	......	......	......	......	829,189	......	13,368	101,307

State of destination

......	114,675	......	......	......	630,146	199,043	......	......

Note: Gasoline received above is in general delivered to Company Storage. Requirements of all classes of trade are filled from such storage, and the Company has no records which would show what part of the above gasoline was received for distribution or sale to retail outlets.

Note: The above gasoline was acquired by purchase.

TOTAL GROSS QUANTITIES OF GASOLINE SOLD BY STANDARD OIL COMPANY OF CALIFORNIA TO RETAIL DEALERS—

(42 Gallon barrels)

Year	*Calif.*	*Ariz.*	*Nevada*	*Oregon*	*Wash.*	*Utah*	*Idaho*
1946	3,225,122	393,467	197,310	861,865	1,038,245	331,431	347,054
1947	2,937,558	431,385	223,973	1,640,264	1,233,551	365,244	393,200

TOTAL GROSS QUANTITIES OF AUTOMOTIVE LUBRICATING OIL SOLD RETAIL OUTLETS OPERATED BY STANDARD OIL COMPANY OF CALIFORNIA (STANDARD STATIONS, INC.)

(42 Gal. barrels)

1946	72,928	8,871	4,450	19,475	23,448	7,469	7,830
1947	77,128	8,432	4,373	20,342	24,148	7,134	7,686

TOTAL GROSS QUANTITIES OF GASOLINE SOLD AT RETAIL OUTLETS OPERATED BY STANDARD OIL COMPANY OF CALIFORNIA (STANDARD STATIONS, INC.)

(42 Gallon Barrels)

Year	*Calif.*	*Arizona*	*Nevada*	*Oregon*	*Wash.*	*Utah*	*Idaho*
1946	4,990,166	285,078	90,125	439,695	548,110	110,693	57,548
1947	5,343,288	293,355	112,179	502,070	604,133	121,109	67,200

TOTAL GROSS QUANTITIES OF AUTOMOTIVE LUBRICATING OILS SOLD AT RETAIL OUTLETS OPERATED BY STANDARD OIL COMPANY OF CALIFORNIA (STANDARD STATIONS, INC.)

(42 Gallon Barrels)

Year	*Calif.*	*Arizona*	*Nevada*	*Oregon*	*Wash.*	*Utah*	*Idaho*
1946	80,064	5,836	1,796	8,213	10,458	2,317	1,272
1947	77,265	5,210	1,969	8,311	10,380	2,259	1,369

TOTAL NUMBER OF TIRES, TUBES, BATTERIES AND OTHER AUTOMOTIVE ACCESSORIES SHIPPED BY COMPANIES MANUFACTURING OR SUPPLYING THE SAME TO STANDARD OIL COMPANY OF CALIFORNIA AND/OR STANDARD STATIONS, INC., OR TO OTHERS ON THE ORDER OF STANDARD OIL COMPANY OF CALIFORNIA AND/OR STANDARD STATIONS, INC., FROM STATES OUTSIDE OF CALIFORNIA, OREGON, WASHINGTON, ARIZONA, NEVADA, IDAHO AND UTAH

1946

States into which Shipped	*Tires*	*Tubes*	*Batteries*
California	......	19,998	4,950
Oregon	......	......	......
Washington	......	......	......
Arizona	......	......	......
Nevada	......	......	......
Utah	......	......	......
Idaho	......	......	......
Total	......	19,998 (1)	4,950 (2)

1947

States into which Shipped	*Tires*	*Tubes*	*Batteries*
California	31,158	......	1,692 (3) (4)
Oregon	8,459	5,004	800 (4)
Washington	10,226	......	......
Arizona	3,969	......	1,268 (3)
Nevada	......	......	......
Utah	3,509	......	879
Idaho	......	......	......
Total	57,321 (5)	5,004 (1)	4,639

Note: Source: (1) Alabama; (2) Pennsylvania; (3) Texas; (4) Oklahoma; (5) Michigan

(3) *The Inconclusiveness of Comparative Figures*

Over the Government's objection, I allowed many comparative statistics, of which the foregoing are examples, to go into the record. This was consistent with the view that in resolving the issues of this case, the potential or actual effect of the agreements is important in determining reasonableness of restraint under the Sherman Act and substantiality of restraint or tendency to create monopoly under the Clayton Act.

But, while the comparative figures bear on the question, they are not determinate. Substantiality of restraint or tendency to create monopoly is established by (a) the market foreclosed,—here represented by the controlled units,— and (b) the volume of controlled business, totalling here in value $68,000,000.00.

Fractionally speaking, the business done by the competitors with their own outlets or with those under contract is much greater than the business of Standard,—both in volume and in money value. Nevertheless, the business of Standard is considerable. In effect, it amounts to a substantial lessening of competition and a monopoly of a sizeable segment of a line of commerce in a definite area—the seven Western states. What has *the tendency* to achieve such result become, *in actual effect,* an unreasonable restraint? Even before adopting the "appreciable segment" test[48], the Supreme Court sought to avoid a rigid formula for finding reasonableness or unreasonableness. In the *Trenton Potteries* case, Mr. Justice Stone stated:

> "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect of competition, for whatever difference of opinion there may be among economists, as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it *are based upon the assumption that the public interest is best protected from the evils of monopoly * * * by the maintenance of competition.*"[49]

It follows that there is illegal restraint here under both Acts, whether the commerce be considered quantitatively or comparatively.

(4) *Application to Sub-leases and Open Accounts*

We need not dwell at length on the contention that the stations operated under a sub-lease or on open account must be omitted from consideration. It is true that the Clayton Act[50] speaks of leases of goods. And it may be conceded that the statute does not apply to leases on real property. And, generally speaking, a sub-lease is not a lease. But, as I stated at the oral argument, the designation which the parties have given to an instrument is not conclusive. We are dealing with an important governmental policy of long duration, established by a statute which became effective on July 2,

[48] See Part III, (A) and cases cited in Footnotes 36 to 45.

[49] *United States v. Trenton Potteries,* 1926, 273 U. S. 392, 397. (Italics added.)

[50] 15 U. S. C. A., Sec. 14; *Curtis Publishing Co. v. Federal Trade Commission,* 1921, 3 Cir., 270 Fed. 881, 906; *Associated Oil Co. v. Meyers,* 1933, 217 Cal. 297, 304-306.

1890,[51] and implemented by a subsequent statute, which became effective on October 14, 1914.[52] Our duty is to give effect to it. If the practices involved in the case are contrary to the provisions of either statute, the character of the instrument in which they are contained is not important. The Sherman Act refers to contracts.[53] The Clayton Act refers to leases, sales or contracts. But, in setting the boundaries of illegality, it speaks of conditions, agreements, or understandings that the lessee or purchaser shall not use or deal in competitive goods, and which may result in the restraints condemned by the statute.[54] The Complaint is drawn under both statutes. Ordinarily, a lease deals with the term, the rent to be paid, and the type of business to be conducted on the premises. But, if, in addition, it says whose goods or products should be handled on the premises, we have a condition, agreement or understanding which has nothing to do with the lease proper, and which is within the scope of our inquiry. And if the exclusive supply undertaking, whether contained in a lease, or lurking behind an open account, has the effect condemned by the statute, it is within its prohibitions.[55]

(5) *Source of Products*

For the purpose of distributing the petroleum products, both in bulk and packaged, supplied by the California refineries of Standard, the territory is divided into twenty-three distributive areas. These areas are supplied bulk products by tank cars or tank trucks from various points, which, in turn, are supplied by tanker from the refineries.

Package goods are supplied by box cars and package trucks from the various refineries. For this purpose, the territory is divided into four areas. The accessories are supplied from eight accessory warehouses, their location and the dealers they serve being:

San Francisco—serves Central and Northern California; also dealers in Northwestern Nevada; also Lakeview District in Southern Oregon.

Salt Lake City—serves all Utah, Arizona, North of Grand Canyon, Eastern and Northern Nevada and Southeastern Idaho.

Phoenix—confined to the State of Arizona and Needles across the Colorado River in California.

Los Angeles—Southern California and Southern Nevada.

Fresno—within the State of California.

Portland—Oregon, Southern Washington and Southwestern Idaho.

Seattle—Washington only.

Spokane—Eastern Washington and Northern Idaho.

The point is pressed that some of the products, such as gasoline, are supplied to California stations exclusively from California refineries. And it is argued that, so far as the California stations are concerned, their dealings in gasoline are beyond the purview of interstate commerce.

We are not dealing here with commerce in different articles. We are dealing with contracts and practices which are alleged to be illegal under the Anti-Trust Acts. These contracts, which have been epitomized in the first part of this opinion[56] cover *specifically* all petroleum products and tires, tubes and batteries. They also affect dealings in other accessories. We need not, therefore,—nay, we cannot—make a segregation, so as to exclude any item which may have both state provenance and destination in the Western area. The contract is an entirety and cannot be split. More, under the Clayton Act, if a contract has a tendency to lessen competition substantially, or to create a monopoly, the fact that it may also affect the movement of goods in intrastate commerce does not validate it, if its whole effect is likely to be a lessening of competition or monopoly in a sizeable and measurable segment of interstate commerce. In interpreting statutes of this character, and, generally, any legislation which aims to carry into effect the plenary power of the Congress to regulate commerce, it is accepted constitutional doctrine that the power to control is not destroyed by the mere fact that purely intrastate activities may also be reached by it.[57]

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[51] 15 U. S. C. A., Sec. 1.
[52] 15 U. S. C. A., Sec. 14.
[53] 15 U. S. C. A., Sec. 1.
[54] 15 U. S. C. A., Sec. 14.
[55] See, *United Shoe Machinery Co. v. United States*, 1922, 258 U. S. 451, 457-458; *Standard Fashion Co. v. Magrane-Houston Co.*, 1922, 258 U. S. 346, 354-355.
[56] See Part I of Opinion.
[57] See Part II-(D), and cases cited in Footnotes 32 to 35. And see, *United States v. Wrightwood Dairy Co.*, 1942, 315 U. S. 110; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 1942, 314 U. S. 498; and see my opinion in *Holl v. Southern Pacific Co.*, 1947, D. C. Calif., 71 Fed. Sup. 21, 23-24.

More, as already shown, there is a constant flow in interstate commerce of these products and supplies.[58] The contracts affect, and the transactions under them are in the course of, interstate commerce. And the practice must also be considered from the effect on the dealers and the competitive suppliers. If, as to them, it results in an effective lock-out of a considerable supply of goods of interstate source, the contracts which carry the practice into effect are invalid.

V

Conclusion and Findings

(1) Summary of conclusions: So we come to the end of our discussion. Grant that, on a comparative basis, and in relation to the entire trade in these products in the area, the restraint is not integral. Admit also that control of distribution results in lessening of costs and that its abandonment might increase costs. Despite all this, there confronts us the inescapable fact that such "balanced distribution"—as counsel for the defendants characterize it,—calls for concentration of representation, which, in turn, results in an unreasonable restriction of trade, and a substantial lessening of competition, so far as the 5197 outlets, their independent operators and those who seek to supply them, are concerned. As the restriction corners a market of the value of $68,000,000.00, it is illegal, even considered on a comparative basis. Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial[59] to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested, by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase—"an appreciable segment" of interstate commerce.

(2) Specific Findings: So the facts proved and the legal principles applicable command the following findings:

1. The exclusive supply agreements relate to interstate commerce.

2. They affect, and the transactions under them are, in the course of, interstate commerce.

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[58] *United States v. Trenton Potteries,* 1926, 273 U. S. 392, 397; and see cases cited in Footnotes 9 to 13. General statements on discontinuity as an element in fixing the intrastate character of a transaction, such as those quoted and relied on, from *Jewel Tea Co. v. Williams,* 1941, 10 Cir., 118 F. (2) 203, 206-207, are not very helpful. They must be evaluated only in relation to the situation under review in the particular case, and in the light of the later Supreme Court decisions, which have modified greatly the concept they seek to perpetuate. The case in which they are found was decided *in 1941.* In *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, *decided in 1944,* the Supreme Court refused to apply rigidly the formula of pause or stoppage. The Court said:

"The record reveals, however, that the goods in both of these two categories are ordered pursuant to a preexisting contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held were covered by the Act. We think they must be included. Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, *a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse.* The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce.' But as we stated in *Kirschbaum Co. v. Walling,* 316 U. S. 517, 520-521, decisions dealing with various assertions of state or federal power in the commerce filed are not particularly helpful in determining the reach of this Act." (*Walling v. Jacksonville Paper Co., supra,* pp. 568-569). (Italics added.)

And see, *Walling v. Mutual Wholesale Foods Supply Co.,* 1944, 8 Cir., 141 F. (2) 331, 338-340; compare, *Clyde v. Broderick,* 1944, 10 Cir., 144 F. (2) 348, 351, *decided after* the *Jacksonville Paper Co.* case, and in which *the same court* which decided the *Jewel Tea Company* case applies a more flexible concept, which accords with the latest rulings of the Supreme Court.

[59] See Part II-(D) of opinion, and cases cited in Footnotes 32 to 35.

3. The relation established by the agreements between the operators and Standard is not that of employer and employee, but that of independent contractor.

4. The agreements confine the operators of stations to which they apply to dealing in Standard products, and automotive accessories handled or sponsored by them.

5. They lock out dealers from sources of competitive products originating in interstate commerce.

6. They deny to dealers access to such competitive products.

7. They deny to manufacturers or suppliers of such products access to the outlets controlled by the independent contractors who operate the stations.

8. They affect a substantial number of outlets and a substantial amount of products, whether considered comparatively or not.

9. They constitute an unreasonable restraint of trade and commerce among the States, under the Sherman Anti-Trust Act.[60]

10. They result in a substantial lessening of competition and tend to create a monopoly in a line of commerce, in contravention of the Clayton Act.[61]

11. They are illegal *in their effect* and should be enjoined.

Judgment will, therefore, be for the plaintiff. The terms of the judgment are contained in an order filed simultaneously.

[¶ 62,262] Louisiana Wholesale Distributors Association, Inc. v. I. Rosenzweig, d. b. a. Pic-Kwickly Grocery.

In the Supreme Court of Louisiana. No. 38,950. June 1, 1948.

In re The Judges of the Court of Appeal for the Second Circuit Applying for Instructions.

Louisiana Unfair Sales Act

Unfair Sales Act—Constitutionality—No Violation of Due Process and Equal Protection Clauses.—In adopting the Unfair Sales Act, the Louisiana legislature was acting within its police power, to protect the economic structure and to prevent the creation or perpetuation of monopolies. Since the Act has neither been alleged nor shown to be arbitrary or discriminatory, the Act is held constitutional. The judgment of the trial court enjoining a retail grocer from advertising and selling cigarettes at less than cost, in violation of the Unfair Sales Act, is affirmed. The dissenting opinion states that the Act is unconstitutional for the reason that the provisions of the Act have no direct relation to the mischiefs at which, in the title and preamble, the Act is said to be aimed, or to the purposes which are intended to be accomplished.

See the Louisiana Unfair Sales Act, Vol. 2, ¶ 8328.01, and prior opinion, ¶ 62,206.

[*Nature of Action*]

FOURNET, J.: This case is now before us for the second time. It was originally here on an appeal by the defendant from a judgment permanently enjoining him from advertising and selling cigarettes at less than cost in violation of the "Unfair Sales Act," Act No. 338 of 1940, as amended by Act 79 of 1942 and Act 265 of 1946. Finding that we had no jurisdiction in the matter, we transferred the case to the Court of Appeal for the Second Circuit under the authority of Act 19 of 1912. — La. —, 34 So. 2d 58. That court is now certifying to us for our answer, under the authority of Section 25 of Article VII of the Constitution of 1921, the question of the constitutionality *vel non* of this act and we, under the authority of this same section and in order to avoid any further delay in returning the case with instructions, have concluded to "decide the whole matter in controversy in the same manner as if it had been on appeal directly to the Supreme Court."

The simple question posed in this case has been answered adversely to the contention of the appellant by the courts of the thirty states of the Union that have had occasion to review the similar acts adopted by their respective legislatures. See, *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.,* 11 Cal. 2d 634, 82 P. 2d 2, 118 A. L. R. 486; *Rust v. Griggs,* 172 Tenn. 565, 113 S. W. 2d 733; *McElhone v. Geror,* 207

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[60] 15 U. S. C. A., Sec. 1.

[61] 15 U. S. C. A., Sec. 14.

Minn. 580, 292 N. W. 414; *Associated Merchants v. Ormesher,* 107 Mont. 530, 86 P. 2d 1031; *State v. Langley,* 53 Wyo. 332, 84 P. 2d 767; *State v. Sears,* 4 Wash. 2d 200, 103 P. 2d 327; *Moore v. Food Dealers Assn.,* 286 Ky. 24, 149 S. W. 2d 755; *Dikeou v. Food Distributors Association (Colo.),* 108 P. 2d 529; *Carroll v. Schwartz,* 127 Conn. 126, 14 A. 2d 754; *Blum v. Engelman,* 57 A. 2d 421. The underlying principle upon which these decisions are based has the support of the decisions of the Supreme Court of the United States. *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469; *Northern Securities Co. v. United States,* 193 U. S. 197, 24 S. Ct. 436, 48 L. Ed. 679; *Townsend v. Yoemans,* 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210; *Kunsman v. Max Factor Co.,* 299 U. S. 198, 57 S. Ct. 147, 81 L. Ed. 122; *Old Dearborn Distilling Co. v. Seagram-Distillers Corp.,* 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109; *Hegeman Farms Corp. v. Baldwin,* 293 U. S. 163, 55 S. Ct. 7, 79 L. Ed. 259; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835.

[*Legislative History*]

The great strides made by mass production and the development of national brands of standard consumers' goods exploited by advertising addressed directly to the public since the beginning of the century have been parallelled by increased and intensified competition, with its resultant effect upon the economic welfare of the citizen and the merchant. To combat the monopolistic dangers inherent in the concentration of retail distribution in the hands of large and richly-financed distributive units seeking to secure an increasingly large share of the retail market in all nationally advertised brands, and to protect the small and independent retailers from gradual liquidation by reason of the varied schemes devised to "kill off" the competition they afford, the law-making bodies throughout the various states of the country early in the century undertook to restrain the inexorable tendency of these practices by enacting legislation designed to eliminate the employment of questionable devices for the studied purpose of injuring competitors. Such devices were condemned in these acts as being inimicable to the public welfare and to the economic stability of the community.

Among one of the most common of these devices is the so-called "loss leader", employed under the guise of an advertising scheme but characterized as "bait" by the late Justice Brandeis of the United States Supreme Court in an article written before his elevation to the bench. Justice Brandeis also said this device would be more appropriately termed a "mis-leader" because its very purpose is, ordinarily, "to create a false impression." This observation, made in 1913, is equally true today. "Loss leader" is the term applied to the practice of selling nationally known articles at cost or less than cost for the calculated purpose of enticing customers away from competitors and into stores where they may be entrapped into purchasing other goods at marked-up prices that will more than make up for the loss on the "leader". Such practices tend to bankrupt the small merchants and to create monopolies by the concentration of distribution in the hands of a few well-financed groups. In addition, they are inimicable to sound and honest merchandising.

Beginning with South Carolina's rather feeble initial attempt to cope with this problem in 1902, the states have gradually and increasingly strengthened legislation levelled at preventing the unreasonably low pricing of goods for the purpose of destroying competition or of eliminating an individual competitor while at the same time deluding the public. Today all but three states have fair trade statutes of some kind. Some thirty states have statutes that are designated generally as Unfair Practices Acts or Unfair Sales Acts. These acts all follow the same general pattern, the only practical difference being that the method employed in computing the cost of the article varies.

[*Louisiana Statute*]

The legislature of Louisiana, following this trend and expression of public policy, adopted in 1940 its Unfair Sales Act, the express object of which, according to its title, is "to protect the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair sales and discriminatory practices by which fair and honest competition is destroyed or prevented". The act, as amended, makes it unlawful for any retailer or wholesaler, with the intent or effect of unfair competition, to advertise, offer to sell, or sell, any merchandise at less than cost. "Cost" is defined in Section 2 to be the invoice cost,

or the replacement cost within thirty days prior to the date of sale, whichever is lower, less all trade discounts, except customary discounts for cash, and plus freight charges, cartage and certain taxes, and also plus a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, is fixed at six per cent for retailers and two per cent at the wholesale level. Section 6 of the act excepts from the operation of its provisions all out of the ordinary situations where a sale at less than cost may be necessary, such as bankruptcy sales, sales to the highest bidder of confiscated goods and those situations where the price of merchandise has been made in good faith to meet competition. Any violation of the act is made a misdemeanor in Section 4, punishable by a fine of not less than $25 and not more than $500 for each offense. Section 5 vests the courts of the state with jurisdiction to prevent and restrain violations of the act and authorizes any person damaged or threatened with loss or injury by reason of its violation to sue for and secure injunctive relief. It is also made the duty of the district attorneys throughout the state to institute proceedings to prevent and restrain violations of the act.

[*Facts of Case*]

The defendant in this case, I. Rosenzweig, doing business as the Pic-Kwickly Grocery, located at Tallulah, Louisiana, in Madison Parish, in answer to the suit filed against him by the Louisiana Wholesale Distributors Association, Inc., a non-profit corporation composed of a large group of wholesale tobacco and grocery distributors of Louisiana, commonly known as jobbers, admitted the allegations contained in the petition charging him with having advertised and sold certain popular brands of cigarettes at less than cost, in violation of the Unfair Sales Act, stating that he used them as a "loss leader" in an effort to stimulate his general grocery business. As a defense, he urged that the act is unconstitutional because it violates the due process and equal protection guaranteed him under the Fifth and the Fourteenth Amendments of the Constitution of the United States, and under Section 2 of Article I of the Constitution of Louisiana, contending that such a statute is, in fact, a price fixing statute and class legislation, precluding him from freely contracting with regard to his property.

[*Ruling of Lower Court*]

Upon this constitutional issue there was judgment in the lower court decreeing Act 338 of 1940, as amended, to be constitutional and granting the plaintiff the injunctive relief prayed for.

[*Cases Cited*]

The leading case on this subject, *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, brought to the Supreme Court of the United States for its decision the question of the constitutionality of a New York milk control law that had been adopted for the purpose of thwarting harmful competition. Under this law the administrative board issued regulations fixing the minimum price that could be charged for milk by the quart and pint and Nebbia, when charged with the violation of these minimum price regulations, asserted as his defense that the statute and regulation contravened the equal protection and due process clauses of the Constitution of the United States. His argument before the United States Supreme Court was that the board's order discriminated unfairly against him as a "cash-and-carry" dealer in milk since his rivals in the trade who had no store but only a wagon and delivery route had no lower limit set for the price at which they were obliged to buy his milk and were allowed to sell pints of milk as low as he did, with delivery to the customer's door as a bonus. In upholding the constitutionality of the regulations issued under the Milk Control Law, the court made the following pertinent observations that are equally applicable in the case now before us:

> "*So far as the requirement of due process is concerned* and in the absence of other constitutional restriction, *a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.* The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. *If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.* 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U. S.

197, 337, 338, 48 L. Ed. 679, 700, 701, 24 S. Ct. 436. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measure which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. * * * The constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. *Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."* (Italics ours.)

In the landmark case of *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, 11 Cal. 2d 634, 82 P. 2d 3, 118 A. L. R. 486, the California Supreme Court upheld the constitutionality of the California Unfair Practices Act of 1936, as amended (an act that is for all intents and purposes identical with the one here being considered), despite the attack made upon it by the defendant, enjoined from selling its products below cost or replacement cost, whichever was the lower, plus the cost of doing business as defined in the act, epitomizing in the following excerpt from its opinion the attitude of the courts with respect to the legality of such statutes:

"That the avowed purpose of the act as stated in section 13 ' * * * to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented'—is well within the state's police power cannot be seriously doubted. *It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare.* In recent years the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of economic conditions. This apparent extension of the police power is in fact no extension at all. The police power has not expanded. *Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest.* However changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. *The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions.* These principles have frequently been enunciated by this Court and by the Supreme Court of the United States. * * * That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no citation of authority." (Italics ours.)

The case relied on by the defendant is *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 Fed. Supp. 70. The statute under which this case was decided has since been superseded by an act of the Minnesota legislature that is practically identical with the one here under consideration, and the constitutionality of this later act was upheld by the Supreme Court of Minnesota in the case of *McElhone v. Geror*, 207 Minn. 580, 292 N. W. 414, wherein it is said:

"Until recently it was thought, incorrectly, that outside the field of businesses conducted under a franchise and enterprises which, historically, were considered subject to price regulation, the fixing of prices was permissible only where the business was 'affected with a public interest'. *Tyson & Bro. v. Banton*, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596. That doctrine, which put price control in a different category from other forms of state regulation, has been disapproved. In *Nebbia v. New York, supra*, it was said: 'Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.' "

[*Within Police Power*]

Such acts have consistently been held not to be price fixing statutes. They merely fix the level below which producers and distributors may not sell without injury to a competitor and, ultimately, to the community. Clearly, therefore, in adopting this state's Unfair Sales Act for the protection of our economic structure and to prevent the creation or perpetuation of monopolies, the legislature was acting well within its police power. And since the act has neither been alleged nor shown to be arbitrary or discriminatory and an examination of its context shows it is broad in its scope and uniform and fair in its operation and is not violative of any of the personal or contractual rights guaranteed to our citizens by the federal and state constitutions, it is our conclusion that the statute is constitutional.

[*Judgment Affirmed*]

For the reasons assigned the judgment of the district court, granting the injunctive relief prayed for, is affirmed.

[Dissenting Opinion]

O'NIELL, C. J., dissenting: The question propounded by the court of appeal is this:

"Are the acts of the Legislature mentioned herein [Act 338 of 1940 as amended by Act 79 of 1942 and by Act 256 of 1946] vulnerable to the plea of unconstitutionality tendered and urged by the defendant?"

My opinion is that Act 338 of 1940 as amended by Act 79 of 1942 and by Act 256 of 1946 is unconstitutional. I base this opinion upon the fact that the provisions of the act have no direct relation to the mischiefs at which, in the title and preamble, the act is said to be aimed, or to the purposes which, according to the title and preamble, are intended to be accomplished. It is no reflection upon the members of the Legislature of Louisiana to say that the title and preamble are not at all appropriate to the avowed purpose for which the statute was enacted, because, as I understand from my research, the statute, including the title and preamble, was copied from or patterned after statutes adopted originally in other states. See Virginia Acts of 1938, Ch. 441; Arizona Laws of 1939, Ch. 39; Idaho Laws of 1939, Ch. 209; Wisconsin Laws of 1939, Ch. 56. The title and preample of the Louisiana statute have never been amended in any way since they were adopted originally as the title and preamble of Act 338 of 1940. It appears to me—I say with great respect—that the original composer of this title and preamble had an exaggerated idea of the things to be accomplished and the evils to be abolished by the adoption of the act. Competition is the life of trade. A merchant putting out and advertising "loss leaders" in his stock of merchandise cannot possibly do injury to his customers or to the general public. Such practice can affect adversely only competitors in business, by stimulating competition. No merchant can continue indefinitely or for a great length of time to advertise and sell "loss leaders" without putting himself out of business. He has as much right to put himself out of business in that way as he would have to close his door and leave the field to his competitors whenever he sees fit. Besides, a customer who goes to a store to buy a so-called "loss leader", whether it be a carton of cigarettes or any other article of merchandise, is not obliged to buy anything else. If he sees fit he may buy only the "loss leader", within the limits of the quantity which the advertiser is willing to sell to any one buyer.

And now, for the purpose of showing why I consider that the title and preamble to this statute, which originated somewhere outside of Louisiana, is—to say the least of it—far-fetched—and misleading—I reproduce here a copy of the title and preamble:

> "AN ACT to protect the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair sales and discriminatory practices by which fair and honest competition is destroyed or prevented; to define 'unfair sales' and to provide remedies for the violations thereof; and to provide penalties for the violation of the provisions of this Act.
>
> "Whereas, the practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce; and
>
> "Whereas, such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy; and
>
> "Whereas, bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and non-

payment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression, now therefore,

"Be it enacted by the Legislature of Louisiana, That" etc.

In the sixth section of the act certain exceptions are made to its applicability, such as *bona fide* clearance sales, if the merchandise is marked and sold as in such sales, or where perishable merchandise must be sold promptly to prevent a loss, or where merchandise is imperfect or damaged, or the sale of it is being discontinued, provided that the merchandise in such cases is advertised and marked down as being sold for such reason, or where merchandise is sold in the final liquidation of any business, or where it is sold to a relief agency, or to a governmental institution, etc., or where the price of the merchandise is made in good faith to meet competition, or where a sale is made by an officer under an order or the direction of any court. These exceptions to the applicability of the statute are only such as the courts themselves would be apt to observe to prevent injustice. But these exceptions do not save the statute from the plea of unconstitutionality.

The statute contains also what is called a severability clause, declaring that if any section, sentence, clause or provision of the act shall be decreed unconstitutional the decree shall not impair any valid provision of the act. The severability clause is a matter of no importance in this case because, if the general provisions of the statute are violative of the due process clause in the Fourteenth Amendment of the Constitution of the United States, the statute is entirely unconstitutional.

The due process clause does not permit the legislature to authorize the several district attorneys and grand juries throughout the state to prosecute—or to authorize the district judges to convict and punish by a fine of $500.00—a merchant who does nothing worse than to sell a package of cigarettes or any other article of merchandise for a sum less than it cost him.

For these reasons I respectfully dissent from the majority opinion in this case.

[¶ 62,263] Allied Paper Mills, et al. v. Federal Trade Commission.

In the United States Circuit Court of Appeals for the Seventh Circuit. No. 8911. June 11, 1948.

On Petition for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

Combination to Fix Prices—Sufficiency of Findings—Sufficiency of Evidence to Support Findings.—A Federal Trade Commission order requiring corporations engaged in the manufacture, sale and distribution of book paper, and an association of such manufacturers, to cease and desist from engaging in concerted price-fixing and other activities in violation of the Federal Trade Commission Act, is held to be supported by the evidence as to all but one of the respondents. The findings are ordered vacated as to that one, and enforced as to all the other respondents. The findings of the Commission that the capacity, tendency and effect of the combination maintained and the acts and practices performed by respondents thereunder were to lessen, restrain and suppress competition in the sale of book papers, and that the combination and conspiracy resulted in the fixing of uniform prices, are held sufficient as a matter of law. Respondents were proved to have agreed upon uniform quantity discounts, uniform finishing differentials, uniform base prices, and a uniform zoning system with uniform zone differentials, without regard to a particular respondent's costs of production and distribution. The pattern clearly provides a means of fixing uniform prices. Evidence that the practice of one respondent was to compete with the other respondents by offering its coated paper within the other respondents' uncoated paper price ranges, and, in so doing, adopting the latters' trade customs for uncoated paper, to meet competition, is held not substantial, and the findings of conspiracy to fix prices cannot be sustained as to that respondent.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6380.62.

Affirming in part and reversing in part the order of the Federal Trade Commission in Dkt. 3760.

Before MAJOR and MINTON, Circuit Judges, and LINDLEY, District Judge.

[*Nature of Action*]

MINTON, C. J.: This is a petition to review a cease and desist order of the Federal Trade Commission and to set aside the Commission's findings as to the facts and conclusions upon which the order is based. In the alternative, we are asked to modify the order and such findings as are unsupported by the evidence or by the law.

The petitioners are some forty-two corporations engaged in the manufacture, sale, and distribution of book paper, the Book Paper Manufacturers Association, and the Association's officers and representatives. The Book Paper Manufacturers Association, hereafter referred to as the Association, is a voluntary, unincorporated body composed of manufacturers of book paper. It was organized in June 1933, in connection with the National Industrial Recovery Act, with its executive committee in substance as the executive authority of the N. R. A. code for book paper manufacture. Each corporate petitioner is a member of the Association and each is engaged in interstate commerce. No single corporate petitioner produces more than 10 per cent of the industry's output.

[*Price Fixing Charged*]

The complaint against the petitioners charged them with engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U. S. C. Sec. 45(a), by entering into among themselves since June 16, 1933, and for more than two years last past, a combination to suppress or restrict price competition and to fix prices. After extensive hearings, the Commission found against the petitioners and issued its order directing them to cease and desist from price fixing and from certain specified activities for the purpose of price fixing.

[*Facts*]

Broadly speaking, book paper is any paper which contains not more than 25 per cent groundwood and which is customarily used for printing purposes. The more important kinds of book paper are those used in books, magazines, and pamphlets, offset paper used in the offset printing process, envelope paper, and tablet paper. Other types include paper used in adding machines, for calendars, menus, posters, decalcomania, and transfer printing. Book paper may be divided on another basis into coated and uncoated paper, the former being paper which after manufacture is coated on one or both sides to improve the printing surface. There are several grades of coated and uncoated paper.

Manufacturers of book paper sell variously to paper merchants, users, or both in varying degrees. Approximately 55 per cent of the book paper production is sold by the mills to the users, principally magazine and book publishers, converters, and printers. The remaining 45 per cent is sold to merchants for resale. Approximately 55 per cent of the total tonnage sales, both to users and merchants, is made on the basis of negotiated contracts. "Spot transactions" comprise the other 45 per cent of the total tonnage sales; a "spot transaction" is a sale resulting from an order for a stated kind and quantity of paper to be delivered on a specified date or dates at an agreed price. Of the spot transactions, a majority are between the mill and the merchant. Paper merchants usually buy and sell book papers produced by more than one manufacturer.

Some manufacturers produce both coated and uncoated papers, others produce only one kind; some produce coated paper only and buy uncoated paper from other producers; some produce only a few grades of either coated or uncoated paper, while others produce many; some concentrate largely upon offset papers or envelope or tablet papers, while many have specialized papers not closely related to any of the standard grades. Book papers are made in many types, sizes, weights, and colors, and with many different special characteristics for particular uses. Paper of any designated grade produced by one manufacturer is not necessarily identical with that classified in the same grade but produced by another manufacturer. All papers classified in one grade compete primarily with one another and are considered equivalent by petitioners for pricing purposes. However, there is also competition between adjoining

grades because it is frequently possible to substitute one for another.

[*Petitions for Review*]

Petitioner Consolidated Water Power and Paper Company, of Wisconsin, hereafter referred to as Consolidated, has separately attacked the Commission's order. For reasons that will be developed, we deem it necessary to detail the facts of its operation since they are not the same as those of the other corporate petitioners. The Commission here has acknowledged Consolidated's unique situation, but it did not make any separate findings as to it.

[*Petitioner's Production*]

Ninety-five per cent of Consolidated's production within the scope of this proceeding is coated book paper, comparable in quality but not meeting the specifications of the so-called standard grades of coated papers manufactured by other mills. This departure from standard specifications results from the groundwood content of Consolidated's product. This coated paper is the exclusive product of Consolidated by virtue of its patent which manufactures and coats paper in a single process at great speeds as compared with the other corporate petitioners' separate and slow coating process after manufacture. Because of its patented process and inexpensive pulp, Consolidated is able to sell its coated papers at prices substantially lower than the published list prices of the standard grades of coated papers. In fact, Consolidated sells its coated paper within the lower price range of the uncoated (and, of course, inferior for printing purposes) paper of the other corporate petitioners. In the five-year period beginning in January 1935, the date of Consolidated's manufacture by the patented process, it has developed an annual market in coated papers of 80,000 tons, a substantial portion of which business was formerly held by the other corporate petitioners. At no time did Consolidated submit a bid for Government business, but it is a member of the Association.

[*Organization of Association*]

Essentially, the combination and conspiracy charged against all the petitioners was to fix prices to customers located throughout the United States, including the United States Government as a customer, by the following means. Certain of the corporate petitioners organized the Association in June 1933; all others have joined it since and have used it since its organization as a clearing house and means of exchange for information submitted to it by the members, including sales reports, prices, discounts, and terms of sale. Regular meetings of the Association are held from time to time at which the corporate and individual petitioners discuss trade and competitive conditions and agree upon and fix trade policies and prices to be charged.

[*Uniform Differentials*]

It is further alleged that the petitioners have formulated and adopted uniform finishing differentials which they use without regard to the actual cost of the finishing operations to the respective petitioners. The petitioners have promulgated and compiled so-called trade customs in the form of rules and regulations dealing with allocation and classification of grades, grading, quotations and sales, and other similar matters, and including a pricing guide containing a zoned map of the United States with price differentials according to zone. It is alleged that the petitioners generally use these rules and regulations.

[*Basing Point System*]

The individual petitioners are alleged to have been and to be the officers and members of the Association executive committee, and as such, have complete charge of its activities and meetings, the collection, compilation, and dissemination of information, and the formulation of trade policies. The corporate petitioners have adopted and maintained an identical zoning system for price fixing purposes by means of which the United States is divided into four zones. The corporate petitioners all sell at fixed and identical delivered prices within these zones. The price for Zone 1 constitutes the base price; the prices for the other zones are the Zone 1 base price plus a fixed and uniform differential for each zone. A single delivered price applies at each and every destination within the respective zones, no matter what place of shipment or place of delivery is involved.[1]

[1] The N. R. A., which was terminated May 27, 1935, granted immunity during its existence for the activities charged herein.

The Commission found the facts substantially as charged in the complaint. We shall discuss the findings below insofar as it is necessary to decide the case. We do not set the findings out in full, but they may be found in the record of these proceedings before the Commission. Vol. 40 Federal Trade Commission Decisions, 696.

[*Jurisdiction to Review*]

At the outset, it is well to decide the extent of our jurisdiction to review these proceedings. There can be no doubt of its limited character. The Federal Trade Commission Act provides: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U. S. C. Sec. 45 (c). This statute as interpreted by the Supreme Court gives finality to the Commission's findings of fact if they are supported by substantial evidence. *F. T. C. v. Algoma Lumber Co. et al.,* 291 U. S. 67, 73, 54 S. Ct. 315, 78 L. Ed. 655; *F. T. C. v. Pacific States Paper Trade Association,* 273 U. S. 52, 63, 47 S. Ct. 255, 71 L. Ed. 534. We do not weigh the evidence or consider the credibility of the witnesses. *Triangle Conduit & Cable Co., Inc., et al. v. F. T. C.,* decided by this Court on May 12, 1948. All reasonable inferences from the facts are likewise for the Commission. *F. T. C. v. Standard Educational Society et al.,* 302 U. S. 112, 117, 58 S. Ct. 113, 82 L. Ed. 141; *Triangle Conduit & Cable Co., Inc. et al., supra; Fort Howard Paper Co. et al. v. F. T. C.,* 156 F. (2d) 899, 907. If there is substantial evidence, though it be conflicting, the findings cannot be disturbed. *Fioret Sales Co., Inc. et al. v. F. T. C.,* 100 F. (2d) 358, 359. In view of this, we cannot sustain the petitioners' contention that where two contradictory and reasonable inferences may be drawn from the same evidence, the reasonable inference of guilt found by the Commission is not supported by substantial evidence. If the Commission's inference from the facts is reasonable, our inquiry ceases.

Section 5 of the Federal Trade Commission Act (15 U. S. C. Sec. 45 (a)) which petitioners are found to have violated prohibits unfair methods of competition in commerce. A price fixing combination or agreement is clearly an unfair method of competition within the Act and is illegal. *F. T. C. v. The Cement Institute et al.,* decided by the Supreme Court April 26, 1948. Any similar combination or agreement which tampers with the price structure is an unlawful activity. *U. S. v. Socony-Vacuum Oil Co., Inc. et al.,* 310 U. S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 1129; *Triangle Conduit & Cable Co., Inc. et al. v. F. T. C., supra.*

The petitioners here contend that the scope of the proceedings against them has been limited to spot transactions to merchants, and does not include contract sales, or spot transactions with non-merchants. They base this contention on objections to certain evidence made by the Commission in the trial, and they argue that the findings and evidence do not expressly relate to other than this limited issue. The Commission denies such a limitation of issues and explains its objections to this evidence on other and satisfactory grounds. Further, the Commission points out that the very fact of its not having expressly limited its findings argues against such a limitation. It contends also that the evidence is not so limited as, for example, the uniform contracts prepared and distributed to the petitioners by the Association, and the bids for Government business, which sales are contract sales. In view of this, we hold that the issues are not limited as contended by the petitioners, and if the findings are otherwise adequate and the evidence substantial, they must be upheld as to the several types of sales.

With these preliminary questions decided, there remain but two issues in the case. The first is that of the adequacy of the findings as to the facts. The petitioners have sharply and extensively argued that the findings are insufficient as a matter of law to support the order to cease and desist. The remaining question is whether there is substantial evidence to support the findings as to the facts. As indicated above in the resume of the complaint, the petitioners are charged with concertedly adopting and using several devices as the means of their total conspiracy. For purposes of this opinion, we shall refer to the concerted means that formed parts of the total conspiracy, and to the total conspiracy itself.

As to the adequacy of the findings as to the facts. In considering the petitioners' contentions in this respect, it is well to keep in mind that findings are to be construed liberally in support of a judgment or order. *Triangle Conduit & Cable Co., Inc. et al. v. F. T. C., supra.* Reasonable inferences which

may be based on facts found will be deemed drawn; and words fairly importing a concerted activity or conniving together to restrain trade are sufficient to charge such a conspiracy. *Triangle Conduit & Cable Co., Inc. et al. v. F. T. C., supra; American Tobacco Co. et al. v. U. S.*, 147 F. (2d) 93, 117.

As we understand the petitioners, they object to the finding of the total combination and conspiracy for indefiniteness. In accordance with the allegations in the complaint, the Commission's findings include a finding of each of the methods or techniques used to accomplish the purposes of the total combination and find categorically that such methods or techniques were arrived at through agreement and concert. The findings as to the facts conclude:

> "* * * the Commission * * * finds, that the capacity, tendency, and effect of the combination maintained in the manner aforesaid and the acts and practices performed by respondents thereunder and in connection therewith, as set out herein, has been, and is, to hinder, lessen, restrain, and suppress competition in the sale of book papers * * *."

We hold that these words, read in conjunction with the other findings, are sufficient as a matter of law. *F. T. C. v. The Cement Institute et al., supra.* Reasonable men cannot be so deceived as to mistake these words for other than a finding of a combination and conspiracy to fix prices. The findings apply to all petitioners—they are all named in the earlier findings, and both the ultimate finding above and the findings of agreement as to the particular means of the total combination refer to "the respondents." The findings of the concerted activities as the means of the total conspiracy are also set out with unmistakable particularity and adequacy.

The petitioners contend further that even if the findings of combination and conspiracy to fix prices are sufficient, there is no adequate finding that such combination and conspiracy resulted in uniformity of price. However, the findings as to the concerted means and methods of the total conspiracy are replete with references to price uniformity and the varying degrees thereof achieved. Moreover, the final paragraph of the findings reads:

> "* * * the Commission * * * finds, that the capacity, tendency, and effect of the combination maintained in the manner aforesaid * * * has been, and is, * * * to prevent, hinder, and restrain the operation of competitive forces which tend to disturb the uniformity of prices established and maintained through the aforesaid means."

We hold that as a matter of law this finding, when considered in connection with the prior findings and subsidiary findings of fact, sufficiently finds the wrong of fixing uniform prices resulting from the combination and conspiracy. Like the other findings, it refers to all petitioners and is adequate in that regard.

The remaining question is as to the sufficiency of the evidence to support the findings. The petitioners[2] contend at the outset that there is no substantial evidence that prices were in fact in any substantial uniformity and therefore that the finding to that effect, supra, and according subsidiary findings must be set aside. We must also reject this contention. There was evidence of the prices for spot sales to merchants for two different periods, one the week ending April 3, 1937, and the other week ending July 16, 1938. Invoices were studied, analyzed, and tabulated in various ways, and they showed that in the 1937 period 85.62 per cent of sales were in agreement with the uniform price list; these sales represented 72.40 per cent of tonnage and 75.63 per cent of dollar value. For the 1938 period, 86.14 per cent were in agreement with the uniform price list; these sales represented 77.64 per cent of the tonnage and 79.56 per cent of the dollar value. As we understand the petitioners, they do not deny the truth of this evidence, but seek to discredit it with arguments going to its weight and by pitting against it expert evidence of their own. Clearly, our appellate function does not involve the sort of review that the petitioners seek of this evidence.

Even without this definitive evidence of substantial uniformity, this general finding is supported by such items of evidence as the petitioners' refusal to fill an order which petitioner Allied's merchant-agent had obtained when he cut his offering price to the United States Government, even though such price cut was to come out of the agent's

[2] References to "petitioners" hereafter do not include Consolidated unless it is specifically so stated.

commission; the undisputed uniformity of bids to the Government after N. R. A.; the reams of correspondence among and concerning the petitioners; and the petitioners' conduct through the Association when faced on occasion with breaking prices. The Commission's inferences from all of the above were reasonable. This view of the evidence has its legal basis in the clear law that price fixing as an unlawful act includes any tampering with or manipulation of prices. It includes more than the mere establishment of uniform prices, and it is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible. *U. S. v. Socony-Vacuum Oil Co., Inc. et al., supra,* at pages 221, 222, 223; *Triangle Conduit & Cable Co., Inc. et al. v. F. T. C., supra.*

The petitioners argue that there is no substantial evidence to support the finding of the total conspiracy. A combination or conspiracy can be shown by circumstantial evidence. *Triangle Conduit & Cable Co., Inc. et al. v. F. T. C., supra; United States Maltsters Assn. et al. v. F. T. C.,* 152 F. (2d) 161, 162. The evidence here which supports the finding of combination and conspiracy is legion: all the petitioners expressly pledged their continued cooperation with the Association upon the termination of the N. R. A.; the petitioners continued to file price changes with the Association on forms provided by the Association therefor and these changes were disseminated by the Association; many petitioners mailed their new base prices directly to other petitioners; the Association prepared standard contract forms containing specified provisions relating to ultimate prices, and most of the petitioners used these forms with or without minor variations; and the Association held frequent and well attended meetings. The petitioners do not controvert the truth of this evidence, but address arguments to its weight and the inferences that should have been drawn therefrom. We cannot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. *Triangle Conduit & Cable Co, Inc. et al. v. F. T. C., supra; Fort Howard Paper Co. et al. v. F. T. C., supra,* at p. 907. Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy. *Wm. Goldman Theatres Inc. v. Loew's, Inc., et al.,* 150 F. (2d) 738, 745.

The record is replete with documentary evidence composed of correspondence, Association minutes, and oral testimony, from all of which combination and conspiracy is the reasonable, if not required, conclusion.

The petitioners finally contend that various findings of agreement among them as to the means and methods used to accomplish the total combination and conspiracy are not supported by the evidence. It is these several activities, used for the purpose of continuing the petitioners' combination and conspiracy to fix prices, which are prohibited in the Commission's order. Without setting out all of these findings, let us examine several pertinent ones to see if there is substantial evidence to support them. The Commission found that the corporate petitioners by agreement adopted so-called trade customs in 1933, when such adoption was legal by virtue of the N. R. A. These trade customs included price differentials for coated and uncoated paper, according to size, weight, and packaging. The Commission found further that these trade customs were revised and expanded by means of agreement in 1936, after the N. R. A. period, and that they have been and are in general use. To support this finding, without going into detail, are the minutes of the Association and the testimony of witnesses, manifestly capable of supporting a finding of collusion and agreement.

The Commission further found that the zoning system was continued after the N. R. A. by mutual understanding and consent, and that despite minor variations it is in general use. This finding is based in part upon the minutes of the Association and also on the testimony of a witness to the effect that it had been continued by mutual consent. "We think the artificiality and arbitrariness of the zone structure is so apparent it cannot withstand the inference of agreement." *Fort Howard Paper Co. et al. v. F. T. C., supra,* at p. 907.

The Commission found that uniform quantity discounts had been adopted concertedly, were in general use with variations, and

were continued by agreement. This is based in part and sufficiently on minutes of the Association and inferences therefrom.

The Commission found that there was uniform though sealed bidding to the United States Government Printing Office, and that this was the result of agreement. This finding is buttressed by correspondence, the testimony of petitioner Allied's merchant-agent whose price cutting resulted in the petitioners' refusal to fill the order he had obtained, and the testimony of the Director of Purchases of the Government Printing Office.

The evidence with sufficient clarity involves all petitioners, although, of course, various items of evidence pertain to various petitioners. The respective petitioners are not relieved from liability as conspirators merely because they all did not take part in the same acts. *American Tobacco Co. et al. v. U. S., supra,* p. 119.

Here the petitioners are proved to have agreed upon these factors: uniform quantity discounts, uniform finishing differentials, uniform base prices, and a uniform zoning system with uniform zone differentials, all without regard to a particular petitioner's costs of production and distribution. The pattern clearly provides a means of fixing uniform prices. The petitioners' temporary departure from their system or temporary inability to carry through their purpose does not affect its illegality. The petitioners' degree of success in stifling price competition is not the measure of their liability.

[*No Substantial Evidence to Support Findings as to One Petitioner*]

It remains to consider whether there is substantial evidence to support the findings as to petitioner Consolidated. Consolidated contends, and the Commission does not deny, that because of inexpensive manufacturing by use of its patented process, it was able to sell its coated papers within the price range of the other corporate petitioners' uncoated papers. It contends, and the Commission does not deny, that it entered into such competition sharply, taking full advantage of its manifest competitive opportunity. Because of the unusual manufacture and composition of Consolidated's coated papers, there was a prejudice against them, and this further dictated selling at prices sharply undercutting those of the other petitioners' coated papers. Despite this, the Commission seeks to uphold its findings as to Consolidated on the basis of the following evidence. We, of course, look only to it to see its substantiality and do not consider Consolidated's evidence or weigh the evidence.

Consolidated was a member of the Association, but the Commission expressly disclaims any contention of guilt by mere association. There is the testimony of witness Mead to the effect that the other petitioners offered their coated papers in competition with Consolidated's coated paper during 1937. Mead further testified that during the period from June 1935 to April 1939, there were thirteen price changes of its coated paper by Consolidated, two of which were made at the same time as another company in the industry made a similar change on both its coated and uncoated paper.

Mead also testified that Consolidated in many respects applied the industry's trade customs for uncoated paper in regard to Consolidated's coated paper, although its costs might be greater as to finishing differentials, and its price lists so stated. Moreover, Consolidated trimmed four sides of its higher grades of coated paper without an additional penalty, as was done by the other petitioners with their coated paper.

Finally, the Commission relies on the fact that although Consolidated used a zoning system, which divided into two parts the area in the other petitioners' Zone 1 (where 95 per cent of Consolidated's output was sold) it did not vary its delivered prices accordingly from time to time during the complaint period.

Consolidated's scheme was to compete with the other petitioners by offering its coated paper within the other petitioners' uncoated paper price ranges. In doing this, it adopted the latters' trade customs for uncoated paper—to meet competition. Incidental facts, such as the two coincident price changes and its varying from its own zoning system, cannot make out the pattern of conspiracy found. Without referring again in detail to the finding of a total combination and conspiracy and the findings of the several agreements and concerted activities of the petitioners, it is clear to us that this evidence is not substantial, and we hold that the findings as to Consolidated cannot be sustained.

[*Ruling*]

The order to cease and desist as to all the petitioners but Consolidated is supported by the evidence and the findings and will be enforced; as to Consolidated, it must be vacated.

It is so ordered.

[¶ 62,264] United States v. Maryland & Virginia Milk Producers Association.

In the United States District Court for the District of Columbia. Cr. 294-48. April 27, 1948.

Sherman Antitrust Act

Indictment—Motion to Dismiss—Failure to Set Forth Sufficient Facts.—An indictment charging a conspiracy to fix prices and restrain trade in milk in violation of the Sherman Act is dismissed. It is held that the indictment does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Act.

See the Sherman Act annotations, Vol. 1, ¶ 1630.225, and Department of Justice comment, ¶ 61,111.

[*Motion to Dismiss*]

Per Curiam: The motion to dismiss is in two parts; one, that it is duplications [*sic*] and the other, that the indictment is bad in substance.

[*Crime Not Charged*]

The Court holds that the indictment is not duplications [*sic*]. As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

[*Insufficient Facts*]

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

[¶ 62,265] United States v. National Association of Real Estate Boards and Washington Real Estate Board.

In the United States District Court for the District of Columbia. Criminal Action No. 950-47. June 4, 1948.

Sherman Antitrust Act

Conspiracy to Fix Brokers' Commissions—Personal Services—No Direct Relation to Interstate Commerce.—The charges or commissions of a real estate broker in the District of Columbia are based on personal services, and do not have a direct effect upon interstate trade or commerce in the District of Columbia. Defendants in a criminal action charging a combination and conspiracy to fix the commissions of real estate brokers are acquitted. It is held that where the subject matter of an agreement does not relate to interstate commerce in the District of Columbia, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain commerce, but was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld. Agreements to regulate the rate of commission to be paid for personal services of real estate brokers in the District of Columbia, standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other conduct or actions that they come within the purview of the Sherman Act. The mere filing of a rate of commission for real estate

brokers for personal services rendered as an aid to property owners in the District of Columbia is not *per se* an unreasonable restraint.

See the Sherman Act annotations, Vol. 1, ¶ 1220.194.

For plaintiff: Victor H. Kramer, Joseph P. Kelly, Jr., Herbert N. Maletz, C. Heyward Belser.

For defendants: Roger J. Whiteford, John J. Wilson, Jo V. Morgan, Jr.; William E. Leahy, William J. Hughes, Jr.

Opinion

CURRAN, J.: Last Tuesday and Wednesday there was argued before this Court two motions for judgments of acquittal; one made by the National Association of Real Estate Boards and one made by the Washington Real Estate Board, two co-defendants in this suit brought by the United States against the two defendants, in the form of an indictment, charging both of the defendants with a conspiracy between themselves and co-conspirators not named, in violation of Section 3 of the Sherman Antitrust Law.

Authorities have been presented very capably by counsel on both sides in this matter, and have been of great assistance to the Court in coming to a conclusion.

[*Issue*]

As I see it, the question here is: What is the nature of the business of the defendants, that is, the National Association of Real Estate Boards and the Washington Real Estate Board and its members, and are the constitutions, the by-laws and the Codes of Ethics or any subdivision thereof, in their direct effect in restraint of trade or commerce in the District of Columbia? Is the business of the defendants interstate commerce in the sense of that word as it has been used and understood in the decisions of the Courts, or is it a business which is an aid or facility to commerce and which, if it affects interstate commerce thereon in the District of Columbia, does so only in an indirect and incidental manner?

[*Facts*]

The facts of the matter are that the defendants, who are real estate men, have entered into voluntary associations for the purpose of bettering the conduct of their business, and after entering such associations they still continue their individual businesses in full competition with each other, and that the associations themselves, as associations, do no business whatever, but are simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold it in the proper way; and to create methods of preserving integrity amongst the members of the association.

[*Broker's Charges*]

In my view the charges of a real estate broker on account of his personal services are nothing more than charges for aids or facilities furnished to clients whereby their objects may be the more easily and readily accomplished. It is my view that charges or commissions of real estate brokers in the District of Columbia are based on personal services performed for clients, and their effect in the sale of real estate are not directly connected with or form a part of interstate commerce in the District of Columbia, because I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia.

Of course indirectly and as an incident they may enhance the cost to the owner of real estate, or they may add to the price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate.

[*Not Restraints on Trade*]

Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of selling the real estate may be increased.

The right of the owners of real estate in the District of Columbia to sell their own property in any way whatever is not affected or touched by the agreement in question, while

the privilege of having their property sold for the real owner, with the aid of a broker, is a privilege which they are charged for and which is not attached to their right to sell their own property.

If charges of the nature that I have mentioned do not amount to a regulation of interstate trade or commerce in the District of Columbia because they touch it only in an indirect or remote way, or else because they are in the nature of compensation for privileges as a facility for that trade or commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not unreasonable or illegal as a restraint thereon; and this is what, in brief, was enunciated by the *Hopkins* case in 171 U. S.

[*Cases Cited*]

In other words, where the subject matter of the agreement does not relate to or act upon or embrace interstate commerce in the District of Columbia, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld, in my view, as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed and where the effect of its formation and enforcement upon interstate trade or commerce in the District of Columbia is in any event but indirect and incidental and not its purpose or object, and so said the Supreme Court of the United States in the *Anderson* case, 171 U. S.

And I was particularly impressed by the language of the Court in the *Duluth* case, the *Board of Trade* case, in 107 Minn. 544 where it was said that when the legality of a particular act is to be tested by whether it violates general statutory prohibitions upon restraints of trade or commerce, courts have given various reasons for their conclusions, and it seems that if any one thing may be said to be the test, it is the effect upon competition. Combinations are not *per se* illegal any more than are contracts or agreements generally, but when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the prohibitions of the anti-trust statute. It does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions which are unobjectionable and necessary that business shall not completely stagnate. Contracts and combinations which tend to promote business and which only remotely, incidentally and indirectly restrain competition are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition it is under the ban of the law whatever may have been the intention of the parties. But if it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make it and operate it, then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of the Act.

[*Agreement Not Within Purview of Act*]

My view of this case is that agreements to regulate the rate of commission to be paid for personal services to real estate brokers in the District of Columbia standing alone have never been held to be agreements in restraint of trade, and it is only when connected with other contracts or other conduct or other actions that they come within the purview of the Sherman law.

It is common knowledge that competition between real estate brokers is in fact strong, and success in getting the business depends not upon offering to transact for less than the uniform rate but upon the skill and facilities possessed for obtaining the highest price for the property from the purchasers.

There is no fixed price at which sales of property must be made in the District of Columbia.

Says the Court in the *Duluth* case, it is inconceivable that an agreement which requires all real estate brokers who work on a commission basis and who are members of the Board, to charge the same rate of

commission for the same service, can materially affect or control the price at which real estate sells, or at which the article sells. In the *Duluth* case the article was not real estate. I used that in my own language, paraphrasing the language of the Court in the *Duluth* case.

Of course in a remote and indirect way every charge and item of expense which attaches to the selling of real property affects to some extent the prices received by the owners and paid by the ultimate purchaser.

I have reviewed the cases and I cannot come to any other conclusion than that the Sherman law must have a reasonable construction or else there would be scarcely an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and with the possibility of a restraint thereon.

Counsel have conceded that in this case there must be an unreasonable restraint, but I am not convinced that the mere filing of a rate of commission for real estate brokers, for personal services rendered as an aid or facility to the owner of property in the District of Columbia, standing alone and with no other action or conduct, is *per se* an unreasonable restraint.

[*Judgments of Acquittal Granted*]

For these reasons and because of the authority that appeals to me in the *Hopkins* and *Anderson* cases, and in the *Duluth* case in Minnesota, the motions of the defendants for judgments of acquittal in this case are granted.

[¶ 62,266] Scott S. McIntire, Director, Tobacco Products Division, State Tax Commission v. Louis Borofsky, d. b. a. The Army and Navy Store.

New Hampshire Supreme Court. No. 3737. June 1, 1948.

New Hampshire Unfair Sales Act

Sales Below Cost—Prima Facie Evidence of Violation—Constitutionality of Act.— The New Hampshire Unfair Sales Act, enacted for the purpose of protecting free and fair competition in the trades and industries against monopolies or other unfair practices, is within the power of the state legislature granted to it by the state constitution. Its wisdom, effectiveness and economic desirability are not judicial questions. A motion to dismiss a bill in equity to enjoin a retailer from advertising and selling cigarettes at a price which did not include the statutory mark-up, is discharged.

See the New Hampshire Unfair Sales Act, Vol. 2, ¶ 8548.

For plaintiff: Ernest D. D'Amour, Attorney-General; Gordon M. Tiffany, Assistant Attorney-General.

For defendant: Thomas L. Marble and Morse & Grant.

[*Statement of Facts*]

Bill in equity, brought by the director of the tobacco products division of the State Tax Commission by virtue of the authority conferred upon him by section 14 of chapter 133 of the Laws of 1947, to enjoin the defendant from advertising the sale of cigarettes and selling the same in violation of chapter 204 of the Revised Laws entitled "The Unfair Sales Act."

The plaintiff's evidence established the following facts:

The Army and Navy Store of Concord, is a trade name duly registered with the Secretary of State and adopted by Lewis and Sons, Inc., (joined herein as a party defendant), a New Hampshire corporation of which Louis Borofsky is the treasurer and a director. The store is engaged in selling at retail general merchandise, clothing, wearing apparel, boots and shoes, household products, and tobacco.

On July 8, 1947, the store advertised in the usual course of business in the Concord Daily Monitor, that it offered for sale popular brands of cigarettes for $1.62 a carton, and on that date in the normal course of business it in fact sold such a brand, namely Chesterfields, for that price, as had been its practice for some months prior thereto. These cigarettes were purchased by the Army and Navy Store for $1.58 a carton. This purchase price of $1.58 a carton included all taxes (federal and state) on the cigarettes in question. The selling price of

$1.62 did not include the "mark-up" of six per cent of the total cost at the retail outlet," as required by section 1 of the Unfair Sales Act.

The defendants moved to dismiss the bill on the ground that chapter 204 of the Revised Laws is arbitrary, unreasonable, and oppressive and contravenes both the State and Federal Constitution.

It was stipulated by the parties hereto that further sales of cigarettes by the defendants would not be below the cost to the retailer as that cost is computed by the plaintiff and that the plaintiff would refrain from pursuing further the remedy of injunction pending a determination of the questions of constitutionality herein raised.

All questions of law raised by the defendants' motion were reserved and transferred without a ruling by Wheeler, J.

[*Issue*]

KENNISON, J. This case presents the constitutionality of the Unfair Sales Act. (R. L., *c.* 204) as applied to the agreed statement of facts quoted above. In preliminary summary the acts makes it a misdemeanor for any retailer or wholesaler, "with intent, or effect, or injuring competitors or destroying competition," to advertise or sell merchandise at less than cost as defined in the Act. The advertisement or sale at less than such cost "shall be *prima facie* evidence of a violation of this chapter." (S. 2). The statutory base for determining "cost to the retailer" is invoice cost or replacement cost, whichever is lower, less trade discounts to which is added freight and cartage charges and "a mark-up, to cover in part the cost of doing business, which mark-up, in the absence of a proof of a lesser cost, shall be six per cent of the total cost at the retail outlet" (S. 1 (I)). Numerous exceptions are made by the act (S. 3) so that it does not apply under stated conditions to isolated transactions, clearance sales, perishable merchandise, imperfect or damaged merchandise, final liquidation sales, sales to relief agencies and for charities, sales to state or municipal agencies, sales in good faith to meet legal competition or sales under court order. The Act also provides that violations may be enjoined by the Superior Court (S. 4).

[*Legislative History*]

The legislative history of the Act begins in 1939 when an unsuccessful attempt was made to obtain an advisory opinion as to its constitutionality. *Opinion of the Justices*, 90 N. H. 567. At the next session the Act was enacted into law (Laws 1941, *c.* 92) and was reenacted in the Revised Laws without substantial change in its present form.

[*Statutes Construed*]

It is urged specifically that section 2 which prohibits the sale of merchandise below cost with the "effect of injuring competitors or destroying competition" is unconstitutional because it is unduly oppressive and contrary to accepted economic and social standards. *Loughran Co. v. Company*, 178 Md. 38. Similar phraseology is found in several of the Unfair Sales Acts of the other states. I. Callmann, *Unfair Competition & Trade Marks* (1945) s. 27, 2 (a). It is well settled in this jurisdiction that the Legislature may declare an act criminal without requiring that it be done with intent. *State v. Cornish*, 66 N. H. 329; *State v. Ryan*, 70 N. H. 196; *State v. Goonan*, 89 N. H. 528; *State v. Yosua*, 91 N. H. 181. In case of doubt the statute has frequently been construed to require intent (*Coutremarsh v. Metcalf*, 87 N. H. 127) but it is clear that the present statute by its express terms requires either the intent or the effect of injuring or destroying competition. The Legislature deemed it necessary to do more than condemn a state of mind and provided that sales below cost, except as provided in s. 3, are an economic evil whether they are intended or have the effect of injuring competition. Such a statute is valid. *McElhone v. Geror*, 207 Minn. 580; *Rust v. Griggs*, 172 Tenn. 565. Cf. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *State v. Tanker Gas, Inc.*, 250 Wis. 218.

[*Prima Facie Evidence of Unfair Competition*]

That part of section 2 providing that advertisements or sales below cost are *prima facie* evidence of a violation of the Act is also attacked. Since no conclusive presumption of guilt is created, Wigmore sees no constitutional problem. 4 Wigmore Evidence (3d ed) s. 1356. So long as there is a rational connection between the fact to be proved and the fact presumed, the statute is valid. *State v. Bozek*, 81 N. H. 277; 162 A. L. R. 495, 532. This is particularly so in this jurisdiction since "*prima facie* evidence, as here used, means evidence to be considered by the jury" (*State v.*

Lapointe, 81 N. H. 227, 239), and in the absence of other evidence does not compel a verdict of guilty. *State v. Langley*, 92 N. H. 136. The constituent elements that make up "cost to the retailer" are peculiarly within the knowledge of the retailer as are the facts which bring him within the exceptions to the Act in section 3. In view of the limited effect given to *prima facie* evidence in this jurisdiction, we cannot say that its application to unfair competition is unreasonable. Competition may be destroyed or injured by deceptive trade practices, discrimination, and unfair competition as well as by combinations and monopolies. They are closely interrelated and we have been informed recently that the Legislative branch of the government has a wide latitude in establishing effective and even duplicating methods of preventing these asserted economic evils. See, *Federal Trade Commission v. Morton Salt Company* 333 U. S. (decided May 3, 1948), *Federal Trade Commission v. Cement Institute*, 333 U. S. — (decided April 26, 1948).

[*Meeting Competition*]

One of the exceptions to the Act is "where the price of merchandise is made in good faith to meet legal competition" *s.* 3 (h). If this required the retailer to examine his competitors' books to ascertain whether the competition was legal, it would be of doubtful validity. *Commonwealth v. Zasloff*, 338 Pa. 457, 465. All that is required of the retailer, however, is an endeavor "in good faith" to meet the legal prices of his competitor. *People v. Pay Less Drug Store*, 25 Cal. (2d) 108.

[*"Cost to the Retailer"*]

The term "cost to the retailer" the statute provides "shall mean *bona fide* costs" *s.* 1 (IV). This is proper. However, the rest of this paragraph states that in computing replacement cost, a cost calculation based on sales or purchases "which cannot be justified by existing market conditions within the state" is disallowed. The indefiniteness and uncertainty of this latter provision renders it invalid. *State v. Walgreen Drug Co.*, 57 Ariz. The Maryland Act, formerly defective in part for this reason, was amended to remove this defect and upheld. *Blum v. Engelman*, (Md.) 57 A. (2d) 421. Since this invalid provision is separable, the remainder of the Act "shall not be affected thereby." R. L., *c.* 204, *s.* 6.

While *s.* 1. (I) contains meticulous detail of the items in "cost to the retailer," the defendants complain that there is no guide to determine "a lesser cost" than the mark-up of "six percent of the total cost at the retail outlet" *s.* 1. (I. 3). As the Act now stands the doubt or ambiguity should be resolved in favor of the defendant. If this places a temporary obstacle to the effective enforcement of the Act, it is a defect inherent in the statute and not one manufactured by the judiciary. The flexibility of cost accounting procedures makes the determination of cost a difficult one but the defendant is entitled to offset its benefits against its detriments. The determination of cost must not be in "bad faith" (*Dikeon v. Ford Distributors Ass'n*, 107 Colo. 38) and it will suffice if it complies with the standard of "what business men generally mean [by cost] arrived at by a reasonable rule." *State v. Langley*, 53 Wyo. 332, 365.

[*Constitutionality Upheld*]

In 1903 Art. 83 of the Constitution was revised. The Legislature was given the authority of the state to protect "free and fair competition in the trades and industries" against monopolies "or any other unfair means." Such is the avowed purpose of unfair sales statutes although there is much controversy whether they are adapted to accomplish that aim or in fact do so. There are some indications, at least in New England, that the statutes are used by the large sellers against the small sellers to prevent local price cutting rather than protecting the small seller against a concerted campaign of underselling by the larger units. *U. S. v. N. Y. Great A. & P. Tea Co.*, 67 F. Supp. 626; 57 Yale L. J. 391, 419 (1948). The vast amount of literature on this subject attests to its controversial nature both economic and legal. More than half of the statutes have similar legislation and, as a result of amendments, a majority of such statutes are considered constitutional. 118 A. L. R. 506; 128 A. L. R. 1126; *Blum v. Engelman*. (Md.) *supra*. The expediency and wisdom of such Legislature in matters of opinion "upon points of . . . expediency." *State v. Moore*, 91 N. H. 16, 21. Since the enactment of Unfair Sales Acts is within the power of the Legislature granted to it by the Constitution, its wisdom, effectiveness and economic desirability is not a judicial question.

[¶ 62,267] Continental Distilling Sales Company, Inc. v. Famous Wines & Liquors, Inc.

In the New York Supreme Court, Appellate Division, First Department. No. 1047. June 21, 1948.

Appeal from an order of the Supreme Court, New York County, granting defendant's motion to dismiss the amended complaint as insufficient in law.

New York Fair Trade Act

Resale Price Maintenance—Sales Agent May Designate Prices—Complaint Sufficient in Law.—The exclusive sales agent for alcoholic beverages in a state, whose predecessor and assignor was authorized by the distiller to fix minimum resale prices and enter into agreements with retailers in that state pursuant to the provisions of the New York Fair Trade Act, may enjoin violation of such an agreement by a retailer. An order granting defendant's motion to dismiss the complaint for insufficiency on the ground that only the owner of the brand name business, and not an exclusive sales agent, may designate resale prices is reversed. No such limitation is expressed in the statute or implicit in its purpose.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.25, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7175.

For plaintiff: Horace S. Manges, Jacob F. Raskin, Weil, Gotshal & Manges.

For defendant: Julian Jawitz.

[*Nature of Action*]

Per Curiam: The complaint alleges that plaintiff is the exclusive sales agent for the State of New York of alcoholic beverages produced by the distiller under brand names; that plaintiff's predecessor and assignor was authorized by the distiller to fix minimum resale prices and enter into agreement with retailers in the State of New York pursuant to the New York Fair Trade Act; that plaintiff's predecessor and assignor entered into such an agreement with defendant, which agreement is still in full force and effect; that plaintiff has been authorized by the distiller to fix minimum resale prices and enter into agreements with retailers in the State of New York pursuant to the New York Fair Trade Act, and to take all measures necessary to enforce pre-existing agreements. The complaint asks that defendant be enjoined from selling the beverages involved at less than the minimum retail prices stipulated.

The court at Special Term granted defendant's motion to dismiss the complaint for insufficiency on the ground that only the owner of the brand name business, and not an exclusive sales agent, may designate resale prices under the Fair Trade Law.

We do not read the statute as being so limited in its contemplation. No such limitation is expressed in the statute or implicit in its purpose. We think that an exclusive sales agent, authorized by the owner, is entitled under the law to designate resale prices and exercise the authority granted by the law. The complaint here is substantially similar to the complaint in Bourjois Sales Corporation v. Dorfman, 273 N. Y. 167, and is sufficient.

The order appealed from should be reversed with $20 costs and disbursements to the appellant and the motion denied, with leave to the defendant to answer within ten days after service of order with notice of entry thereof, on payment of said costs.

PECK, P. J., DORE, CALLAHAN and SHIENTAG, JJ., concur.

COHN, J., dissents and notes to affirm.

[¶ 62,268] United States v. White Cap Company

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 46C 861. June 17, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Consent Judgment—Sale or Lease of Machinery—Patent Licensing.—A consent judgment entered in an action charging violations of the antitrust laws by a manufacturer of

closures for glass jars and containers and of sealing machinery, enjoins the defendant from leasing or selling sealing machinery on condition that the lessee or purchaser purchase closures only from defendant, and in specified quantities; conditioning the availability of sealing machinery or parts thereof upon the procurement of closures from defendant or any other designated source; removing sealing machinery from the premises of any lessee thereof because such lessee uses closures or machinery manufactured or sold by any person other than the defendant; altering or changing sealing machinery in such a manner as to prevent the use therein of closures manufactured or sold by others, unless such alteration improves the operation efficiency of the machine; altering or changing closures in such a manner as to prevent the use in connection therewith of sealing machinery manufactured or sold by others, unless the change results in more efficient operation; conditioning any license or immunity to practice any invention relating to sealing machinery or closures by the tying of any such license or immunity to the purchase or procurement of machinery or closures from defendant or any other designated source; and instituting or maintaining any suit for royalties alleged to have accrued prior to the date of this judgment under any existing machine patent as herein defined. Defendant is ordered and directed to grant to each applicant therefor a non-exclusive license to make, use and vend machines under all existing machine patents as herein defined.

See the Sherman Act annotations, Vol. 1, ¶ 1530.40, 1590, and the Clayton Act annotations, Vol. 1, ¶ 2023.10.

For plaintiff: Herbert A. Bergson, Acting Assistant Attorney General; Sigmund Timberg, Robert A. Nitschke, Special Assistants to the Attorney General.

For defendant:

Final Judgment

The plaintiff, United States of America, having filed its complaint herein on May 14, 1946; defendant, White Cap Company, a corporation, having appeared and filed its answer to said complaint denying the substantive allegations thereof and asserting its innocence of any violation of law; and the plaintiff and said defendant by their respective attorneys having consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and without any admission by any party in respect to any such issue and upon the consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED, as follows:

[*Jurisdiction; Cause of Action*]

I.

This court has jurisdiction of the subject matter of this action and of the parties to this judgment; the complaint states a cause of action against defendant, White Cap Company, under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said Act being commonly known as the "Sherman Act" and under Section 3 of the Act of Congress of October 15, 1914, as amended, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes," said Act being commonly known as the "Clayton Act."

[*Terms Defined*]

II.

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(a) "White Cap" means the defendant, White Cap Company, a corporation organized and existing under the laws of the State of Delaware, having its principal office at Chicago, Illinois.

(b) "Closures" means caps for glass jars and containers suitable for vacuum packing.

(c) "Sealing Machinery" means machinery and accessories suitable for applying closures to glass jars and containers for vacuum packing.

(d) "Existing machine patents" means all presently issued United States letters patent, applications for letters patent, and patents on such applications, owned or controlled by defendant, White Cap Company, or under which it has power to issue licenses or sublicenses, relating to sealing machinery, con-

sisting of the following numbered United States patents:

1,801,062	2,132,335
1,875,789	2,158,675
1,920,539	2,169,973
1,931,911	2,173,602
2,041,891	2,319,213
2,057,464	2,319,214
2,076,052	2,337,032
2,103,051	2,337,033
2,107,237	2,347,668
	2,361,948

and the following numbered applications for United States patents:—

769,624	544,305
483,568	

and renewals, reissues, divisions and extensions thereof.

[*Applicability of Judgment*]

III.

The provisions of this judgment applicable to defendant, White Cap Company, shall apply to each of its subsidiaries, successors, and assigns, and to each of its officers, directors, agents, nominees, employees, or any other person acting under, through or for such defendant.

[*Acts Enjoined*]

IV.

Defendant White Cap is hereby enjoined and restrained from:

A. Leasing, selling, or making or adhering to any contract for the sale or lease of, sealing machinery, whether patented or unpatented, or fixing a price charged therefor or discount from or rebate upon such price, on or accompanied by any condition, agreement, or understanding:

(1) That the lessee or purchaser thereof shall not purchase for use in connection with said machinery closures made or sold by any one other than the defendant; or

(2) That the lessee or purchaser shall purchase from the defendant a specified volume, quota, percentage or value of closures.

B. Selling, making or adhering to a contract for the sale of, or otherwise making available closures, whether patented or unpatented, or fixing a price charged therefor or discount from or rebate upon such price, on or accompanied by, any condition, agreement, or understanding;

(1) That the purchaser or recipient thereof shall not use said closures in connection with sealing machinery made or sold by any one other than the defendant; or

(2) That the purchaser or recipient thereof shall use such closures, or any specified volume, quota, percentage or value thereof, in sealing machinery made or sold by the defendant.

C. Entering into, adopting, adhering to, or furthering any agreement or course of conduct for the purpose of, or which in effect constitutes, the leasing, selling, or making or adhering to a contract contrary to the provisions of sub-paragraphs A and B above.

D. Conditioning the availability of sealing machinery or parts or repairs thereof upon the procurement of closures from the defendant White Cap Company or any other designated source, or the availability of closures or services in connection therewith upon the procurement of sealing machinery from the defendant White Cap Company or any other designated source.

E. Removing sealing machinery from the premises of any lessee thereof because such lessee purchases, uses, or deals in closures or sealing machinery manufactured or sold by any person other than the defendant.

F. Altering or changing sealing machinery or utilizing patents on such alterations or changes, in such a manner as to prevent the use therein of closures manufactured or sold by anyone other than the defendant, provided, however, that this subsection F shall not apply if the alteration or change improves the operation or efficiency of the machine in applying any closure made by the defendant.

G. Altering or changing closures, or utilizing patents on such alterations or changes, in such a manner as to prevent the use in connection therewith of sealing machinery manufactured or sold by any one other than the defendant, provided, however, that this subsection G shall not apply if the alteration or change results in more efficient operation.

H. Conditioning any license or immunity, expressed or implied, to practice any invention related to sealing machinery or to closures claimed in any United States patent by the tying of any license or immunity for such invention to the purchase or procure-

ment of machinery, closures, or any similar product or article from the defendant White Cap Company or any other designated source.

I. Instituting or threatening to institute or maintaining any suit, counter-claim or proceeding, judicial or administrative, for infringement, or to collect charges, damages, compensation or royalties, alleged to have occurred or accrued prior to the date of this judgment under any existing machine patent, as defined in Section II(d) of this judgment.

[*Licensing Required*]

V.

A. Defendant White Cap is hereby ordered and directed to grant to each applicant therefor a non-exclusive license to make, use, and vend under any, some, or all existing machine patents as herein defined, and is hereby enjoined and restrained from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections IV and V of this judgment and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of said Sections IV and V of this judgment.

B. Defendant White Cap is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this section except that (1) the license may be non-transferable; (2) a reasonable nondiscriminatory royalty may be charged; (3) reasonable provision may be made for periodic inspection of the books and records of the licensee, by an independent auditor or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty days' notice in writing to the licensor.

C. Upon receipt of written request for a license under the provisions of this section, defendant White Cap shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by White Cap, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and White Cap shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on White Cap to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment of royalty or other compensation, but subject to the provisions of subsection D of this section.

D. Where the applicant has the right to make, use, and vend under subsection C of this section, defendant White Cap may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, White Cap shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant files his application with the Court.

E. Nothing herein shall prevent any applicant from attacking, in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents nor shall this judgment be construed as im-

porting any validity or value to any of said patents.

[*Laws Applicable*]

VI.

Nothing in this judgment shall prevent defendant, White Cap, from availing itself of the benefits of (A) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, (B) the Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," or (C) save as elsewhere in this judgment provided of the patent laws.

[*Inspection to Secure Compliance*]

VII.

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to defendant, White Cap, made to its principal office, be permitted subject to any legally recognized privileges: (1) access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment; and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; *provided*, however, that no information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 62,269] United States v. Standard Oil of California and Standard Stations, Inc.

In the United States District Court for the Southern District of California, Central Division. No. 6159-Y Civil. Supplemental Opinion. Filed June 28, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Contracts in Restraint of Trade—Effect of *Columbia Steel* Case—Motion for Reconsideration Denied.—The decision of the United States Supreme Court in the *Columbia Steel* case (¶ 62,260) that the proposed merger of steel companies would not violate the Sherman Act, there being no probability of a restraining effect upon interstate commerce, does not require a reconsideration of the instant case, in which it was originally held that exclusive dealing contracts between a major oil company and independent service station operators violated the antitrust laws (¶ 62,261). In the instant case it was proved that the challenged practices have in fact resulted in denying to the independent operators free dealing in certain commodities. The original decision stands, and the motion for reconsideration is denied.

See the Sherman Act annotations, Vol. 1, ¶ 1220.521, the Clayton Act annotations, Vol. 1, ¶ 2023.36, and the opinions at ¶ 62,260, 62,261.

For plaintiff: Tom C. Clark, Attorney General; James M. Carter, United States Attorney; William C. Dixon, W. Alan Thody, Special Assistants to the Attorney General; Lawrence W. Somerville, Special Attorney, Antitrust Division.

For defendants: Lawler, Felix & Hall, John M. Hall; Pillsbury, Madison & Sutro, Everett A. Mathews.

I

The Motion to Reconsider

YANKWICH, D. J.: On the same day on which the opinion in this case was filed, June 7, 1948, the Supreme Court decided *United States v. Columbia Steel Company, et al.*[1] On June 16, 1948, the defendants in this case filed a notice of motion for "reopening, reargument and reconsideration". This was followed by the motion itself, which, originally noticed for June 28, 1948, was advanced to, and actually made, on June 24, 1948, and submitted. It seeks a decision, findings and judgment in favor of the defendants.

I doubt if a motion of this character, which is akin to the motion for "another and different judgment" under California practice,[2] can be entertained in our court, either before or after formal findings and judgment are filed. However, neither in the case in which I expressed such doubt[3] nor in a more recent case in which a similar motion was made,[4] did I allow this to stand in the way of determining the motion on the merits. Nor will I do so now. For I grant that a judge may, at any time before finality attaches to his decision, change his views on the law of a case or the conclusions to be reached as to a controversy or a specific phase of it.[5] More, it would be the imperative duty of any judge of a lower court to give effect to a decision of the highest court of the land, announced subsequent to, or simultaneously with, his decision, and which called for a modification of his views. And such action would be obligatory, whether the higher court spoke with unanimity or was divided, or even if the judge agreed with the minority opinion. When such a siutation confronted me several years ago, I wrote:

> "I feel compelled by this decision to hold that the new enactment, Chapter 10, of the Bankruptcy Act in so far as it applies to irrigation districts of the type of the petitioner, is constitutionally vulnerable, as was the old. As a student, exercising private judgment, I agree with the conclusion of the dissenters that immunity from interference through federal bankruptcy laws, even if applicable to states, should not be extended to state instrumentalities, whether they be municipal, quasi-municipal or public corporations. *However, as a judge of a lower court, I cannot exercise private judgment, but must follow the opinion of the majority, which, as I read it, extends the immunity to all governmental agencies created by a state for the performance of public functions.*"[6]

Counsel for the defendants who are, no doubt, familiar with our practice in this respect, have assumed that I would hear the motion on the merits. For, in addition to referring to cases which recognize the right of a court to reconsider its decision[7], they filed simultaneously a twenty-page printed memorandum, the aim of which is to show "that the decision of the Supreme Court in *United States v. Columbia Steel Company*, requires a decision in favor of the defendants."

Hence the notice, the brief and the motion itself, which is now before me for decision, all call for a determination of the question propounded by the defendants whether the decision referred to commands a ruling in the present case in favor of the defendants.

II

The Scope of United States v. Columbia Steel Co.

I am of the view that it does not call for a different conclusion than that announced on June 7, 1948. At the outset, I advert to the fact that the range of the ruling I made is not to be determined by the arguments which the Government advanced, *but by what was actually decided.* The facts that in the *Columbia Steel Company* case the Government may have made arguments similar to those made in this case loses all significance, if, *in fact*, my ruling was contrary to the contention. To illustrate: The Government, in the present case, contended that the exclusive supply provision in the Standard con-

[1] *United States v. Columbia Steel Company, et al.*, No. 461, October Term.

[2] California Code of Civil Procedure, Sec. 663.

[3] *Brooks Bros. v. Brooks Clothing Co. of California*, 1945, D. C. Calif., 5 F. R. D. 14.

[4] *Blanchard v. Pinkerton*, No. 7738, an opinion which was filed on May 13, 1948, but which has not yet been published.

[5] See, *G. Amsinck & Co., Inc. v. Springfield Grocer Co.*, 1925, 8 Cir., 7 F. (2) 855, 857-858; *Continental National Bank v. National City Bank*, 1934, 9 Cir., 69 F. (2) 312, 317-318. While the cases just cited arose prior to the effective date of the Federal Rules of Civil Procedure, the right of a court to change its conclusions before final judgment is recognized in cases decided since the rules went into effect. See, *Marconi Wireless Co. v. United States*, 1943, 320 U. S. 47, 48.

[6] *In re Lindsay-Strathmore Irrigation District*, 1937, D. C. Calif. 21 Fed. Sup. 129, 135 . Italics added.

[7] See cases in Footnote No. 5.

tracts was illegal *per se*. I declined to so hold. On the contrary, I ruled that it was illegal *only if it resulted in an unreasonable restraint under the Sherman Act or in substantial lessening of* competition under the Clayton Act.[8] I wrote:

"As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by the evidence, restricts the stations not employe-operated to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal *per se*. We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it result in a substantial lessening of competition or the creation of monopoly in the line of commerce."[9]

The Supreme Court in the *Columbia Steel Co.* case, interprets its own prior decisions, and especially the *Yellow Cab* decision,[10] in the same manner. Mr. Justice Reed, after referring to the Government's contention that such contracts are illegal *per se*, says:

"We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor producers to market their rilled steel. In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the Yellow Cab case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged."[11]

And even the adoption of the Government's contention by a lower court in one case and its rejection in another by a higher court does not, *necessarily*, mean that *the facts in both cases call for the same decision.*

III

The Grounds of the Columbia Steel Co. Decision

Unlike the present case which charged violation of *both* the Sherman and Clayton Acts, the *Columbia Steel Co.* case charged violation of Sections 1 and 2 of the Sherman Act only. The narrow scope of the inquiry in that case appears from this brief statement of the issues with which the opinion begins:

"The United States brings this suit under Sec. 4 of the Sherman Act to enjoin United States Steel Corporation and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the West Coast on the ground that such acquisition would violate Sections 1 and 2 of the Sherman Act. The Complaint, filed on February 24, 1947, charged that if the contract of sale between United States Steel and Consolidated Steel Corporation were carried out, competition in the sale of rolled steel products and in fabricated steel products would be restrained, and that the contract indicated an effort on the part of United States Steel to attempt to monopolize the market in fabricated steel products. After a trial before a single judge in the district court, judgment was entered in favor of the defendants, and the government brought the case here by direct appeal. 32 Stat. 823, 15 U. S. C., Sec. 29."[12]

The position of the Government in the case was weakened by the fact that on June 17, 1946, the Attorney General of the United States had approved the sale by the War Assets Administration to the United States Steel Corporation, one of the defendants, of the plant which the Government had constructed, during the war, at Geneva, Utah. The negotiations for the sale of the Consolidated plant began prior to that sale. And the purpose of the Consolidated purchase was, as stated in the opinion, with evident approval:

"to assure a market for plates and shapes produced at Geneva, and Roach testified

[8] See opinion pages 11-27.

[9] See Opinion pages 27-28.

[10] *United States v. Yellow Cab Co.*, 1947, 332 U. S. 218.

[11] *United States v. Columbia Steel Co., et al.*, slip decision pp. 24-25. It is to be observed that Mr. Justice Reed in Footnote No. 17 of the Opinion quoted a portion of the *Yellow Cab* opinion which laid great stress on the effect of a restraint on commerce in a given area, and which adopted the language in *Indiana Farmers Guide Co. v. Prairie Farmer Co.*, 1934, 293 U. S. 268, 279, which I stressed in the opinion. (See pages 44-45 of my opinion)

[12] Slip decision *United States v. Columbia Steel Co.*, page 1.

that Consolidated's purpose was to withdraw the stockholders' equity from the fabrication business with its cyclical fluctuations at a time when a favorable price could be realized." [13]

In effect, the court rules that Consolidated's acquisition would not have any great effect on the market, in view of the fact that its requirements are "an insignificant fraction of the total market—less than ½ of 1 per cent." [14]

The court was also unable to foresee the probability of the continuance of even that limited market if the sale is not completed. Mr. Justice Reed said:

"Whether we accept the government's or Consolidated's figures, however, they are of little value in determining the extent to which West Coast fabricators will purchase rolled steel products in the eastern market in the future since the construction of new plants at Geneva and Fontana and the creation of new basing points on the West Coast presumably give West Coast rolled steel producers a far larger share of the West Coast fabricating market than before the war." [15]

And, finally, the court stressed the fact that the future dealings between Consolidated and United States Steel would be mere incidents of ownership, not illegal *per se*, and would not transgress the provisions of the Sherman Act. As Mr. Justice Reed put it:

"A subsidiary will in all probability deal only with its parent for goods the parent can furnish. *That fact, however, does not make the acquisition invalid.* When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists. That this is the teaching of the *Yellow Cab* case is indicated by the following quotation:

'And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States v. Reading Co.*, 253 U. S. 26, 57, is that "dominating power" over the cab operating companies "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred.' That view is in accord with previous decisions of the Court.

"The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." [16]

The position of the Court was summed up in this language:

"We conclude that the so-called vertical integration resulting from the acquisition of Consolidated *does not unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product.* We accept as the relevant competitive market the total demand for rolled steel products in the eleven-state area; over the past ten years Consolidated has accounted for only 3% of that demand, and if expectations as to the development of the western steel industry are realized, Consolidated's proportion may be expected to be lower than that figure in the future. *Nor can we find a specific intent* in the present case to accomplish an unreasonable restraint, for reasons which we discuss under heading III of this opinion." [17]

So, on the whole, it is evident that the decision in *Columbia Steel Co.* case cannot be given the broad scope which the defendants claim for it. *It is canalized in the narrow channel which the facts in the case established.* The court did not have before it any established facts from which to determine the effect which such acquisition might have on future dealings with the acquired company in certain steel products. And there being no probability of restraining effect on interstate commerce, the court found no violation of the Sherman Act.

The minority opinion lends support to this view of the case. The majority declined to see violation in size resulting from per-

[13] Slip decision, page 10.
[14] Slip decision, page 11.
[15] Slip decision, page 13.
[16] Slip decision, pages 26-27. (Italics added.)
[17] Slip decision, page 30. (Italics added.)

missible concentration of ownership. They required deleterious effects on commerce, in addition, before refusing sanction to the purchase. These they could not find or foresee. The minority, on the contrary, would have found violation in mere bigness.[18]

In the present case, as appears from the original opinion, we are dealing *not with probabilities but with actualities.* It was proved at the trial that the challenged practices have, *in fact,* already resulted in denying to the independent operators of stations *which are not owned by the defendants,* free dealing in certain commodities in interstate commerce and locking out Standard's competitors from these outlets. And, as there are no rights incident to ownership, of the type involved in the contemplated purchase of Consolidated Steel, the conclusions already announced must stand. The motion is denied.

[¶ 62,270] United States v. International Salt Company, Incorporated.

In the United States District Court for the Southern District of New York. Civil 32-310. Memorandum. April 1, 1948.

Sherman Antitrust Act

Patent Monopoly—Decree Requiring Lease of Machinery—Modification of Decree.—A petition for modification of a decree requiring defendant to lease its patented salt machines, by the insertion of language authorizing defendant to reduce its rentals where necessary to meet competition, is granted where the evidence indicates the existence of such competition in some localities. Modification of the decree by the addition of a provision that defendant shall not be required to lease the devices in a territory where its engineering services are not available is denied. The evidence indicates that the "servicing" is largely a good will gesture to promote the sale of salt. It is the object of the decree to divorce the leasing of machines from the sale of salt.

See the Sherman Act annotations, Vol. 1, ¶ 1270.401.

Memorandum

[*Petition for Modification*]

RIFKIND, D. J.: Defendant has petitioned for a modification of the decree. In accordance with the suggestion of the Supreme Court, *International Salt Co., Inc. v. United States of America,* 1947, 332 U. S. 392, proof was received of the circumstances which, in

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[18] The gist of the dissent is contained in this forceful statement:

"We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices. Control of prices in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression—an economy of abundance or scarcity. Size in steel should therefore be jealously watched. In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it."

Clearly, the minority, led by Mr. Justice Douglas, would stop large concentrations of ownership because they see in them the possibility of harm to the national economy through price-control and other harmful restrictions to freedom of commerce. The majority, led by Mr. Justice Reed, do not see in consolidation of economic power the unreasonable restraint condemned by the Sherman Act. (15 U. S. C. A., Secs. 1 and 2) To them, that Act does not denounce *bigness per se,* but only such control, large or small, as results, in fact, in the restrictive or monopolistic evils at which the anti trust law is aimed.

Here, as is obvious from this and the original opinion, the injurious effect on interstate commerce of the restrictions has been shown to exist. More, the present action charges also violation of the Clayton Act (15 U. S. C. A. 14) which aims to stop monopolistic practices in their inception. Under it, a violation can be found if the practices *tend* to achieve the harm condemned by the statute, although such result has not yet been attained.

the opinion of the defendant, warranted a revision of the decree.

At the close of the case defendant asked for two changes.

[*Changes Requested*]

(1) The insertion of language in Art. VI(d) authorizing defendant to reduce its rentals where necessary to meet competition; and (2) the addition of a provision that it shall not be required to lease the devices in a territory where its engineering services are not available.

[*Reduction to Meet Competition*]

The proof justifies the first modification. Though the evidence was not strong it did indicate the existence of such competition in some localities.

[*Separation of Leasing and Sales*]

With respect to the second modification, the proof is less than satisfactory. It appears that defendant does not sell salt in the western states; consequently, it does not maintain any offices in that area and its personnel is not available to "service" machines there. It appears, however, that where it served defendant's purpose, it leased machines in that area both directly and through an independent distributor. It also sells machines abroad without any facilities for "servicing" them. The evidence indicates that the "servicing" is largely a good will gesture to promote the sale of salt. It is the object of the decree to divorce the leasing of machines from the sale of salt.

[*Modification Ordered*]

The decree will be modified as follows:

Art. VI(d) is amended by changing the period at the end of the first sentence to a colon and inserting, "Provided, defendant may reduce its rental, sale price or royalty where, when, and to the extent necessary, in good faith, to meet competition."

[¶ 62,271] Calamia v. Goldsmith Bros., Inc.

In the New York Supreme Court, Special Term, Part IV. 119 N. Y. L. J. 2404. June 28, 1948.

New York Fair Trade Act

Enforcement of Fair Trade Agreement—Injunction Suit—Sales Below Established Price.—A cigar retailer who has entered into fair trade contracts with cigar manufacturers may enjoin a competing retailer, with notice of such agreements, from selling the brands of cigars covered by the contracts below the fixed prices. Evidence that this action is the first one brought by plaintiff in several years does not support defendant's contention of abandonment of the contract rights by plaintiff. To attempt amicably to correct differences without recourse to legal proceedings cannot be held to be an abandonment of legal remedies.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.80, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7359.

Jurisdiction—Cigars Manufactured in Other States—Retail Distribution in New York.—Cigars manufactured in other states and brought into New York for retail distribution are subject to the provisions of the New York Fair Trade Act. It is the final or retail sales aspect which is being controlled.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.52, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7112.

[*No Abandonment of Remedy*]

KOCH, J.: Plaintiff and defendant are competitors in the retail cigar business. Plaintiff has brought this action to enforce three fair trade agreements, seeking to enjoin the defendant from selling the brands of cigars referred to in the contracts below the prices fixed therein. The injunctive relief is sought pursuant to section 369-b of the General Business Law of N. Y. Plaintiff and three cigar manufacturers entered into fair trade agreements during 1947, fixing the retail price of various brands of cigars of these manufacturers. Plaintiff has shown upon the trial that defendant, with notice of these agreements and the prices fixed therein, has been selling these brands of cigars below the fixed prices. It has also

been shown that defendant has continued to do this, although it had received notice that by so doing it was violating the fair trade agreements. Defendant in answer contends that the plaintiff has abandoned his rights under these contracts. The evidence does not support this contention. It appears that the practice of plaintiff in 1947 was to notify recalcitrant dealers of the existence of the fair trade agreements. In nearly every instance the notice was sufficient, and the prices were adjusted to the fixed price. The fact that this is the first action of this nature since the end of World War II does not indicate abandonment of the contract rights by plaintiff. The necessity for other actions has not been shown. To attempt to amicably correct differences between businessmen without recourse to legal proceedings cannot be held to be an abandonment of those legal remedies, particularly where such methods have been successful in the past. Nor is the defendant aided by its claim that there is a general upheaval and instability in the retail cigar market today. The existence of such a condition has not been established on this trial, and with regard to the brands in question the underselling has generally been corrected.

[*Jurisdictional Point*]

Defendant has also raised a jurisdictional point. Its contention in this respect is based on the fact that the manufacturers are not New York concerns and that the cigars are brought into New York from other states. Although the cigars, as initially moved, are in interstate commerce and subject to federal regulation, they are brought to New York for retail distribution in this state. It is this final or retail sales aspect that is being controlled and is within the meaning and intent of the Miller-Tydings amendment to the Sherman Anti-Trust Act (15 U. S. C. A., 1).

[*Judgment for Plaintiff*]

Judgment for plaintiff. The findings of fact having been waived, settle judgment on notice.

[¶ 62,272] North Station Wine Company, Inc. v. United Liquors, Ltd. et al

In the Supreme Judicial Court of Massachusetts. June 6, 1948.

Suit in equity in the Superior Court, wherein interlocutory decrees on demurrers were entered by order of Williams, J., and Donahue, J., and the final decree was entered by order of Brogna, J.

Allegation of Unlawful Conspiracy—Combination and Monopoly Insufficiently Alleged—Decree Dismissing Bill Affirmed.—A retailer of liquor who was obliged to purchase rum at a certain price from a distiller in order to obtain other liquors is not entitled to an order requiring the distiller to instruct defendant newspapers to accept plaintiff's advertising of the rum at a price not based on the wholesale cost plus a reasonable mark up. The allegation of refusal of defendant newspapers to advertise the rum at the price set by plaintiff does not sufficiently allege combination. Even if the fact of combination were sufficiently alleged, there are no such allegations of the character, purpose and effect of the combination as to make out a *prima facie* case or to require an answer. The bill fails to show the unlawful quality of the combination, if there was a combination. No unlawful monopoly is alleged.

See the Massachusetts law on Trusts, Monopolies, and Restraint of Trade, Vol. 2, ¶ 8395.35.

For plaintiff: L. Winer.

For defendants: Lee M. Friedman, S. Werlin; S. H. Babcock, J. H. B. Edwards; B. Aldrich; E. A. Whitman.

[*Nature of Action*]

QUA, C. J.: This suit is here on appeal of the plaintiff from a final decree dismissing the bill after the sustaining of separate demurrers of the four defendants. The plaintiff also appealed from only one of the interlocutory decrees sustaining the demurrers, but the others are "open to revision" upon the appeal from the final decree. G. L. (Ter. Ed.) c. 214, § 27. *Bressler v. Averbuck,* 322 Mass. 139, 140.[1] The several demurrers are vested upon various

[1] Mass. Adv. Sh. (1947) 1251, 1252.

grounds, but a ground common to all is that the bill states no cause of action.

The allegations of the bill are in substance these: The plaintiff conducts a retail liquor business. The plaintiff was obliged to purchase from the defendant United Liquors, Ltd., large quantities of a certain brand of rum at an average wholesale price of $3.01 per four fifths of a quart in order to procure from that defendant other brands of liquors. The plaintiff has been able to sell only a small part of this rum and cannot sell it at a price based on the wholesale cost plus a reasonable mark up. In order to recoup part of its loss, the plaintiff submitted to the defendants Boston Herald-Traveler Corporation and Post Publishing Company copy advertising the rum for sale at $1.89 per four fifths of a quart. Both newspapers refused to advertise that brand of rum at that price. Failure of these defendants to accept the plaintiff's advertising copy "would substantially affect" the plaintiff's plan to dispose of its rum. The plaintiff "was advised by an officer" of the defendant United Liquors, Ltd., that "an agreement had been entered into" among that defendant, the three other defendants, National Distillers Corporation of New England, Boston Herald-Traveler Corporation, and Post Publishing Company, and "other widely circulated newspapers doing business in Boston" whereby "the newspapers," including the two newspaper defendants in this suit, "agreed" not to accept advertising of the brand of rum in question at a price of less than $3.81 per four fifths of a quart. This brand of rum "has not been fair traded"[1] in Massachusetts, and the attempts of all the defendants to control its price are "improper and . . . in violation of the rights" of the plaintiff so to dispose of its rum as to salvage a part of its investment. Except for the "agreement" entered into by all the defendants, the plaintiff would have been able to procure some widely read newspaper in Boston to accept its advertising, and the refusal of one newspaper to accept its advertising would not have seriously prejudiced the plaintiff, but the "agreement" among all the defendants "creates a peculiar power of coercion possessed by them in combination which would not be effective without such agreement. . . ." The fair market value of the rum is not in excess of $1.89 per four fifths of a quart, and the combination of the defendants by their concerted action to maintain its price at $3.81 per four fifths of a quart "is a fraud on the general public and unlawful interference with" the plaintiff's right "to normally transact his [*sic*] business in accordance with duly accepted advertising methods." The acts of the defendants, by their force of numbers and their power in the control of the press and their influence, have created a combination, "which by its very power and influence, is interfering with" the plaintiff's business and constitutes an unlawful conspiracy as it affects the plaintiff and will cause substantial loss to the plaintiff from its failure to sell its rum at a price which it considers fair.

The prayers are that the defendants United Liquors, Ltd., and National Distillers Corporation of New England be ordered to instruct the newspaper defendants "to the effect that they have no objection to the advertising" by said newspapers of the rum at the prices submitted by the plaintiff; that the newspaper defendants be ordered to accept the plaintiff's advertising at prices for the rum to be stipulated by the plaintiff; and for damages and further relief.

The allegation that the plaintiff was obliged to purchase the rum at a certain price in order to obtain other liquors seems to have no relation to the remainder of the bill and is immaterial. The gist of the plaintiff's grievance, if it has a grievance, seems to be that the two defendant newspapers refused to advertise its rum at the price at which the plaintiff desired to have it advertised.

The plaintiff argues that this refusal was in consequence of an unlawful "agreement" or combination among all the defendants and including newspapers not defendants, and that damage will result to the plaintiff. We agree that even if a newspaper, acting alone, is commonly at liberty to reject such advertising as it sees fit (see *Commonwealth v. Boston Transcript Co.* 249 Mass. 477), it and its associates may be amenable to suit, as any other parties would be, if they have joined in an unlawful combination causing harm to the plaintiff through the peculiar force of numbers. See *DesLauries v. Shea,* 300 Mass. 30, 33; *Comerford v. Meier,* 302 Mass. 398, 401; *Fleming v. Dane,* 304 Mass. 46, 49-51; *Weiner v. Lowenstein,* 314 Mass.

[1] See G. L. (Ter. Ed.) c. 93, §§ 14A-14D, as inserted by St. 1937, c. 398, as amended.

642, 646-647; Restatement: Torts, § 765. But, to begin with, we find in the present bill no sufficient allegation of combination. Averments of crucial facts in a pleading should be clear, direct and unequivocal. An allegation merely that the party pleading has been informed or, as here, "advised," of such a fact, followed in the remainder of the pleading by references assuming the truth of the fact but without any express allegation that it is true, is not enough as against a demurrer. *Dealtry v. Selectmen of Watertown,* 279 Mass. 22, 27. *I. T. S. Rubber Co. v. Essex Rubber Co.* 281 Fed. 5, 10. See *Fuller v. Lovell,* 304 Mass. 542, 546; *Mairs v. Madden,* 307 Mass. 378, 380-381; *Carson v. Gikas,* 321 Mass. 468.[1] In the second place, even if the fact of combination were sufficiently alleged, we think there are no such allegations of the character, purpose, and effect of the combination as to make out a *prima facie* case against any of the defendants and to call for an answer. The only harm alleged is that the two newspapers carried out their agreement not to advertise the particular brand of rum at less than $3.81 per four fifths of a quart. This seems to fall short of the kind of intentional invasion of a known and well recognized right of the plaintiff which commonly calls for affirmative justification by a defendant. The case differs in this respect from the recent case of *Owen v. Williams,* 322 Mass. 356.[2] A combination so to limit advertising would not seem to have been directed against the plaintiff. It might well have been thought to be in the interest of the plaintiff and other dealers as a protection against cut prices. No motive of injuring the plaintiff is alleged. There is no discrimination against the plaintiff as compared with other dealers. There is nothing more than a suggestion or insinuation that there are not other newspapers outside the combination in which the plaintiff can advertise at any price it wishes. It does not appear that other effective methods of advertising are not open to it. The allegations of "a peculiar power of coercion," of "fraud on the general public," and of "unlawful interference" are mere generalizations unsupported by the necessary allegations of particular facts. *Johnson v. East Boston Savings Bank,* 290 Mass. 441, 446-447. *McCarthy v. Hawes,* 299 Mass. 340, 344. *Neustadt v. Employers' Liability Assurance Corp. Ltd.* 303 Mass. 321, 326. *Mairs v. Madden,* 307 Mass. 378, 380-381. *Foster v. Shubert Holding Co.* 316 Mass. 470, 474. In short, the bill fails to show the unlawful quality of the combination, if there was a combination. The plaintiff is at least in no better position than was the plaintiff in *Neustadt v. Employers' Liability Assurance Corp. Ltd.* 303 Mass. 321, 324-326, by which this case, so far as it depends upon combination, would seem to be governed. In point also are *Robitaille v. Morse,* 283 Mass. 27, 33, and *Foster v. Shubert Holding Co.* 316 Mass. 470, 475. See *Boylston Housing Corp. v. O'Toole,* 321 Mass. 538, 550;[1] *Martell v. White,* 185 Mass. 255. Compare *Tompkins v. Sullivan,* 309 Mass. 496, 500.

The bill does not allege that any or all of the defendants have created a monopoly at common law. There is nothing to show that they have acquired or will acquire in the rum trade a dominating influence tending to suppress competition. *Commonwealth v. Dyer,* 243 Mass. 472, 486. *Foster v. Shubert Holding Co.* 316 Mass. 470, 472. See *Associated Perfumers, Inc. v. Andelman,* 316 Mass. 176, 183-184. Neither does violation of G. L. (Ter. Ed.) c. 93, § 2, appear. It does not appear that the particular brand of rum is an "article or commodity in common use," and if rum in general is such an article, it does not appear that with respect to rum in general the alleged agreement has any appreciable tendency to restrain or prevent competition or to enhance prices. See *Commonwealth v. North Shore Ice Delivery Co.* 220 Mass. 55; *Berenson v. H. G. Vogel Co.* 253 Mass. 185; *Keith v. Heywood Boot & Shoe Co.* 255 Mass. 321, 324; *Foster v. Shubert Holding Co.* 316 Mass. 470. We need not consider what the remedy would be if violation of the statute appeared. See G. L. (Ter. Ed.) c. 93, §§ 3-7.

Finally, we do not agree with the plaintiff that the bill can stand on the theory that the several defendants, or some of them, have induced the newspapers not to enter into a business relation with the plaintiff. See Restatement: Torts, § 766. It is plain that the bill was not drawn on any such theory. It does not allege that any defendant induced or caused any other defendant not to do what it would otherwise have done. So far as appears each defendant was as much an originator and as much

[1] Mass. Adv. Sh. (1947) 789.
[2] Mass. Adv. Sh. (1948) 193.

[1] Mass. Adv. Sh. (1947) 869, 879.

an active moving party in bringing about the "agreement" as any other defendant.

Interlocutory decree affirmed.

Final decree affirmed with costs.

[¶ 62,273] **United States v. The Mortgage Conference of New York, et al.**

In the United States District Court for the Southern District of New York. Civil Action No. 37-247. June 28, 1948.

Sherman Antitrust Act

Consent Judgment — Dissolution of Conference — Fixing of Mortgage Rates and Charges.—A consent judgment entered in an action charging mortgage lenders and an association of mortgage lenders in the New York City area with violations of the antitrust laws requires the dissolution of the association within four months of the date of entry of judgment, and enjoins each of the defendants from participating in any agreement or program to fix interest rates, terms of amortization or periods of maturity for mortgages; to fix rental charges for real estate; to systematically report or circulate through any central person or agency information concerning uncompleted negotiations for mortgages or advice as to the advisability of placing a mortgage; to restrain any mortgage lender from placing a mortgage; to abstain from competing for mortgages or leases for certain spécified reasons. Defendants are also enjoined from participating in any association the purpose of which is to perform any of the acts enjoined.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10.

For plaintiff: James C. Wilson, J. Francis Hayden, Mervin C. Pollak, Sigmund Timberg, Special Assistants to the Attorney General; Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; J. Paul McQueen, Special Attorney.

For defendants: Root, Ballantine, Harlan, Bushby & Palmer; Boyle Feller, Stone & McGivern; Mitchell, Capron, Marsh, Angulo & Cooney; Donovan, Leisure, Newton, Lumbard & Irvine; Stephen G. Kent; Amend & Amend; Jackson, Nash, Buphy, Barringer & Brooks; Barry, Wainwright, Thacher & Symmers; Berle, Berle, Agee & Land; Paul Windets; Milbank, Tweed, Hope, Hadley & McClay; O'Connor & Farber; Sincerbeaux & Shrewsbury; Louis W. Dawson; Francis K. Raynor; Sullivan & Cromwell; William A. Hyman; House, Grossman, Woorhams & Hemly; Eugene J. Conroy; Edward F. Keenan; Brower, Brill, Ennis & Gangel; Newman & Bisco; George Hoague, John Barber, Jr., Ralph C. Williams, Jr.; Dillon, O'Brien & Clark; Joseph V. McKee; Davis, Polk Wardwell Sunderland & Kiendl; White & Case; Oliver Donnally; Winthrop, Stimson, Putnam & Roberts; Choate, Byrd, Leon & Garretson; all of New York, N. Y. Cullen & Dykeman; Hutton & Dalahan; Snedeker & Snedeker; all of Brooklyn, N. Y.

FINAL JUDGMENT

The plaintiff, United States of America, having filed its complaint herein on August 6, 1946; the defendants having appeared and severally filed their answers to the complaint denying the substantive allegations thereof and asserting their innocence of any violation of law; and the defendants, by their attorneys, having severally consented to the entry of this final judgment herein, without admission by any defendant with respect to any issue of fact or law raised by the complaint, and on their understanding that neither such consent nor this final judgment shall constitute evidence or adjudication of any violation of law.

Now THEREFORE, no evidence or testimony having been taken herein, and without any trial or adjudication of any issue of fact or law herein; it is hereby

ORDERED, ADJUDGED AND DECREED:

I.

That this Court has jurisdiction of the subject matter of this action and of the parties hereto, and that the complaint states a cause of action under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended (U. S. C. Title 15, Section 1) commonly known as the Sherman Act.

II.

That as used in this final judgment:

A. "Mortgage" means a mortgage or mortgages upon real property located in

the New York City area originally made to secure a loan of ten thousand dollars or more;

B. "Real property" means real property located in the New York City area;

C. "New York City area" means the area included in the counties of New York, Bronx, Kings, Queens, Richmond, Westchester and Nassau, all in the state of New York;

D. "Mortgage lender" means any financial institution, corporation or person regularly engaged in the business of investing funds under its control in mortgages, as herein defined.

III.

That the provisions of this final judgment applicable to any defendant (except the order of termination and dissolution contained in paragraph IV hereof) shall apply with equal force to all subsidiaries and successors of each of the defendants and to all persons acting under authority of, through or for the defendants, or any of them. Such provisions shall not apply to any transaction solely between a defendant and its own subsidiaries, officers, directors, trustees, mortgage correspondents or bona fide agents having no interest in such transaction other than that of representing such defendant therein.

IV.

That the defendant The Mortgage Conference shall forthwith take all steps necessary to terminate its activities and to effectuate its dissolution within four months of the date of the entry of this judgment, and shall at the expiration of said four months period, file a report with this Court and the Attorney General setting forth the measures taken to effectuate such dissolution.

V.

That the defendants, and each of them, are hereby enjoined from entering into, adhering to, participating in, or maintaining any continuing agreement, undertaking, plan or program with each other or with any other mortgage lender:

A. To fix interest rates, terms of amortization or periods of maturity for mortgages;

B. To fix rental charges for real estate;

C. To systematically report to or circulate through any central person or agency: (1) information concerning the pendency or details of specific uncompleted negotiations for mortgages or applications for mortgages not constituting contracts for mortgages, or (2) any opinion or advice relating to the advisability of placing a mortgage;

D. To prevent or restrain any mortgage lender from placing a mortgage;

E. To abstain from competing for a mortgage, from competing for a lease of real property or from causing others to do the same:

(1) Because such property is owned or occupied or is to be owned or occupied by persons belonging to any particular racial or national group; or

(2) Because of information, opinions and advice reported by or received from any other defendant or mortgage lender concerning uncompleted negotiations for mortgages or applications for mortgages not constituting contracts for mortgages; or

(3) Because it would involve the satisfaction of an existing mortgage held by another mortgage lender.

F. To abstain from competing for a mortgage on real property on which construction is contemplated or in progress, or causing others to do the same, because such construction might lessen the income from other real property in which one or more mortgage lenders have investments.

VI.

That the defendants are, and each of them is, hereby enjoined from forming, being a member of, or participating in the activities of any organization or association of any kind where the purpose of such formation, membership or participation is to do directly or indirectly any of the acts enjoined in paragraph V of this final judgment, and from causing any organization, association or other group or person, which any one or more of the defendants actually control, to do directly or indirectly any of such acts.

VII.

That without hereby determining, adjudicating or effecting the legality under the Antitrust laws of the common policies and agreements hereafter referred to in this paragraph VII, the provisions of this final judgment shall not prevent any defendant

from acting with one or more other defendants or with other mortgage lenders in establishing and executing such common policies and agreements as are appropriate:

(A) To business and operations authorized by state or local law involving the buying or selling of mortgages or the buying, financing, developing, building, rehabilitating, owning, operating, managing and selling of real property, carried on by a trust company or other corporation which is duly organized pursuant to state or local law and wholly owned by mortgage lenders;

(B) To transactions in which two or more mortgage lenders act together, in a particular common undertaking, or with a common interest in a trust estate, to buy, construct, own, operate, finance or reorganize any real property project, development or operating unit, or to transactions relating to the sale of a mortgage by one mortgage lender to another;

(C) To activities authorized by Federal or State laws or regulations or orders duly issued by Federal or State administrative officials, agencies or boards having authority to issue the same.

VIII.

That the provisions of this final judgment shall not apply to any activities or transactions, if any, which may be exempt from the application of the Antitrust laws by the provisions of Public Law 15, 79th Congress (59 Stat. 33, 34, 15 U. S. C., Sections 1011-1013).

IX.

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to the defendants, be permitted, subject to any legally recognized privilege, (a) to have access during reasonable office hours of the defendants to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendants relating to any of the matters contained in this judgment, and (b) subject to the reasonable convenience of the defendants, to interview, without restraint or interference from the defendants, officers or employees of the defendants, who may have counsel present, regarding any such matter; provided, however, that no information obtained by the means permitted in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

X.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this final judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, or for the amendment or modification of any of the provisions hereof. In any proceeding for the enforcement of this final judgment, the defendants in such proceeding are not estopped by way of defense from asserting that, or adducing evidence bearing on whether, the activities, transactions or course of conduct involved are outside of the interstate commerce described in the complaint in this action, and bearing on the nature and extent of their effect upon such commerce.

[¶ 62,274] Coty, Inc. v. Buffum & Co., Inc.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 91. June 16, 1948.

Illinois Fair Trade Act

Injunction—Resale Price Maintenance Contracts—Unfair Competition Prohibited.— The advertising, offering for sale and selling in Illinois of perfume applicators and refills containing perfumes manufactured and trade-marked by plaintiff, a Delaware corporation, at prices less than those established by plaintiff under the Fair Trade Act of Illinois, constitutes a violation of that Act. Defendant is permanently enjoined from selling or distri-

buting plaintiff's perfumes except in the original sealed packages originating with plaintiff and at the prices established by plaintiff under the Fair Trade Act of Illinois and all other states having Fair Trade Acts.

See the Illinois Fair Trade Act, Vol. 2, ¶ 8224, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7354.

For plaintiff: James R. McKnight, Robert C. Comstock, Lewis S. Bernstein, Chicago, Ill.

For defendant: Critton, Schroeder, Merriam & Hofgren; Maurice S. Weinzelbaum, Chicago, Ill.

Final Judgment

The Court being fully advised in the premises and the parties hereto having consented to the same, the Court enters the following findings of fact, conclusions of law and decree herein:

Findings of Fact

1. Plaintiff, Coty, Inc. is a Delaware corporation having its principal place of business in New York, New York.

2. Defendant, Buffum & Co., Inc. is an Illinois corporation, having its principal place of business in Chicago, Illinois.

3. Plaintiff has adopted and used, is now using, and is the lawful owner of the trade marks L'ORIGAN and EMERAUDE for perfumes, cosmetics and toilet preparations, and registrations Nos. 146,974 of September 27, 1921, 184,091 of May 21, 1924 and 187,543 of August 5, 1924 and renewed for L'ORIGAN and No. 181,498 of March 18, 1924 and renewed for EMERAUDE, all issued on said respective dates therefor by the United States Patent Office.

4. Plaintiff's perfumes, cosmetics, and toilet preparations, bearing the trade marks L'ORIGAN and EMERAUDE have for many years been, and are now extensively sold in interstate commerce so that said products bearing either of said trade marks are understood by the trade and public to be plaintiff's products.

5. On July 1, 1947 plaintiff entered into contracts establishing $2.85 as the minimum retail price and unit list price for .34 of an ounce of its EMERAUDE perfume under the Fair Trade Act of Illinois.

6. On July 1, 1947 plaintiff entered into contracts establishing $1.50 as the minimum retail price and unit list price for .20 of an ounce of its L'ORIGAN perfume under the Fair Trade Act of Illinois.

7. Plaintiff's said contracts under the Fair Trade Act of Illinois for EMERAUDE and L'ORIGAN perfumes provided that these perfumes were not sold in bulk, and that the smallest quantity which could be sold was the listed amount at the price as heretofore set forth herein in paragraphs 6 and 7.

8. The prices and quantities for plaintiff's EMERAUDE and L'ORIGAN perfumes set forth in paragraphs 6 and 7 herein have continuously been effective from July 1, 1947 to date.

9. Defendant advertised, offered for sale and sold perfume applicators and refills containing perfume which defendant advertised and claimed to be L'ORIGAN or EMERAUDE perfume, without plaintiff's consent and at dates later than plaintiff's first use and registration of the trade marks L'ORIGAN and EMERAUDE.

10. Defendant advertised, offered for sale and sold perfume applicators and refills containing plaintiff's L'ORIGAN and EMERAUDE perfumes, during a period between November, 1947 and February, 1948 at $1.49 for the filled applicator and 50 cents for the filled refill, which are prices less than the prices established by plaintiff and then in effect under the Fair Trade Act of Illinois.

Conclusions of Law

11. This Court has jurisdiction of the parties hereto and over the controversy involved in this action.

12. The trade marks L'ORIGAN and EMERAUDE used on perfumes, cosmetics and toilet preparations, and the registrations therefor, Nos. 146,974, 184,091 and 187,543 for L'ORIGAN and No. 181,498 for EMERAUDE, all issued by the United States Patent Office and owned by plaintiff, are each good and valid in law.

13. Defendant has infringed plaintiff's said registered trade marks L'ORIGAN and EMERAUDE by said advertising, offering for sale and sale of perfume applicators and refills containing perfume under such trade marks without plaintiff's consent and has engaged in unfair competition

with the plaintiff in advertising, offering for sale and selling perfume applicators as containing such perfumes.

14. Defendant has violated the Fair Trade Act of Illinois by advertising, offering for sale and selling perfume applicators and refills containing plaintiff's L'ORIGAN and EMERAUDE perfume at prices less than those established by plaintiff under the Fair Trade Act of Illinois.

15. Plaintiff is entitled to a permanent injunction against defendant to restrain said trade mark infringement, unfair competition and violation of the Fair Trade Act of Illinois.

Decree

16. It is Hereby Ordered, Adjudged, and Decreed that Buffum & Co. Inc. and its agents, servants, employees, and attorneys, and all persons in active concert or participation or privity with it be and are hereby forever enjoined and restrained from in any way, directly or indirectly (a) infringing plaintiff's registered trade marks L'ORIGAN and EMERAUDE or either of them and particularly from using L'ORIGAN or EMERAUDE or any other words confusingly similar thereto on or in connection with perumes, or any other goods of the same descriptive properties, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services, including perfume applicators or containers; and (b) selling, offering for sale or advertising perfumes or other goods of the same descriptive properties as and for L'ORIGAN or EMERAUDE or either of them, or otherwise committing acts of unfair competition with reference to plaintiff and its L'ORIGAN or EMERAUDE products; (c) selling or distributing L'ORIGAN or EMERAUDE perfumes except in the original sealed packages originating with plaintiff and at the prices established by plaintiff under the Fair Trade Act of Illinois and all other states having Fair Trade Acts; and (d) selling or distributing any L'ORIGAN or EMERAUDE perfumes in defendant's Pipette, or refill cartridges, or any other receptacle or applicator or in bulk at $1.49 or $.50 or any other price less than that established by plaintiff under the Fair Trade Act of Illinois and all other states having Fair Trade Acts.

17. That taxable costs be allowed to plaintiff.

18. The parties having entered into settlement, there is no award of damages or profits of any kind.

[¶ 62,275] Consolidated Cosmetics and Dana Perfumes, Inc. v. Buffum & Co., Inc.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 80. June 21, 1948.

Illinois Fair Trade Act

Decree—Resale Price Maintenance Contracts—Unfair Competition Prohibited.—A decree prohibits the advertising, offering for sale and selling of perfume applicators and refills containing perfumes at prices less than those established by the manufacturer and trade mark owner under the Illinois Fair Trade Act.

See the Illinois Fair Trade Act, Vol. 2, ¶ 8224, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7354.

For plaintiff: James R. McKnight, Chicago, Ill.

For defendant: Critton, Schroeder, Merriam & Hofgren, Chicago, Ill.

Final Judgment

The Court being fully advised in the premises and the parties hereto having consented to the same, the Court enters the following findings of fact, conclusions of law and decree herein:

Findings of Fact

1. Plaintiff, Consolidated Cosmetics, is a firm composed of James L. Younghusband, Howard Younghusband and Paul Rowatt, and plaintiff, Dana Perfumes, Inc. is an Illinois corporation, both plaintiffs having their

principal places of business in Chicago, Illinois.

2. Defendant Buffum & Co., In., is an Illinois corporation, having its principal place of business in Chicago, Illinois.

3. Plaintiff, Consolidated Cosmetics has adopted and used, is now using and is the lawful owner of the trade mark TABU for perfumes, cosmetics and toilet preparations and registrations Nos. 314,493 of July 3, 1934, 407,797 of June 27, 1944 and 426,323 of December 24, 1947, all issued by the United States Patent Office.

4. Plaintiffs, Consolidated Cosmetics and Dana Perfumes, Inc., have so extensively sold perfumes, cosmetics and toilet preparations bearing the trade mark TABU that said products bearing said trade mark are understood by the trade and public to be plaintiffs' products.

5. On July 21, 1947, plaintiff Dana Perfumes, Inc. entered into contracts establishing $2.25 as the minimum retail price and unit list price for one dram of TABU perfume under the Fair Trade Act of Illinois.

6. The price and quantity for plaintiffs' TABU perfume set forth in paragraph 5 herein have been effective continuously from July 21, 1947, to date.

7. Defendant advertised, offered for sale and sold perfume applicators and refills containing perfume which defendant advertised and claimed to be TABU perfume, without plaintiffs' consent and at dates later than plaintiffs' first use and registrations of the trade mark TABU.

8. Defendant advertised, offered for sale and sold perfume applicators and refills containing plaintiffs' TABU perfume, during a period between November, 1947, and February, 1948, at $1.49 for the filled applicator and 50 cents for the filled refill, which are prices less than the prices established by plaintiffs and then in effect under the Fair Trade Act of Illinois.

Conclusions of Law

9. This Court has jurisdiction of the parties hereto, and over the controversy involved in this action.

10. The trade mark TABU used on perfumes, cosmetics and toilet preparations and registrations therefor Nos. 314,493, 407,797 and 426,323 issued by the United States Patent Office and owned by Consolidated Cosmetics are each good and valid in law.

11. Defendant has infringed the trade mark TABU by said advertising, offering for sale and selling of perfume applicators and refills containing perfume under such trade mark without plaintiffs' consent, and has engaged in unfair competition with plaintiffs in advertising, offering for sale and selling perfume applicators as containing such perfume.

12. Defendant has violated the Fair Trade Act of Illiniois by advertising, offering for sale and selling perfume applicators and refills containing plaintiffs' TABU perfume at prices less than those established under the Fair Trade Act of Illinois.

13. Plaintiffs are entitled to a permanent injunction against defendant to restrain said trade mark infringement, unfair competition and violation of the Fair Trade Act of Illinois.

Decree

14. It is hereby ordered, adjudged and decreed that Buffum & Co., Inc. and its agents, servants, employees, and attorneys, and all persons in active concert or participation or privity with it, be and are hereby forever enjoined and restrained from in any way directly or indirectly (a) infringing plaintiffs' registered trade mark TABU and particularly from using TABU or any other words confusingly similar thereto on or in connection with perfumes, or any other goods of the same descriptive properties, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; (b) selling, offering for sale or advertising perfumes or other goods of the same descriptive properties as and for TABU, or otherwise committing acts of unfair competition with reference to plaintiffs and their products TABU; (c) selling or distributing any TABU perfume except in the original sealed packages originating with plaintiffs and at the prices established by plaintiffs under the Fair Trade Act of Illinois; and (d) selling or distributing any TABU perfume in defendant's Pipette, or refill cartridge, or any other receptacle or applicator or in bulk at $1.49 or $.50 or any other price less than that established by plaintiffs under the Fair Trade Act of Illinois.

[¶ 62,276] Master Metal Strip Service, Inc. and Martin J. Gossen v. Protex Weatherstrip Mfg. Co., a Co-Partnership, etc.

In the United States Circuit Court of Appeals for the Seventh Circuit. No. 9477. July 1, 1948.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Sherman Antitrust Act

Patent Infringement—License Agreement—Unlawful Monopoly of Unpatented Article. —An exclusive license agreement by which plaintiff patentee granted to plaintiff licensee the exclusive right to manufacture and sell, under the patentee's patent, not the patented combination defined in the claims of that patent, but the weatherstrip and sash balance device embodied in the invention shown, described and claimed in the patent, which device constitutes but a single element of the combination, and the bringing of an action for infringement of such patent, constitutes a conspiracy to maintain an illegal monopoly in restraint of trade in an unpatented article of commerce, in violation of the Sherman Act. A counterclaim to the infringement suit, denying infringement and the validity of the patents, and seeking a declaratory judgment against plaintiffs for antitrust violations, is upheld, and defendant is awarded injunctive relief and damages.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201, 1270.501.

Affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division.

Before SPARKS and MINTON, Circuit Judges, and LINDLEY, District Judge.

SPARKS, Circuit Judge. Plaintiffs charged defendant, a copartnership, with infringement of United States patents Nos. 2,158,963 and 2,257,051 issued on the respective dates of May 16, 1939, and September 23, 1941, on applications filed respectively on January 6, 1938, and December 8, 1939. The answer denied infringement and validity of both patents, and a counterclaim asked for a declaratory judgment to that effect, and for a further judgment against plaintiffs for their alleged attempt to monopolize an unpatented element of their combination in violation of the antitrust laws of the United States. This counterclaim further alleged that, although plaintiffs had not here charged defendant with infringement of Gossen prior patent No. 2,101,577, yet they had formerly done so, and for that reason there still existed an actual controversy between plaintiffs and the counterclaimant as to whether the latter had infringed or was then infringing this patent No. 2,101,577, and for that reason, and in order to avoid the expense and burden of a multiplicity of suits and to adjudicate in this action the entire controversy existing between these parties, the counterclaimant charged that patent No. 2,101,577 and each of its claims were void because Gossen was not the original inventor, nor did he first discover any material part of its disclosure.

The court held that an actual controversy existed between the plaintiffs and the defendant, under the Declaratory Judgment Act, section 274d of the Judicial Code (28 U. S. C. A., section 400d), as to each of the Gossen patents, Nos. 2,158,963, 2,257,051 and 2,101,577.

Before submission of this cause plaintiffs served notice upon defendant that as a basis for their charge of infringement against defendant they would rely solely on claims 1 and 2 of patent No. 2,158,963, and not upon any claims of the other two patents mentioned in this complaint and counterclaim.

The claims here in issue are numbers 1 and 2 of patent No. 2,158,963. Claim 1 is set forth.[1] Claim 2 is substantially similar

[1] "1. In combination, a window frame, a sash slidably mounted within said frame, tubes secured within the frame at the sides of the sash and each tube having a bottom wall and laterally spaced side walls, the side walls of the tubes being free of the frame and extending into grooves in the adjacent side portions of the sash, said side walls having a spring tension connection with their bottom walls so that the side walls may press laterally against the sash within the grooves to frictionally hold the sash in any position of adjustment within the frame, flange formations along the side walls within the grooves, said flanges extending inwardly from the side walls and terminating short of each other between the side walls to provide slots along the tubes within the grooves, and coiled lifting springs located within the tubes

thereto. It differs only in that claim 2 is somewhat more specific as to the particular construction of the metal weather strip-sash balance unit and its so-called tube portion. Appellant describes the difference as that claim 2 includes means carried by tubes at the sides whereby the tubes may be secured to the frame laterally and exteriorly of their side walls.

The court found the facts substantially as follows: Master Metal Strip Service, Inc. is the successor in business and in interest to the exclusive licensee named in an exclusive license agreement of July 18, 1939, between plaintiff, Gossen and Maurice S. Oftedal, who was then doing business as Master Metal Strip Service Co. Under that license agreement Gossen, the patentee, granted to Oftedal, doing business as Master Metal Strip Service Co., the predecessor of the corporate plaintiff, the exclusive right to manufacture and sell, throughout the Dominion of Canada and the United States, exclusive of the State of Wisconsin, under Gossen patent No. 2,158,963, not the patented combination defined in claims 1 and 2 of that patent, but the weather strip and sash balance device embodied in the invention shown, described and claimed in the patent, which device constitutes but a single element of the combination here in issue.

As consideration for such license to manufacture and sell the metal weather strip and sash balance device, the licensee agreed to pay the patentee one cent per foot for the first million feet of weather strip material sold each year by the licensee, no royalty on the second million feet sold each year, and on all weather strip material sold in each year in excess of two million feet, licensee was to pay one-half cent per foot.

From the date of the license to the filing of the complaint, the license was in full force and effect between the plaintiffs. From the issuance of the patent to the time of trial the defendant did not manufacture or sell any window frame or window sash of the character disclosed in the Gossen patent in issue or its claims 1 and 2.

Neither Master Metal Strip Service, Inc. nor defendant manufactures or sells window frames or window sash, as disclosed by the Gossen patent in issue, and as defined in claims 1 and 2 thereof. The combination defined in claims 1 and 2 of Gossen does not differ in any material respect from that disclosed by the Bricker patent No. 848,961.

The court sets forth in detail the similarities and the differences in substantially the following language: Both Bricker and Gossen have in combination the frame, sash and thin metal strip. Both have tubes secured within the frame, each tube having a bottom wall and laterally spaced side walls, the side walls being free of the frame and extending into grooves in the adjacent portions of the sash. Both have flange formations along the side walls within the grooves, said flanges extending inwardly from the side walls and terminating short of each other between the side walls. The only differences between Bricker and Gossen are (1) Bricker contemplated fastening his metal strip to the frame while Gossen in the written instructions he gives for using his metal strip advises fitting the weather strip together with the coil springs to the sash and then placing the sash in the frame, and (2) Gossen states that the side walls have a spring tension connection with their bottom walls so that the side walls may press laterally against the sash within the grooves to frictionally hold the sash in any position of adjustment within the frame. How this tension is to be brought about is not stated in the claim, but the construction of the tubes is practically the same in both patents and both are made of thin metal, the kind of metal not being stated. Gossen says, "The extent of the divergence of the side walls of the tubes may be regulated by pressing inwardly with a blunt tool at the juncture of the side walls and the flanges. This enables the side walls to be given the desired tension to hold the sash in place and serve the weather strip function."

The District Court found that the same result could be produced by the pressure of a blunt tool along the juncture of the side walls of Bricker, and that such would be the effect is a fact known to competent mechanics; that the advantages claimed by Gossen for his alleged invention are that the arrangement enables his improved sash balance and weather strip device to be readily and easily applied to buildings already built and that the tubes and the lifting elements may be assembled with the sash before placement in the window frame.

and fixed at one end as to the tubes and connected at their other ends to the sash through the slots in the tubes, said flanges extending over the springs and retaining the same within the tubes in all positions of adjustment of the sash within the frame."

The court further found that Bricker shows the metal weather strip attached to the window frame, but that there is no reason why Bricker's metal parts might not as well be assembled with the sash and the sash then placed in the frame in the same manner that Gossen assembles and places his. The court called attention to the fact that in claims 1 and 2 Gossen discloses a coil spring, but as an ultimate fact the court found that there is nothing new in the use of the spring nor the method of attaching it to the tube at the top or the frame at the bottom.

As matters of law the District Court concluded that claims 1 and 2 of patent No. 2,158,963 do not disclose invention because each consists solely of old elements which operate in the same manner as the prior art and disclose no novelty.

The court further concluded that by plaintiffs' license agreement and their operations thereunder, and in bringing this action, they have attempted to and have conspired to maintain an illegal monopoly in restraint of trade in an unpatented article of commerce, namely, a metal weather strip-sash balance device, as used in the patent, and in so doing plaintiffs have violated the antitrust laws of the United States, 15 U. S. C. A., sections 1 *et seq.;* that by reason of such violations defendant is entitled to the relief provided by such Act as follows:

(1) An injunction enjoining plaintiffs and each of them, and all others acting by or under direction or authority, their successors and assigns, from: (a) Bringing suit for infringement of the Gossen patent No. 2,158,963 against defendant's customers or prospective customers, or directly or indirectly threatening defendant's customers or prospective customers with infringement suits of this patent, or from in any manner interfering with defendant's by use of this Gossen patent; (b) enforcing or carrying out directly or indirectly against defendant, its customers or prospective customers, any of the provisions of such license or any other similar license agreement involving this Gossen patent.

(2) An accounting for three-fold damages, if any, suffered by defendant by reason of the above named unlawful acts of the plaintiffs, together with defendant's disbursements and reasonable attorney's fees, and costs.

The court further concluded that by reason of plaintiffs' violation of the antitrust laws, above referred to, they should be barred from maintaining this action against the defendant, and that the defendant is entitled to dismissal with prejudice as to claims 3 to 8, inclusive, of Gossen patent No. 2,158,963, and as to claims 1 to 11, inclusive, of Gossen patent No. 2,257,051, and also as to claims 1 to 8, inclusive, of Gossen patent No. 2,101,577.

The District Court concluded as an ultimate fact that Gossen's disclosures as defined in claims 1 and 2 of patent No. 2,158,963, amounted to nothing more than mere mechanical skill, and concluded that such disclosures did not amount to novelty as contemplated by the statute, hence it held the patent was invalid. Judgment was rendered for the defendant consistent with the conclusions of law and from that judgment this appeal is prosecuted.

The trial court has found the material facts in a very clear and concise manner. We think they are fully supported by the evidence, and as to the question of patentability, we are convinced that in view of the disclosures of Bricker's patent No. 848,961, the claims 1 and 2 of Gossen's patent No. 2,158,963 disclose nothing in excess of the skill of the art. We think there is no error in holding these claims invalid.

We are of the opinion that the evidence fully supports the District Court's conclusions and judgment as to appellants' violation of the antitrust laws of the United States. We case our conclusion in this respect upon the case of *Mercoid Corporation v. Mid-Continent Investment Co.,* 320 U. S. 661. Appellants seek to distinguish that case from the one at bar. We are unable to grasp such distinction.

It will be noted that the District Court made no direct finding as to infringement as charged in the complaint, and plaintiffs have assigned this fact as error. With this contention we do not agree. We find no case in this circuit which supports appellants' assignment in this respect, nor have they cited any case where upon similar facts the court has supported this contention. See *Cover v. Schwartz,* 133 F. 2d 541; *Trico Products Corp. v. Anderson Company,* 147 F. 2d 721; *Grant Paper Box Co. v. Russell Box Co.,* 151 F. 2d 886.

Judgment affirmed.

[¶ 62,277] The Windsor Theatre Co. v. Loew's Incorporated, et al.

In the United States District Court for the District of Columbia. Civil Action No. 614-48. June 8, 1948.

Clayton Antitrust Act

Motion to Quash—Venue—Transacting Business in District.—Defendant motion picture theatre operators, who operate two theatres in Baltimore, Maryland, and who receive films from six distributor defendants located in the District of Columbia, do not "transact business" in the District of Columbia so as to render them amenable to service of process in that District under the provisions of Section 12 of the Clayton Act. The acts relied on to constitute transacting business must constitute a substantial part of the ordinary business of the corporation and must be continuous or at least of some duration. Visits by the theatre manager to the distributors' exchanges in the District of Columbia once a week for the purpose of booking films, and occasional visits for "spot booking" and requests for adjustments and credits, do not constitute such continuous and regular acts. The act of booking is not sufficient to bring the corporation within the "transacting business" clause of the Clayton Act. A motion to quash service of process is granted.

See the Clayton Act annotations, Vol. 1, ¶ 2032.

For plaintiff: Harold L. Schlitz, Washington, D. C.

For defendant: Edmund L. Jones, Donald Russell; Metler, Shea & Oppenheimer, all of Washington, D. C.

Opinion on Motion to Dismiss Complaint or to Quash Service of Process

Plaintiff brought this action under the provisions of the Sherman and Clayton Acts,[1] to recover treble the amount of damages allegedly sustained and to enjoin certain alleged violations of the above-named Acts. The Walbrook Amusement Company and the Hilton Theatre Company, corporate defendants, moved to dismiss the complaint or in lieu thereof to quash the service of process on the grounds that they are not inhabitants of the District of Columbia, that they were not found in, and that they do not transact business in the District of Columbia. Defendant corporations operate two theatres in Baltimore, Maryland, receiving their films from the six distributor defendants located in the District of Columbia.

Plaintiff does not contend that these defendants are inhabitants of or that they are to be "found" in the District of Columbia. However, it is urged they are transacting business in the District of Columbia and can be sued in this District by reason of the provision of the Clayton Act[2] which provides: "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

The question raised requires a determination of whether the acts done by defendants in the District of Columbia are sufficient to sustain a finding that they were "transacting business" in this District. From the facts as I have found them, the general manager of defendants regularly visits the distributors' exchanges in the District of Columbia for the purpose of "booking" the films for which contracts have been made. Such visits occur once a week and last for a period of approximately two hours. "Booking" consists of setting a specific play date and theatre for the exhibition of films which have been contracted for in the agreement to license. The sequence of events leading up to the time that a picture is booked by the general manager of these defendants are as follows: First, a salesman of the distributor defendants calls on the general manager of the exhibitor defendants in Baltimore, Maryland, where he negotiates an Agreement to License a certain film. This agreement to license becomes a contract only when it has been finally approved in the distributor's New York office. Some of the agreements leave the general manager several options which he must exercise when he "books" the film, while in others every

[1] Title 15 U. S. C. A. Sec. 1 *et seq.*

[2] Title 15 U. S. C. A. Sec. 22.

detail is settled. Second, when the film is available for release the distributor in the District of Columbia mails a notice of availability to the exhibitor in Baltimore, who then comes to the District of Columbia and books the film. Generally, the following action is done in the District; a specific play date is selected for the showing of the film; it is decided whether the film will be shown on a preferred playing date, i.e., Saturday or Sunday; it is decided whether a film will run for three or four days; and it is decided whether the film will be exhibited in the Walbrook or the Hilton Theatres. It does not appear that there are any negotiations with regard to these matters. The general manager merely advises the Booker of the choice he has made.

In addition to booking pictures, occasionally other matters have been discussed by defendants' general manager in the District of Columbia. At times when one of the two defendant theatres has been without a film to be exhibited on a particular date, the general manager has come to the District of Columbia to "spot book" a film. This spot booking has occurred only on infrequent occasions. Moreover, the general manager of defendant theatres has secured or attempted to secure credits and adjustments in rates when a film has not earned the anticipated amount of return. Some of these requests for credits took place in the District of Columbia, while others were conducted by telephone and correspondence through the mails. They were infrequent and not in any sense continuous.

The quantum of business which must be transacted by a corporation in a district, in order to make it possible to establish venue of an action under the antitrust acts, is less than the "doing business" necessary to sustain the service of process in other cases. *Eastman Kodak Co. v. Southern Co.,* 273 U. S. 359; *United States v. Scophony Corporation of America,* — U. S. —, April 26, 1948. However, the acts relied on to constitute transacting business must constitute a substantial part of the ordinary business of the corporation and must be continuous or at least of some duration. *Westor Theatres, Inc. et al. v. Warner Bros. Pictures, Inc., et al.,* 41 F. Supp. 757 (N. J.).

The case at bar is similar to *Hartford Theatre Co. v. Twentieth Century-Fox Corp. et al.,* C. A. 34670 (D. C.) and *Commonwealth Amusement Enterprises, Inc. v. Colonial Theatres Company, Inc. et al.,* Law No. 6532 (Mass.) in which motions to quash service were granted by this Court and by the District Court of the United States for the District of Massachusetts. It is true in the case at bar, there were additional acts performed by the general manager of defendant theatres which did not appear in the *Hartford Theatre* and *Commonwealth Amusement* cases, namely, spot booking and requests for adjustments and credits. As to these activities, however, the evidence clearly indicates that they were done only occasionally and there was not the continuity necessary to sustain a finding that defendants were transacting a substantial part of their ordinary business in this jurisdiction. These transactions can not be termed "ordinary business"; they were exceptional and occasioned only by unforeseeable events.

The only act of defendant's representative repeatedly and continuously performed in this jurisdiction was booking. This act was relied on in both the *Hartford* and the *Commonwealth Amusement* cases, *supra,* and in both cases it was held that booking was not sufficient to bring the corporation within the transacting business clause of the Clayton Act. In my opinion the decisions in these cases are correct and should be followed. The decisions relied on by plaintiff in support of its position were decided on different states of facts and are not controlling on the question raised in the case at bar.

Accordingly, service of process will be quashed.

Findings of fact and conclusions of law are filed with this opinion.

Findings of Fact on Motion to Dismiss Complaint or Quash Service of Process Against the Walbrook Amusement Company and the Hilton Theatre Company

1. Plaintiff is a Maryland corporation engaged in the business of operating a motion picture theatre known as the Windsor, located at 3113-15 West North Avenue, in Baltimore, Maryland.

2. Defendant, the Walbrook Amusement Company, is a Maryland corporation engaged in the business of operating a motion picture theatre known as the Walbrook, located at 3100 West North Avenue, in Baltimore, Maryland.

3. Defendant, the Hilton Theatre Company, is a Maryland corporation engaged in the business of operating a motion picture theatre known as the Hilton, located at 3117 West North Avenue, in Baltimore, Maryland.

4. Motion picture feature films, short subjects and newsreels are regularly supplied to the Walbrook and Hilton theatres by the defendant motion picture distributors: Loew's Incorporated, Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation pursuant to the terms of contracts of license entered into between such distributors and defendants the Walbrook Amusement Company and the Hilton Theatre Company.

5. Said motion picture products are distributed to the defendants through the Washington, D. C. "exchanges" or branch offices of the aforesaid defendant motion picture distributors, and the Walbrook and Hilton theatres do not receive the motion picture product of such distributors from any other point.

6. The summons and complaint in the pending action were served on defendants The Walbrook Amusement Company and The Hilton Theatre Company in the City of Baltimore, Maryland.

7. Neither the Walbrook Amusement Company nor the Hilton Theatre Company has or ever has had any office, records, property, or interests of any kind in the District of Columbia, nor any officers, agents, servants or employees residing therein. The sole business of each of such defendants is that of operating a motion picture theatre in the City of Baltimore.

8. Negotiations for the licensing or buying of pictures for exhibition in the Walbrook and Hilton Theatres are conducted at the Hilton Theatre Building in the City of Baltimore, between Joseph Baer, General Manager of the two exhibitor defendant corporations, and the salesmen of the various distributor defendants named in the complaint. When agreement is reached on the licensing terms for a particular picture or pictures, Baer signs a contract form or memorandum of agreement. This contract form or memorandum of agreement is then taken or forwarded by the salesman to the branch office of the distributor in Washington. If the branch manager rejects the deal, the salesman returns to Baltimore for further negotiations with the exhibitor. If the branch manager approves the deal, the contract is forwarded to New York for final approval by the sales manager or some highly placed officer of the distributor. There is no binding contract prior to approval in New York. Each license agreement contains a provision to the effect that it is complete, that all promises, representations, understandings and agreements have been expressed in the agreement, and that no change, modification or assignment thereof shall be binding upon the distributor in its main office in New York City.

9. Following the execution of the contract by the exhibitor and the duly authorized representative of the distributor, the branch office of the distributor mails an availability notice to the exhibitor advising him when the picture will be available for exhibition in his theatre.

10. Following receipt of a notice of availability, Baer comes to the branch office of the distributors in Washington, D. C. and books the motion pictures for exhibition. The trips to Washington occur once a week and consume approximately two hours' time. Booking consists of deciding upon the actual days the picture will be exhibited, and the theatre to be used for the exhibition of the pictures. In addition, it is sometimes necessary to decide whether the picture is to be exhibited on "preferred playing time", i.e., Saturday or Sunday. All of these matters are settled by the terms of some of the original contracts to license, and in the others the final determination is left open, to be made when the film is booked. There are no negotiations with regard to these mattters, Baer merely advises the booker of the choice he has made.

11. On infrequent occasions defendant exhibitor is without a picture for one of the theatres. In such a case it is necessary, on short notice, for the exhibitor to book an old film to fill in this date. Such an arrangement is known as "spot-booking." Spot Booking is done in Washington, D. C. Such arrangements occur only rarely.

12. On occasions a picture will not gross as large a return as was anticipated when the license agreement, fixing the percentage of the gross as rental, was signed. Requests

are sometimes made in the District of Columbia for adjustments and credits to be extended to the exhibitor when a film has not earned the anticipated return. Such requests rarely occur and they have been made over the telephone and through the mails as well as in the District of Columbia by Baer.

13. The Walbrook and Hilton defendants have the films picked up in Washington by a common carrier, which delivers the prints to the theatres in Baltimore and returns them to Washington after they have been exhibited.

14. Film rentals due the various distributors are paid by the Walbrook and Hilton defendants by checks mailed from the office of such exhibitor defendants in Baltimore to the exchange offices in Washington.

Conclusions of Law

1. Defendants, The Walbrook Amusement Company and The Hilton Theatre Company are not transacting business in the District of Columbia, within the meaning of § 12 of the Clayton Act.

2. Motion to quash service of process against said defendants will be granted.

[¶ 62,278] St. Louis Amusement Company, et al. v. Paramount Film Distributing Corporation, et al.

In the United States Circuit Court of Appeals for the Eighth Circuit. No. 13,502. July 6, 1948.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Sherman Antitrust Act

Consent Decree—Arbitration System—No Agreement in Restraint of Trade.—The mere agreement on the part of motion picture distributors to the setting up of an arbitration system under the provisions of a consent decree for handling clearance controversies, with the rules for conducting the proceedings approved by the District Court, and the commitment of each defendant motion picture exhibitor as part of its consent to abide by any final award in a proceeding to which it had been a party, did not constitute a combination or conspiracy in violation of the Sherman Act. The refusal, during the time the consent decree was in effect, of such distributors as had been party to an arbitration proceeding on a clearance period, under a complaint filed by some exhibitor of which plaintiffs were given notice and had an opportunity to intervene, to agree with plaintiffs on a longer clearance against the theatre of the complaining exhibitor than that fixed in the arbitration award, could not, without more in the situation, in view of the prohibition of the decree, be claimed to constitute an actionable combination or conspiracy under the statute.

See the Sherman Act annotations, Vol. 1, ¶ 1220.534.

Affirming 61 Fed. Supp. 854, reported in CCH *Trade Cases*, 1945-1946, at ¶ 57,403.

For plaintiff: Russell Hardy, Mat J. Holland, James H. Arthur.

For defendants: Albert C. Bickford, Jacob M. Lashly, Israel Treiman, Julius H. Drucker, Lashly, Lashly, Miller & Clifford, Simpson, Thacher & Bartlett; S. Mayner Wallace, Edwin Foster Blair, Wesley A. Sturges.

Before SANBORN, THOMAS and JOHNSEN, Circuit Judges.

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

The appeal is from a summary judgment entered against the plaintiffs on motions of the defendants. The trial court's opinion appears in 61 F. Supp. 854.

The action is one under the Sherman Anti-Trust Act, 15 U. S. C. A. § 1 et seq., brought by six motion picture exhibitors in St. Louis, Missouri, operating a total of 31 local theatres, against five major distributors in the industry,[1] together with the American Arbi-

[1] While the complaint lists five distributors as defendants, one of the distributors seems to have been named under both its former and present corporate names. Actually therefore only four distributors appear to be involved.

tration Association, two of its agents, and the separate operators of two other movie theatres in St. Louis,[2] for injunctive relief and treble damages.

The combination and conspiracy relied on consisted of an alleged agreement among the defendant distributors not to make any license contracts for films with an exhibitor against whom the American Arbitration Association should have entered an award fixing the clearance period[3] between such exhibitor's theatre and other theatres, except upon the basis of the period prescribed by the award. The American Arbitration Association and its two agents were claimed to be a party to the combination and conspiracy in that the Arbitration Association had consented to receive complaints from exhibitors on clearance questions and to make decisions and awards on the complaints, which necessarily would affect the situation of other exhibitors. The operators of the two local movie theatres referred to were charged with having joined the combination and conspiracy by having filed complaints with the Arbitration Association seeking an award on the clearance rights of each of such theatres in relation to the theatres of plaintiffs.

The complaint further alleged that on one of these complaints the Arbitration Association had entered an award directing the distributors (all of which were parties to the proceeding) to reduce the clearance period which they had previously allowed plaintiffs' theatres as against the complaining theatre from fourteen to seven days; that the distributors had since that time refused to contract or supply pictures to plaintiffs except on the basis of this reduced clearance period; that the clearance reduction had resulted in a loss of patronage at plaintiffs' theatres amounting to and occasioning damages to plaintiffs in the sum of $95,000;[4] and that plaintiffs would similarly continue to suffer great loss and damage in the future because of the situation unless injunctive relief were granted.

As to the complaint filed on behalf of the second theatre, it was alleged that the Arbitration Association was taking steps looking toward the making of an award[5] and that plaintiffs thus were being threatened with a reduction also in the clearance period theretofore enjoyed by them against this theatre.

On the allegations so far stated, the complaint could present a situation that might fall within *Paramount Famous Lasky Corporation v. United States,* 282 U. S. 30, 51 S. Ct. 42, 75 L. Ed. 145, affirming *United States v. Paramount Famous Lasky Corporation,* D. C. S. D. N. Y., 34 F. 2d 984, on which plaintiffs rely. But this is not the whole of the complaint. The complaint further showed that the agreement which was claimed to constitute the unlawful combination and conspiracy had consisted in fact of the execution by each of the distributors of a written consent to the entering of an interlocutory decree in a general anti-trust suit, brought against them and others in the film industry by the Attorney General in the District Court for the Southern District of New York, entitled *United States of America, Plaintiff, v. Paramount Pictures, Inc., et al., Defendants,* No. 87-273. It was under the provisions of this consent decree that the arbitration system for the handling of clearance complaints by exhibitors was set up and that the consenting defendants became bound to abide by the results of any awards so made.

The arbitration system as provided for in the consent decree was obviously merely "an auxiliary enforcement procedure" which the court authorized to be used during the pendency of the action or until a modification or vacation of the consent decree. The final decree entered by the statutory three-judge court, which heard the case ultimately on its merits, terminated the arbitration set-up, "except in so far as may be necessary to

[2] The complaint names other parties as defendants but they were apparently not validly served with process and are not before us on the appeal.

[3] "A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." *United States v. Paramount Pictures, Inc.,* 68 S. Ct. 915, 923, footnote 6.

[4] From the award, which was made a part of the showing in support of the distributors' motion for a summary judgment, it would appear that the only one of the plaintiffs actually involved in that arbitration proceeding was St. Louis Amusement Co., and that it in fact had filed a consent to the arbitration and an agreement to be bound by the award.

[5] The brief of the distributors here states that during the pendency of the present action no further steps have been taken in this arbitration proceeding.

conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems." See *United States v. Paramount Pictures, Inc.,* D. C. S. D. N. Y., 70 F. Supp. 53, 75. But in the written opinion which the court filed preceding the formulation of its decree, it took occasion to comment that the arbitration system had been of "demonstrated usefulness" as an enforcement expedient during the pendency of the action, *Id.,* 66 F. Supp. 323, 333, and it also made a formal finding, No. 160, that "The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance * * *," *Id.,* 70 F. Supp. at page 71. Again, in connection with the final decree, the court emphasized its previous comment and said: "The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded." *Ibid.,* p. 76.

The decree of the three-judge court (in which clearance relations in the motion picture industry was only one of the many questions involved) was made the subject of appeals by the various parties in the suit to the Supreme Court. We are not here concerned with any of the matters considered and discussed by the Supreme Court in its opinion on the appeals, except as to the use of the arbitration system and the expressions made in relation thereto, for such light as they may throw upon the merits of plaintiffs' contentions here.

It is plaintiffs' contention that the court in the anti-trust case in New York could not validly make a provision in its decree for an arbitration system; that even though the set-up was made with the consent of the parties in the case it was in effect the creation of a private judicial system; that in any event the creation of an arbitration system and the attempt to fix rules governing clearances were legislative matters which would lie solely within the jurisdiction of Congress; that the arbitration provisions of the consent decree were therefore void; and that the agreement of the distributors to the creation and maintenance of the system and to be bound by the awards under it constituted accordingly an unlawful combination and conspiracy, falling within *Paramount Famous Lasky Corporation v. United States, supra,* 282 U. S. 30, 51 S. Ct. 42, 75 L. Ed. 145.

In entering summary judgment against the plaintiffs, the trial court held that the arbitration provisions of the consent decree in the New York case could not be declared to be invalid and that there was no basis therefore for plaintiffs' contention that the consent of the several distributors to the provisions was of itself an unlawful agreement, combination and conspiracy. The trial court disposed of the action before the decree on the merits had been entered in the New York case and before the appeals had been taken from that decree to the Supreme Court. At the time the matter was argued here, the appeals to the Supreme Court were awaiting hearing, and we have allowed our disposition to await the decision and opinion of the Supreme Court.

In the opinion only recently handed down by the Supreme Court, *United States v. Paramount Pictures, Inc.,* 68 S. Ct. 915, the following is said about the arbitration system under the consent decree and the right of the court, in its discretion, to make provision for such a system under the final decree:

> "The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs 'with rare efficiency.' But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in the decree.
>
> "We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Con-

gress for enforcing the anti-trust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court." 68 S. Ct. at page 938.

We do not believe that more is necessary to indicate the correctness of the trial court's order in the present case. The mere agreement on the part of each distributor to the setting up of an arbitration system under the provisions of the consent decree for handling clearance controversies, with the rules for conducting the proceedings approved by the District Court, and the commitment of each exhibitor as part of its consent to abide by any final award in a proceeding to which it had been a party did not constitute a violation of the Sherman Act.

We ought perhaps to make it clear that it was provided in the consent decree that "The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration."

It was not possible therefore to touch rights under existing contracts and, as the opinion of the Supreme Court points out, there was no bar to the exercise of any right under the Sherman Act for wrongs which had been done. But, as we have indicated, the refusal, during the time the consent decree was in effect, of such distributors as had been party to an arbitration proceeding on a clearance period, under a complaint filed by some exhibitor, of which plaintiffs were given notice and had an opportunity to intervene, to agree with plaintiffs on a longer clearance against the theatre of the complaining exhibitor than that fixed in the arbitration award, could not, without more in the situation, in view of the prohibition of the decree, be claimed to constitute an actionable combination or conspiracy under the statute.

Plaintiffs have made the further contention that the refusal of the defendant distributors here, on the basis of the consent decree, to make agreements on clearances after November 19, 1943, contrary to any awards which had been made in arbitration proceedings, was in any event an unlawful combination and conspiracy, because the provisions of the consent decree ceased to be operative after that date. But the provision in the decree on which plaintiffs rely was merely one that was intended to leave the consent decree operative generally for three years without modification. There was no provision automatically terminating the decree at the expiration of that time, but instead it was provided that jurisdiction was retained to enable any party "to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof." Without such a modification, the arbitration provisions remained in effect down to the time of the decree on the merits, as the court recognized in its rendition of that decree. See 70 F. Supp., pages 75, 76.

The other contentions of plaintiffs are without merit and do not require discussion.

The judgment is affirmed.

[¶ 62,279] Commissioner of Corporations and Taxation v. Charles V. Ryan & Others.

In the Supreme Judicial Court of Massachusetts. No. 10,588. July 1, 1948.

Massachusetts Unfair Cigarette Sales Act

Sales Below Cost—Suspension of License—Statutory Presumption of Cost.—The suspension by the Commissioner of Corporations and Taxation of the cigarette license of a retailer for failure of the licensee to comply with the provisions of a letter from the Commissioner stating the minimum resale price of cigarettes was illegal, and the retailer is entitled to equitable relief and damages therefor. Applying the statutory presumption that in the absence of proof of a lesser or greater cost of doing business by the retailer the

cost of doing business shall be taken to be six per cent of the invoice cost of the cigarettes to the retailer, the retailer could not be found to be selling cigarettes below cost.

See the Massachusetts Unfair Sales Act, Vol. 2, ¶ 8388.

For plaintiff: R. W. Cutler, Jr., Assistant Attorney General.

For defendant: J. F. Egan, C. V. Ryan.

[*Nature of Action*]

LUMMUS, J.: This case arises under G. L. c. 64C, entitled "Cigarette Excise," which was inserted by St. 1945, c. 547, s. 1, and which has never before received judicial interpretation. The statute provides that no person shall sell cigarettes unless licensed by the appellant commissioner. S. 2. Such a license may be revoked by the commissioner "for failure of the licensee to comply with any provision of said chapter . . . or for other good cause." S. 4. Every licensee "shall keep a complete and accurate record of all cigarettes" purchased, which "shall include a written statement" containing, among other things, "the price paid for such brand of cigarettes purchased." S. 5. By s. 6 an excise equal to one and one half mills for each cigarette sold is imposed. By s. 14 (a) "It shall be unlawful for any retailer, with intent to injure competitors, destroy substantially or lessen competition, to advertise, offer to sell or sell at retail cigarettes at less than cost to the retailer," and by s. 14 (b) "Evidence of advertisement offering to sell, or sale, of cigarettes by any retailer . . . at less than cost to him, shall be prima facie evidence" of such intent.

By s. 13 (a) "The term 'cost to the retailer' shall mean the invoice cost of the cigarettes to the retailer, or the replacement cost of the cigarettes to the retailer within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower, less all trade discounts except customary discounts for cash; to which shall be added the cost of doing business by said retailer as evidenced by the standards and the methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred, and must include, without limitation, labor (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising."

By s. 13 (b) "In the absence of proof of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the retailer shall be presumed to be six per centum of the invoice cost of the cigarettes to the retailer, or of the replacement cost of the cigarettes to the retailer within thirty days prior of the date of sale, in the quantity last purchased, whichever is lower, less all trade discounts except customary discounts for cash."

By s. 22 any person aggrieved by any action of the commissioner or his authorized representatives may apply for a hearing. By s. 24 "Any person aggrieved because of a decision of the commissioner under section twenty-two may appeal therefrom to the appellate tax board within ten days after written notice of the decision has been mailed or delivered to him."

[*Suspension of License*]

The partnership consisting of Charles V. Ryan, Helen L. Ryan and Harry J. Richard, hereinafter called the retailers, conducted a drug store in Springfield under the name of Ryan Drug Company, in which they sold cigarettes at retail. They had a license from the Commissioner of Corporations and Taxation, which was to expire on June 30, 1947. On February 28, 1947, the commissioner suspended that license. That action followed a letter from the commissioner to all retailers of cigarettes in which he stated that the retail prices of the so-called "popular brands" of cigarettes should be not less than twenty cents a package or $1.98 a carton. On March 10, 1947, the retailers applied for a hearing under G. L. 64C, s. 22. On May 21, 1947, after a hearing, the commissioner decided not to vacate the suspension and not to restore the license. On May 23, 1947, the retailers appealed to the Appellate Tax Board. G. L. c. 64C, s. 24. G. L. (Ter. Ed.) c. 58A, s. 6, as amended by St. 1945, c. 367, s. 3, and St. 1947, c. 632, s. 2. The board, by a majority decision, made on October 22, 1947, held that the cause for which the commissioner suspended the license was insufficient in law, and granted to the retailers the sum of $250 as equitable relief, under G. L. c. 64C, s. 24. The commissioner appealed to this court on November 5, 1947, under G. L. (Ter. Ed) c. 58A, s. 13.

[*Cause for Suspension*]

The commissioner, in his letter of suspension dated February 28, 1947, declared that in suspending the license he acted under G. L. c. 64C, s. 4. That section authorizes suspension "for failure of the licensee to comply with any provision of said chapter . . . or for other good cause." In revoking a license for cause the commissioner had a duty to specify the cause for which he was acting. *Higgins v. License Commissioners of Quincy,* 308 Mass. 142, 145, 147. *Becker Transportation Co. Inc. v. Department of Public Utilities,* 314 Mass. 522, 526, 527. But it does not appear that the retailers objected to proceeding with the hearing without better specification of the ground of suspension, and very likely waived any infirmity in the letter of suspension. *Miami Grove Inc. v. Licensing Board for Boston,* 312 Mass. 318, 324. The board found as follows: "The commissioner, in open hearing, stated and we find that the suspension of the license was based on the fact that the Ryan Drug Company did not comply with the provisions of the February 18, 1947, letter. This letter is referred to above and indicated that cigarettes should be sold at not less than $.20 per package, or $1.98 per carton." If that was the sole ground for the suspension of the license, that suspension was invalid, for nowhere in G. L. c. 64C is authority given to the commissioner to fix prices for cigarettes. The cost, below which cigarettes may not be sold, is the actual cost to the particular retailer, and not the usual cost in the trade or the cost as determined by any survey or by any public officer. G. L. c. 64C, ss. 13, 14.

[*Question of Sales Below Cost*]

But we assume in favor of the commissioner, for the purposes of the present case, that he acted upon his finding, which he expressed on May 21, 1947, that at the time of the suspension the retailers "sold cigarettes at less than cost as defined by" G. L. c. 64C, and that the question whether the retailers did so sell was properly before the board and is properly before this court on appeal. The evidence is reported.

Under G. L. (Ter. Ed.) c. 58A, s. 13, "The decision of the board shall be final as to findings of fact," and "Each claim of appeal shall set out separately and particularly each error of law asserted to have been made by the board, with precise references to the portions and particulars of the proceedings before the board in which it is alleged that error of law occurred," and "The court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board." In substance the statute provides that the decision of the board as to the facts is final, and that only rulings of law are open in this court. *Assessors of Lawrence v. Arlington Mills,* 320 Mass. 272, 274. *Brockton Knights of Columbus Building Association, Inc. v. Assessors of Brockton,* 321 Mass. 110, 113.[1] *Commissioner of Corporations & Taxation v. St. Botolph Club, Inc.,* 321 Mass. 269.[2] But whether the evidence warrants a general conclusion of the board is a question of law, and is raised by appeal. *Assessors of Boston v. Garland School of Home Making,* 296 Mass. 378, 383. *Assessors of Boston v. Lamson,* 316 Mass. 166, 168. *Assessors of Boston v. Boston, Revere Beach & Lynn Railroad,* 319 Mass. 378, 379. The authority to grant equitable relief, given to the board by G. L. c. 64C, s. 24, does not operate to control G. L. (Ter. Ed.) c. 58A, s. 13, so as to bring questions of fact to this court for decision upon the reported evidence, under the equity practice illustrated by *Allen v. Moushegian,* 320 Mass. 746, 752.

[*Statutory Presumption*]

The board received evidence, introduced by the commissioner, that surveys conducted among certain drug stores showed that the cost of retailing cigarettes exceeded twelve per cent. That evidence seems to have been competent under G. L. c. 64C, s. 20. But it was material only so far as it enabled an inference to be drawn as to the cost of the particular retailers whose cost of doing business was in issue in this case. The board could give such weight to that evidence as it saw fit. On the other hand, the retailers introduced evidence that their cost was less than three per cent. This, too, the board was not required to accept. In fact, the board refused to adopt either figure, and fell back, as it had a right to do, upon the presumption, created by G. L. c. 64C, s. 13 (b), that "In the absence of proof of a lesser or higher cost of doing business by the retailer" the cost of doing business shall be taken to be six per cent of the invoice cost of the cigarettes to the retailer. Applying the statutory presumption, the retailers could

[1] Mass. Adv. Sh. (1947) 423, 426.

[2] Mass. Adv. Sh. (1947) 539.

not be found to be selling cigarettes below cost.

[*Discounts Held Immaterial*]

Neither was there any error on the part of the board in disregarding the "customary discounts for cash" (G. L. 64C, s. 13 [b]) allowed to the retailers by the wholesaler. It was immaterial whether those discounts appeared on the invoices given by the wholesaler to the retailers or not. They were not to be considered in reckoning costs, and need not be disclosed by the retailers to the commissioner.

[*Case Not Rendered Moot*]

While the matter was pending before the board, the license, which had been unlawfully suspended, expired by its own limitation. The question arises whether that fact renders the case before us moot. In *Mullholland v. State Racing Commission,* 295 Mass. 286, the plaintiffs, sued in equity to prevent the holding of horse racing meetings at Suffolk Downs. Pending the suit the license for the meetings expired. Rugg, C. J., said (page 289), "When, at the time of the disposition of a cause, the situation is such that the relief sought is no longer available or of any use to the plaintiffs and a decision by the court will not be applicable to existing rights, no decision will be rendered. The questions originally involved have become moot. They are not proper subjects for litigation." See also *Hubrite Informal Frocks, Inc. v. Kremer,* 297 Mass. 530; *Henderson v. Mayor of Medford,* 321 Mass. 732.[1] In the present case, however, it does not appear that the expiration of the license has made moot the questions involved in its suspension. The retailers are in business, and have been dealing in cigarettes for a number of years. They may reasonably expect that, in the absence of wrongful conduct on their part, their license will be restored. They have been awarded equitable relief in a substantial sum, based on the illegality of the suspension of their license, and there was no error of law in that award. Under these circumstances we think the questions involved in this case have not become moot. *Kenworthy & Taylor, Inc. v. State Examiners of Electricians,* 320 Mass. 451.

[*Damages Awarded*]

Because of the illegality of the suspension of the license to sell cigarettes at retail, this court on appeal awards $250 to the appellees Ryan and others, as was awarded by the Appellate Tax Board, and an order is to issue certifying said sum to the comptroller, all in accordance with G. L. c. 64C, s. 24.

So ordered.

[¶ 62,280] United States v. The International Nickel Company of Canada, Limited, and The International Nickel Company, Inc.

In the United States District Court for the Southern District of New York. Civil Action No. 36-31. July 2, 1948.

Sherman Antitrust Act

Consent Judgment—Monopoly.—A consent judgment entered in an action charging a Canadian corporation and its American subsidiary with monopolization and restraint of trade in nickel ores, nickel and nickel products requires defendants to sell, for a period of twenty years, basic nickel raw materials to producers of rolling mill products containing nickel, and to present to certain technological libraries copies of an existing manual describing methods and processes employed by the subsidiary in the production of rolling mill products.

See the Sherman Act annotations, Vol. 1, ¶ 1530.70, 1590.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; Sigmund Timberg, Manuel M. Gorman, J. Francis Hayden, Special Assistants to the Attorney General.

For defendants: Sullivan & Cromwell, George C. Sharp; Isseks, Meyers & Verdon, Ernest S. Meyers.

[1] Mass. Adv. Sh. (1947) 1083.

Final Judgment

The plaintiff, United States of America, having filed its complaint herein on May 16, 1946, and the defendants having appeared and filed their answer to such complaint denying any violation of law; and all parties hereto by their attorneys having severally consented to the entry of this final judgment herein; and the defendant The International Nickel Company of Canada, Limited, a foreign corporation, having consented to accept jurisdiction of this Court solely for the purposes of this judgment;

Now THEREFORE, without trial or adjudication of any issue of fact or law herein, and without any admission by the defendants with respect to any such issue, and before the taking of any testimony herein, and upon the consent of all the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

[*Jurisdiction*]

I

This Court has jurisdiction of the subject matter of this action and all the parties hereto and the complaint states a cause of action against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act.

[*Terms Defined*]

II

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(a) "Inco Ltd." means the defendant The International Nickel Company of Canada, Limited, a corporation organized and existing under the laws of the Dominion of Canada, its successors and assigns.

(b) "Inco Delaware" means the defendant The International Nickel Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and any subsidiary or division of Inco Ltd. which at the time is producing rolling mill products in the United States.

(c) "Nickel-bearing materials" means nickel ores, concentrates, mattes and speisses, used or intended to be used in whole or in part for their nickel content or the production of nickel.

(d) "Rolling mill products" means rolled or extruded metallic nickel and rolled or extruded nonferrous alloys of nickel the nickel content of which is above fifty (50) per centum, in the usual commercial forms, including, but without limitation to, sheets, strips, bars, rods and tubing, and machined forgings of metallic nickel or of such alloys of nickel; and, if at the time Inco Delaware is producing and marketing in the United States any sheets, strips, bars, rods, or tubing made of metallic nickel or of alloys of nickel the nickel content of which is above fifty (50) per centum by any process employed as a substitute for rolling or extrusion, the term "rolling mill products" shall also mean such products made by such process; and if at the time Inco Delaware is producing and marketing in the United States any articles made of metallic nickel or of alloys of nickel the nickel content of which is above fifty (50) per centum which are more advanced than "rolling mill products" as above defined and which are not made from "rolling mill products" as above defined, the term "rolling mill products" shall also mean such articles; provided, however, that "rolling mill products" shall not include any cast product or any product of a kind produced primarily for use as a source of nickel, such as for remelting, dissolving or plating. For the purposes of this definition "non-ferrous alloys of nickel" means alloys which contain less than ten (10) per centum of iron; and also alloys containing ten (10) per centum or more of iron which Inco Delaware at the time is producing and marketing in the United States.

(e) "Rolling mill producer" means any person, other than Inco Delaware, engaged or about to engage in the production of rolling mill products in the United States but, except as defendants may elect otherwise, shall not include any person that is or controls, or is controlled by or is under common control with, a person engaged in the business of marketing on a commercial scale nickel-bearing material, nickel oxide or unwrought metallic nickel.

(f) "Rolling material" means (1) such kinds of unwrought metallic nickel in the usual commercial forms, including, but without being limited to, shot, ingots, cathodes, bricks, cubes and powder and (2) such kinds of nickel-copper matte or other material

(such as a nickel oxide sinter) the metal content of which is likewise predominantly of nickel, as Inco Ltd. and its other subsidiaries may at the time be providing to Inco Delaware for the production by it in the United States of rolling mill products; provided, however, that "rolling material" shall not mean any material to the extent that it is used by Inco Delaware for experimental production or for the production of a product to be further processed and primarily sold outside the United States by Inco Ltd. or any of its subsidiaries.

[*Sale of Raw Materials Required*]

III

Inco Ltd. and Inco Delaware are hereby ordered and directed for a period of twenty years after the date of entry of this judgment:

(a) Subject to the provisions of Section IV, upon the request of rolling mill producers, to offer to sell and to sell rolling material to them for the production of rolling mill products within the United States, and for a reasonable inventory for such purpose, without any condition or restriction on the use of, sale or marketing of rolling mill products produced therefrom.

(b) To sell any rolling material sold to rolling mill producers pursuant to subparagraph (a) of this Section III at a price and other terms of sale as favorable as the prevailing current price and other terms of sale for the same kind of material then being charged by the defendants and their subsidiaries to other unaffiliated, non-governmental consumers in the United States; or if the particular kind of rolling material is not being sold on a commercial scale by the defendants and their subsidiaries to such other consumers, at a price not exceeding:

(i) if it is a sintered rolling material containing more copper than is contained in nickel oxide sinter then being sold to such other consumers as aforesaid but containing by weight substantially the same percentage of oxygen and substantially the same aggregate percentage of nickel and copper, the prevailing price per pound of nickel content then currently being charged on such sales of such nickel oxide sinter plus, per pound of copper content in excess of the approximate average amount in such nickel oxide sinter, a fair United States market price for refined copper, or

(ii) if it is some other rolling material, the prevailing price per pound of nickel content then currently being charged on sales of the most nearly comparable material to such other consumers as aforesaid, reasonably adjusted for the estimated saving or increased expense experienced by Inco Delaware in converting such rolling material into rolling mill products of a kind for which such rolling material is primarily suited, plus the market price for any additional metals of value contained,

and in each such case on as favorable other terms of sale as those generally being granted by the defendants and their subsidiaries to such other consumers.

[*Obligations Qualified*]

IV

The obligations set forth in Section III of this final judgment shall be subject to the following:

(a) At any time when the total quantity of any kind of rolling material which Inco Ltd. and Inco Delaware may decide to offer to sell for the production of rolling mill products in the United States by rolling mill producers and to deliver to Inco Delaware's plants for the production of such products, is or may be insufficient to provide both to all rolling mill producers and to Inco Delaware the full amounts which they may desire for such purpose, sub-paragraph (a) of Section III shall (in so far as the quantity which Inco Ltd. and Inco Delaware are to offer to sell and to sell is concerned) be construed to require only the following: that with respect to the aforesaid total quantity of such kind of rolling material Inco Ltd. and Inco Delaware shall in good faith endeavor without discrimination to share such total quantity, on the basis of relative bona fide needs for the production of rolling mill products in the United States, as between (i) the amount sold to all rolling mill producers in the aggregate pursuant to said subparagraph (a) on the one hand, and (ii) the amount delivered to Inco Delaware's plants for their own production of rolling mill products in the United States on the other hand. The determination of such relative bona fide needs may be made by Inco Ltd. and Inco Delaware in advance from time to time for periods not exceeding one year. Nothing in this judgment shall affect or limit the right of Inco Ltd. and Inco Delaware to

determine the total quantity of rolling material and of each kind thereof which they may offer to sell for the production of rolling mill products in the United States by rolling mill producers and deliver to Inco Delaware's plants for the production of such products.

(b) Inco Ltd. and Inco Delaware need not sell during any calendar year to any rolling mill producer (i) who does not notify Inco Delaware during the previous November of his desire to purchase rolling material under Section III during such year; or (ii) who does not upon request contract with Inco Delaware for such year, or if relative bona fide needs are then being determined pursuant to sub-paragraph (a) of this Section IV and are being determined for a period of less than a year then for such period, to purchase the rolling material which may be sold to him pursuant to Section III, or such part thereof as Inco Delaware may desire to have covered by contract.

(c) Deliveries of rolling material need be made only in carload shipments distributed reasonably uniformly through the year. Sales of rolling material need not be made to any rolling mill producer who does not undertake to buy for the production of rolling mill products in the United States a minimum during the calendar year of 108 short tons of nickel contained. At the election of Inco Ltd. or Inco Delaware any sale may be made by Inco Ltd. or any of its subsidiaries.

[*Manual To Be Made Available to Competitors*]

V

Inco Delaware is hereby ordered and directed to present to the libraries of Massachusetts Institute of Technology, Cambridge, Mass., Columbia University, New York, N. Y., University of Pennsylvania, Philadelphia, Pa., University of Michigan, Ann Arbor, Mich., University of Illinois, Urbana, Ill., University of Alabama, University, Ala., Texas A. & M. College, College Station, Tex., Colorado School of Mines, Golden, Colo., California Institute of Technology, Pasadena, Calif., and University of Washington, Seattle, Wash., a copy of the written manual heretofore prepared by Inco Delaware and submitted to the Department of Justice descriptive of processes and methods used by Inco Delaware in its commercial practice as of October 1947 in the production of rolling mill products from sinter and nickel-copper matte at its Huntington, W. Va. rolling mill, and entitled

"Nickel-Copper Matte and Sinter
Processes and Methods of Producing
Rolling Mill Products—October 1947
The International Nickel Company, Inc.
Huntington Works"

and to provide 300 copies of such manual to the Library of Congress of the United States.

[*Sales on Condition Prohibited*]

VI

Inco Ltd. and Inco Delaware and their officers, directors, agents and employees and any persons acting or claiming to act under, through or for any of them, be and they hereby are severally and jointly enjoined and restrained from selling nickel-bearing materials or rolling material to any producer of nickel-bearing materials or rolling material on the express or implied condition that such producer shall not import all or any part of its production of nickel-bearing materials, of rolling material or of rolling mill products into the United States, its territories or possessions, or selling rolling material to any producer of rolling mill products on the express or implied condition that such producer shall not import rolling mill products produced by it into the United States, its territories or possessions. This Section VI shall not be deemed to adjudicate or determine the legality or illegality of nor shall it apply to agreements, undertakings or understandings between Inco Ltd. and any of its subsidiaries or between any such subsidiaries.

[*Inspection to Secure Compliance*]

VII

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to the defendants, be permitted, subject to any legally recognized privilege (1) access, during the office hours of Inco Delaware, to all its books, ledgers, accounts, correspondence, memoranda and other of its records and documents in its possession or under its control relating to any matters

contained in this judgment; (2) access at reasonable times to such records and documents of Inco Ltd. as may be then located in the United States in the possession or under the control of Inco Ltd. relating to any matters contained in this judgment; and (3) subject to the reasonable convenience of the defendants and without restraint or interference from them, to interview such of their officers or employees as may be in the United States, who may have counsel present, regarding any such matters; and upon such request the defendants shall submit such reports in writing with respect to the provisions of Sections III, IV and VI of this judgment as might from time to time be reasonably necessary to the enforcement of this judgment; provided, however, that no information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings in which the United States is a party for the purpose of enforcing or securing compliance within this judgment, or as otherwise required by law.

[*Acts Not Violative of Judgment*]

VIII

None of the defendants, their officers, directors, agents or any persons acting or claiming to act under, through or for any of them shall be in contempt of this judgment for doing anything outside the United States which is required, or for not doing anything outside the United States which is unlawful, under the laws of the government of the dominion, province, country or state in which Inco Ltd. or any of its subsidiaries may be incorporated or chartered or in the territory of which Inco Ltd. or any such subsidiaries may be doing business. In any such case Inco Ltd. shall advise the plaintiff thereof as promptly as is practicable and thereupon the plaintiff may apply to this Court, with full opportunity to the defendants to be heard, for such relief consistent with the provisions of this judgment as the Court may deem appropriate.

[*Vacation of Judgment*]

IX

This Court shall enter an order dismissing the complaint herein and vacating this judgment in its entirety upon the petition of the plaintiff (a) at any time after January 1, 1957, or (b) at any time after the obligations of the defendants under Section III shall have become inoperative by reason of the fact that Inco Delaware is not using rolling material provided by Inco Ltd. or its other subsidiaries for the production of rolling mill products in the United States; and in any new proceeding instituted by the plaintiff under the Sherman Act after the entry of any such order this judgment shall not be deemed a bar to the granting of appropriate relief or to the defendants' interposing any defense other than that such relief is barred by this judgment.

Without limiting the provisions of Section X hereof, Inco Ltd. or Inco Delaware shall be entitled to have Sections III and IV hereof vacated upon a showing to the Court upon 30 days' notice to the Attorney General that Inco Ltd. and its subsidiaries in the sale of rolling material are in substantial competition with nickel containing material produced by others and either sold in the United States or sold for use in the United States, provided that an application for such purpose shall not be made oftener than once every two years.

[*Jurisdiction Retained*]

X

Jurisdiction of this cause is retained for the purpose of enabling only the Attorney General or Inco Ltd. or Inco Delaware to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment; for the modification or termination of any of the provisions thereof (and in the event any laws, requirements or requests of any government or governmental body make observance of this judgment unduly burdensome or are inconsistent with the terms of this judgment the right of the defendants to apply for such relief as the Court may deem appropriate is hereby expressly recognized); and for the enforcement of compliance with this judgment, and for the punishment of violations thereof.

[¶ 62,281] **Daniel L. Gardella v. Albert B. Chandler, individually and as Commissioner of Baseball, Ford C. Frick, individually and as President of the National League of Baseball Clubs, an unincorporated voluntary association, William Harridge, individually and as President of The American League of Professional Baseball Clubs, a voluntary unincorporated association, George M. Trautman, individually and as President of the National Association of Baseball Leagues, a voluntary unincorporated association, and the National Exhibition Company.**

In the United States District Court for the Southern District of New York. Civil 43-539. July 13, 1948.

Sherman Antitrust Act

Professional Baseball—No Interstate Commerce—Motion to Dismiss Complaint Granted.—Professional baseball leagues whose member teams cross state lines to play games are not engaged in such interstate trade or commerce as to be subject to the prohibitions of the antitrust laws. The transportation across state lines is merely incidental to the playing of the game.

See the Sherman Act annotations, Vol. 1, ¶ 1021.582.

For plaintiff: Frederic A. Johnson.

For defendants: Willkie Owen Farr Gallagher & Walton; Baker, Hostetler & Atterson; Hedges, Hoover & Tingley; Edgar P. Feeley.

GODDARD, D. J.: This is a motion to dismiss the action for failure to state a claim upon which relief can be granted and for want of jurisdiction over the subject matter of the action, for lack of diversity of citizenship of the parties.

The plaintiff was employed as a baseball player in the 1944 and 1945 season by National Exhibition Company, the owner of the New York Giants. The defendants are Albert B. Chandler, individually and as Commissioner of Baseball, Ford C. Frick, individually and as President of the National League of Professional Baseball Clubs, an unincorporated voluntary association, William Harridge, individually and as President of the American League of Professional Baseball Clubs, a voluntary unincorporated association, George M. Trautman, individually and as President of the National Association of Professional Baseball Leagues, a voluntary unincorporated association, and National Exhibition Company, owner of the New York Giants of the National League.

Plaintiff is a resident of New York. The residence and citizenship of the defendants are not alleged, except that defendant, National Exhibition Company, is alleged to be a New York corporation, with its principal office and place of business in New York City.

The complaint seeks to recover treble damages under various sections of the Sherman and Clayton Anti-Trust Acts, 15 U. S. C. A. §§ 1, 2, 3, 13 and 14, and is based solely on alleged violations of these sections of the anti-trust Act and contains three causes of action.

In his First cause of action the plaintiff in substance alleges that these defendants have entered into a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. It further alleges that after the National and the American Leagues were organized, these two leagues on February 3, 1945 entered into a new agreement called the Major League Agreement. This agreement created the office of Commissioner of Baseball, which post is now and the times referred to held by defendant, Chandler; that the Major League Agreement was intended to vest and did vest in the Commissioner disciplinary power over all players and officials in Major League Baseball; that subsequently on December 7, 1946 the National League and the American League entered into an agreement with the National Association of Baseball League[s] [the Minor Leagues] whereby the Minor Leagues recognized the office and power of the Commissioner as it exists under the Major League Agreement; the Major League Agreement and the Major-Minor Leagues Agreement and the rules adopted in accordance therewith forbid any other than a standard or uniform contract to be entered into between club and player; this standard form contract contains a provision [hereinafter referred to as the "reserve clause"] whereby the player in signing his contract for the ensuing season or seasons agrees not to sign a contract with or play for any club at the

expiration of the period of the contract, other than with or for the club or its assignee, which employs him; this contract also subjects the parties to the interrelated agreements as to the disciplinary power of the Commissioner; the plaintiff then alleges the various grades of leagues and sets forth the teams and their owners comprising the National League and alleges that each of these teams have a home field in the city they represent; that each engage in schedule games for which they charge an admission price; that each club plays seventy-seven games at home and eleven games on the home grounds of its rivals; that in travelling from state to state each club causes to be transported at its own expense the necessary equipment to play the games. The complaint further states that the National League receives part of the proceeds of each game as do the two contesting teams; that in order to complete the schedule state lines are regularly and systematically crossed; that radio broadcasts of the game are given and this right to broadcast the game is a valuable right which the clubs sell to various manufacturers for the purpose of advertising their products; that a baseball club can be and is used as a means of advertising by manufacturers; that with the exception that the Washington team of the American League is in the District of Columbia, the American League and its teams operate the same as the National League teams; that there exists an "All Star" game and "World Series," for which broadcast and television rights are sold for substantial amounts; that radio, television, newspaper publicity and other avenues of communication, as well as the necessary purchase of equipment by the Leagues and Clubs, cause them to be engaged in interstate commerce; that the Minor League Clubs of the International League and the Jersey City Club of this League extends into Canada; that the Commissioner's power extends into Canada, Porto Rico, Cuba, Mexico; and includes the power of the Commissioner to suspend player, coach or manager under certain conditions and for certain violations; that the plaintiff was suspended by the Commissioner for five years; that such suspension deprives the plaintiff of his means of livelihood as a professional player; that such continued suspension will destroy plaintiff's playing ability; that plaintiff's suspension was due to his violation of the provisions of the Major League Agreement and in particular of the "reserve clause"; that this "reserve clause" establishes the Commissioner as the final umpire of a salary dispute between player and club; that the plaintiff in disregard of the "reserve clause" played for a professional team, not recognized by Organized Baseball, in Mexico for the season of 1946; that the purpose of the "reserve clause" was to prevent wealthier clubs from buying up all the best talent and to equalize the power of the clubs; that this purpose has not been fulfilled by the use of the "reserve clause" as is evidenced by the continued success of certain teams; that this success has not hurt the drawing power of the game; that the validity of the "reserve clause" has not been litigated between club and player unless the player was an unique performer and was granted an opportunity to play for the club enforcing the provision; that plaintiff was not paid a salary commensurate with an unique performer and defendant New York Giant's representatives have not retracted statements that plaintiff was a secondary player; that in previous baseball wars the ineligibility of Major League players was customarily removed after they had disregarded the "reserve clause" by playing with teams not recognized by Organized Baseball; that representatives of the National Exhibition Company have contributed to the plaintiff's suspension; that the Jersey City Club of the International League is owned and controlled by the National Exhibition Company and the representatives of other minor league "farms" have contributed to plaintiff's suspension; that all the above allegations create a conspiracy in restraint of trade or commerce among the several states and with foreign nations contrary to Section 1 of the Sherman Anti-Trust Act.

The Second cause of action alleges that these same facts constitute a violation of Section 3 of the Sherman Act and Section 14 of the Clayton Act.

The Third cause of action contains all the allegations of the First cause of action and adds allegations of the "farm system" and how minors sign these contracts and cannot disavow them upon reaching majority; and how the clubs buy and sell this talent under controlled prices created by the agreements heretofore mentioned; and how this "reserve clause" is used as a means of fostering and maintaining monopolies in trade or commerce among the several states and foreign nations in violation of Section 2 of the

Sherman Act and Section 13 of the Clayton Act.

The plaintiff alleges these acts have damaged him to the extent of One Hundred Thousand [$100,000] Dollars.

The defendants' contention is that neither they nor the plaintiff are engaged in "trade" or "commerce" among the several states within the meaning of the Sections of the Sherman and Clayton Acts.

This precise question, namely—whether the Big League ball clubs as they operated then, were engaged in "trade" or "commerce" within the Sherman Act, was passed upon by the Supreme Court in *Federal Baseball Club v. National League*, 259 U. S. 200, which held on the record before it, that National League ball clubs were not engaged in interstate "trade" or "commerce" as that language was used in the Sherman Act.

With the exception of the introduction of national advertising upon the radio and television broadcasts of baseball games today, the facts as to the manner and method of operation at the time of the *Federal Baseball Club* case are substantially the same as are presented in the case at bar.

In the *Federal Baseball Club* case the Supreme Court relied heavily, if not entirely, on *Hooper v. California*, 155 U. S. 648 which in turn relied primarily upon *Paul v. Virginia*, 75 U. S. 168, holding that the business of insurance is not commerce. In the *Hooper* case the question was whether an insurance company using some instrumentalities of commerce in effecting a marine insurance policy was engaged in interstate commerce. The court held that it was not engaged in interstate commerce and made the distinction between "interstate commerce, or an instrumentality thereof, on the one side, and the mere incidents which may attend the carrying on such commerce on the other." The authority of *Hooper v. California* and *Paul v. Virginia* on the question of "commerce" under the Sherman Anti-Trust Act has been substantially lessened if not completely overruled by *United States v. Underwriters Association*, 322 U. S. 553, which held that an insurance company which conducts a substantial part of its business across state lines is engaged in "commerce among the several states" and is subject to the provisions of the Sherman Anti-Trust Act. *United States v. Underwriters Association* held that the decisions in *Paul v. Virginia* and cases following it are inconsistent with the more recent opinions of the court as to the coverage of the Sherman Act. So it is quite possible that the Supreme Court may not adhere to its earlier decision in the *Federal Baseball Club v. National League* case. However, the Circuit Court of Appeals for this Circuit only recently in *Conley v. San Carlo Opera Co.*, 163 F. (2d) 310, 311, reaffirmed the controlling authority of the *Federal Baseball Club* case where the facts are substantially similar.

Notwithstanding that there seems to me to be a clear trend toward a broader conception of what constitutes interstate commerce than formerly in view of the expanding and changing conditions since the decision in the *Federal Baseball Club* case, I feel that as the Circuit Court of Appeals of this Circuit regards *Federal Baseball Club v. National League* as authority, this court must do so.

The motion to dismiss the complaint is granted.

Settle order on notice.

[¶ 62,282] **Fred S. Curdts, Edward C. Curdts, James W. Curdts, trading as Trio Amusement Co. v. Greenville Enterprises, Inc., Wilby-Kincey Service Corporation, Paramount Film Distributing Corporation, Loew's Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, RKO Radio Pictures, Inc., United Artists Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, Republic Pictures Corporation.**

In the United States District Court for the Western District of South Carolina, Greenville Division. C. A. No. 792. July 9, 1948.

Clayton Antitrust Act

Motion to Strike—Materiality of Allegations—No Direct Injury to Plaintiff.—A complaint setting forth a private cause of action for damages and injunctive relief arising from an alleged conspiracy in violation of the Clayton Act is restricted to antitrust violations

which directly injure the plaintiff. In an action brought by a theatre operator against motion picture producers and distributors, allegations as to the institution and determination of antitrust suits brought by the Government against the defendants, references to alleged restraints in the production of motion pictures, and allegations of defendants' unlawful conduct towards other exhibitors, which conduct was not alleged to have been employed against plaintiff, are ordered stricken from the complaint.

See the Clayton Act annotations, Vol. 1, ¶ 2036.

For plaintiffs: Kendrick & Stephenson, and Haynsworth & Haynsworth, Greenville, South Carolina; George S. Ryan, Boston, Massachusetts.

For defendants: Wyche, Burgess & Wofford, Greenville, South Carolina; Donald Russell, Spartanburg, South Carolina; M. G. McDonald, Greenwood, South Carolina; Brooks, McLendon, Brim & Holderness, Greensboro, North Carolina.

[*Motion to Strike*]

The defendants move this Court to strike from the complaint certain specified allegations as irrelevant, immaterial and reptitious.

In considering such motion, it is proper to bear in mind the plain admonition of Rule 8 (a) (2) of the Rules of Civil Procedure, which enjoins the limitation of pleadings to a "short" and "plain" statement of a party's claim. Mindful of the object of this admonition and under the authority of Rule 12 (f), Courts should, in the interest of orderly procedure and clarity, strike from a pleading matter which is "verbose, repetitious, superfluous or foreign to the issue". This we held generally in *McNorrill v. Gibbs* (D. C. S. C. 1942) 45 F. Supp. 363, at p. 364.

The materiality and propriety of the complaint's several allegations are determined under Rule 12 (f) by the nature and character of plaintiff's action. In this case, plaintiff's complaint sets forth a private cause of action for the recovery of damages and injunctive relief arising out of an alleged conspiracy of the defendants violative of the Clayton Act, whereby the plaintiff partnership was directly injured in the operations of the Ritz Theatre in Greenville, South Carolina. Covering practically fifty pages, it assuredly is not a "short" statement of plaintiff's right of action. It includes four "counts", though counsel for plaintiff stated upon argument of this motion that to some extent at least these counts overlapped. It deals with every phase of the motion picture business and extends back to the birth of the industry. Many of the allegations refer to events that admittedly long antedated the period when the plaintiff partnership acquired the theatre, in the operation of which it claims its damages and right of action arose.

[*Statutory Right of Action*]

The right of action asserted by the plaintiff is statutory. This statutory authority restricts the right of action to violations of the anti-trust laws by the defendants, *directly injuring* the plaintiff. As the opinion in *Westor Theatres v. Warner Bros. Pictures* (D. C. N. J. 1941) 41 F. Supp. 757, 763, aptly states it, "An individual plaintiff is not entitled to sue by reason of violations resulting in injury to other persons or to the public." Similarly, in *American Banana Co. v. United Fruit Co.* (C. C. A. N. Y. 1908) 66 F. 261, aff. 213 U. S. 347, 29 S. Ct. 511, 53 L. Ed. 826, the Court, in reviewing the complaint in a private suit under the Clayton Act, said: "It is then of first importance to ascertain what actions of the defendants have injured the plaintiff. If the complaint contains allegations of actions which have not had that effect, it is unnecessary to consider them, however much they may contravene the other provisions of the statute". Needless to add, there are no such limitations upon suits filed "for the common good" by the United States, which may seek to correct violations resulting in injury to any and all persons and to the public in general. *Carbonic Gas Co. v. Pure Carbonic Co.* (D. C. N. Y. 1933) 4 F. Supp. 992, 993.

Measured by these standards, it is obvious that many of the allegations of the complaint are subject to a motion to strike. In large part, it would seem that the complaint was prepared on the theory of a suit "for the common good", embracing the broad allegations that could only be appropriate to such an action, and but incidentally as a private suit limited to those acts for which direct injury accrued to the plaintiff. Necessarily, many allegations appropriate enough in the first type of action are immaterial in the latter type and, if included, may well be highly

prejudicial to the defendants. See, *Hennepin Theatre Corp. v. Paramount Pictures* (D. C. Minn. 1941) 1 FRD 621.

We shall consider and determine separately the several allegations challenged by the motion.

1. In paragraphs 26 and 27 of the plaintiff's first count,[1] the plaintiff sets forth two anti-trust actions filed by the Government against certain of the defendants in this action, or their corporate predecessors, to enjoin the inclusion in their film license contracts of uniform compulsory arbitration and identical credit system provisions. According to the complaint itself, both such actions resulted in final decrees dated July 21, 1931, entered under the mandates issued pursuant to *Paramount Famous Lasky Corp. v. United States,* 282 U. S. 30 and *United States v. First National Pictures,* 282 U. S. 44. Since the entry of such decrees, the complaint itself alleges that these prohibited contract provisions have not been inserted in their film license contracts by the defendants. All of this occurred before the plaintiff claims in its complaint that it began to operate the Ritz Theatre. Patently, the plaintiff could not have been injured by two conspiracies effectively terminated by Court decree long before the plaintiff engaged in business.

This precise issue was presented in *Quittner v. Motion Picture Producers and Distributors Assn.* (D. C. N. Y. 1931) 50 F. (2d) 266. In that case, which was, also, a "private suit" under the antitrust laws, the plaintiff sought to allege the institution and determination of the same suits which are embraced in paragraphs 26 and 27 of the instant complaint. In striking such allegation, the Court said:

> "* * * In the allegations under attack in paragraphs seventeenth to twenty-third, inclusive, there is nothing to show that the rules and regulations of the uniform contract were in any way invoked against the plaintiffs: nor is there any allegations indicating that the plaintiffs suffered any injury or sustained any damage as the result of the adoption or use of the contract, or the rules and regulations involved in the *Paramount* and *First National* cases. In the absence of such allegations, these paragraphs have no proper place in the complaint. *Keogh v. Chicago and N. W. R. Co.,* 260 U. S. 156, 164, 43 S. Ct. 47, 67 L. Ed. 183; *Locker v. American Tobacco Co.* (C. C. A.) 218 F. 447, 448; *Sullivan v. Associated Billposters & Distributors of U. S. (D. C.)* 272 F. 323, 328; *Jack v. Armour & Co.* (C. C. A.) 291 F. 741; *Hart v. B. F. Keith Vaudeville Exchange* (C. C. A.) 12 F. (2d) 341, 345, 47 A. L. R. 775."

I am of opinion and so hold that these paragraphs set forth irrelevant matter which should be stricken from the complaint.

2. In paragraph 23 (b) and 39,[2] the plaintiff refers to alleged restraints in the production of motion pictures. The plaintiff, however, is engaged solely in the exhibition of motion pictures. It is impossible for me to see how various intercorporate loans made in connection with the production (as distinguished from the distribution or exhibition) of motion pictures, generally many years before the plaintiff began to operate the Ritz Theatre, "directly" injured the plaintiff. The motion to strike, directed at these allegations, is accordingly sustained. See, *Sager Glove Corp. v. Bausch & Lomb Optical Co.* (C. C. A. Ill. 1945) 149 F. (2d) 1, 3.

3. In paragraphs 45 (a), 45 (b), 47 (a) and 48 (a) of the first count,[3] the complaint includes allegations of anti-trust violations directed against the operations of the Majestic, Bijou and Ritz Theatres, prior to the time when the plaintiff allegedly took over the management of the Ritz Theatre. In paragraphs 38, 38 (h) and 40 of the first count, paragraph 2 (c) of the second count, paragraph 2 (b) (2) of the third count and paragraphs 2 (a) (2) and 2 (b) (1) of the fourth count,[4] the plaintiff refers to "other exhibitors" and their complaints against the defendants, or certain of them. All of these allegations are challenged by the motion to strike.

In my opinion the motion is well taken. The plaintiff is not concerned with the conduct of the defendants towards "other exhibitors" and this is especially true where such conduct preceded its entry into the film exhibition business, and would require the Court to "transform one lawsuit into many little unrelated lawsuits." *Best Foods v. General Mills* (D. C. Del. 1944), 3 FRD 459, 461; *International Tag and Salesbook Co. v. Amer-*

[1] Covered by Section 3, Count 1, of Defendants' motion to strike.

[2] Covered by Sections 1 and 7, Count 1 of Defendants' motion to strike.

[3] Covered by Sections 9, 10 and 11, Count 1, of Defendants' motion to strike.

[4] Covered by Sections 4, 5, 6, and 7, Count 1, Section 1, Count 2, Section 9, Count 3, and Sections 1 and 2, Count 4, of Defendants' motion to strike.

ican Salesbook Co. (D. C. N. Y. 1943), 6 FRD 45; *Hughes Tool Co. v. Motion Picture Assn.* (D. C. N. Y. 1947) unreported.

4. In paragraphs 23 (c) (1) to (14), inclusive, and 29 to 37, inclusive, of the first count,[5] the plaintiff sets forth various specifications of discriminations charged to have been employed by the defendants but not alleged to have been invoked against the plaintiff. In its succeeding thirty-eighth paragraph, the plaintiff restates such of those discriminations as it contends injured it in its business. As has already been pointed out the plaintiff is not concerned with discriminations which did not injure it. So far as the specific discriminations alleged in the thirty-eighth paragraph to have injured the plaintiff are included in paragraphs 29 to 37, the latter allegations are repetitive. The allegations of paragraphs 23 (c) (1) to (14), inclusive, and 29 to 37 are either irrelevant, as stating discriminations which were not employed against the plaintiff, or repetitive of the summarization in paragraph 38 of alleged discriminations asserted to have directly injured plaintiff. In either event the challenged paragraphs should be stricken. By such ruling, the plaintiff is in no way prejudiced, since paragraph 38 fully covers all matters on which it can found its action.

5. Paragraph 28 of the first count,[6] refers to intercorporate developments of the defendants which are unnecessary to plaintiff's cause of action. While I do not deem the inclusion of such paragraph as prejudicial to the defendants, I see no reason to retain it in the complaint when such retention may well confuse the jury. This paragraph will accordingly be stricken.

6. In paragraphs 43 of the first count and 2, 2 (c) (1), 2 (c) (2), 2 (c) (3), 2 (d), 2 (e), 2 (f) (1), 2 (f) (3) and 2 (g) of the third count,[7] the plaintiff refers, *inter alia,* to theatres in other cities, allegedly connected with the defendant Paramount Pictures and stated generally to be operated under common booking and buying agencies with those theatres operated in Greenville by interests identified with such defendant. In the absence of evidence of the geographical location and unitary business operations of all such theatres, it is not easy to determine the relevancy of these allegations, which are embraced in defendants' motion, simply on the face of the pleadings. Other allegations of the complaint are sufficiently broad for the plaintiff to offer evidence of this general character, if it chooses to do so, and this Court could then consider the relevancy of such evidence in the light of all the accompanying circumstances. But if such evidence should be deemed irrelevant on trial, these allegations in the complaint could have worked serious prejudice to the defendants. I can see no real harm accruing to plaintiff by striking these allegations but reserving a ruling on the propriety of evidence of this character until the actual trial. Assuredly, the allegations are evidentiary at best and would be open to attack on that ground. I shall, therefore, sustain the motion to strike these allegations but reserve the right to determine the relevancy of evidence along the lines of such allegations at the trial.

7. In paragraph 41 of count 1[8] the plaintiff describes an action filed by the United States against certain of the defendants which is reported in *United States v. Paramount Pictures* (D. C. N. Y. 1946) 66 F. Supp. 323. Since the filing of this complaint, however, the decree of the Expediting Court referred to in this paragraph has been reviewed by the Supreme Court which handed down an opinion on May 3, 1948. Patently, the plaintiff would wish to amend the paragraph even should the Court rule that this allegation is properly in the complaint. I am, therefore, striking this paragraph without prejudice to the right of the plaintiff hereafter to move to amend its complaint to set forth the present status of this suit. Until such motion is made, I shall reserve my decision upon the propriety of including in the complaint allegations with reference to this action.

For the reasons above set forth, it is hereby ORDERED that the defendants' motion to strike is granted.

Let the plaintiff file an amended complaint in conformity with this opinion and order, and the defendant shall have twenty days after the service of such amended complaint upon their counsel of record in this cause within which to answer or further plead in the cause.

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[5] Covered by Sections 2 and 3, Count 1, of Defendants' motion to strike.

[6] Covered by Section 3, Count 1, of Defendants' motion to strike.

[7] Covered by Section 8, Count 1, and Sections 1, 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12, Count 3, of Defendants' motion to strike.

[8] Covered by Section 7, Count 1, of Defendants' motion to strike.

[¶ 62,283] **American Linen Company, a corporation, et al. v. Los Angeles Towel Service Company, a California corporation, et al.**

In the Superior Court of the State of California in and for the County of Los Angeles. No. 542586. July 21, 1948.

California Unfair Practices Act

Statutory Cause of Action—Exclusive Remedy—Clerk May Not Issue Subpoena Duces Tecum.—In an action instituted under the California Unfair Practices Act, in which it is charged that the defendant corporation is selling below cost in violation of the Act to the injury of plaintiff competitors, the defendant may not be compelled, under a *subpoena duces tecum* issued by the Clerk of the Court, to produce its books and papers as an aid in sustaining the charge. Where a statute creates a new right and provides a remedy for its enforcement, that remedy is exclusive. The statute expressly provides that the books and records of a party to the cause may be required to be produced, but does not provide for the issuance of a subpoena by the Clerk. Further, since the Act requires a court order for a mere inspection of documents, it would appear that nothing short of a court order would be sufficient to cause the production of books and records upon a hearing in court or the taking of a deposition. The Clerk, short of such an order, is without authority to issue a *subpoena duces tecum.*

See the California Unfair Practices Act, Vol. 2, ¶ 8068.90.

This is an action instituted under the Unfair Practices Act against the defendant corporation by some of its competitors. The gist of the complaint is that the defendant is "selling below cost" in violation of the Act to the damage of the plaintiffs. The particular question here for decision is whether the defendant under a subpoena *duces tecum* issued by the Clerk of the Court may be compelled to produce its books and papers as an aid in sustaining the charge. The defendant declined to produce the documents called for by the subpoena upon the ground, among others, that no proper foundation therefor had been laid in the affidavit of the plaintiffs—the basis for the issuance of the subpoena. The objection, as it was phrased by the defendant, does not question the right of the Clerk to issue a subpoena *duces tecum* in an action based upon the Act. Instead, the contention is that the basic affidavit is not sufficiently specific and otherwise is inadequate under the provisions of C. C. P. § 1985. While, as indicated, the defendant by his objection does not raise the point that the Clerk was wholly without jurisdiction, if that be the fact, to issue a subpoena *duces tecum* in an Unfair Practice Act case, nevertheless, the Court may not order compliance with the subpoena if jurisdiction was lacking. As the Court is of the opinion that jurisdiction was lacking, it is unnecessary to discuss the details of defendant's objection as it was made.

Initially, it needs to be pointed out that the cause of action made the basis of this suit did not exist at common law. In that connection it is also necessary to recall that where as here a statute creates a *new* right or liability and additionally provides a remedy for its enforcement that remedy is exclusive. (*People v. Graycroft,* 2 Cal. 243; *Globe Newspaper Co. v. Walker,* 210 U. S. 356; 1 C. J. 989; 1 C. J. S. 974.) "The reason for the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition." (*Dollar Sav. Bank v. U. S.,* 19 Wall (U. S.) 227, 239.) "Remedy" in the sense it is used in the principle stated may embrace all preliminary proceedings leading up to the rendition of the judgment, such, for instance, as who may be called as witnesses and the manner and method of summoning them; the manner and method of inspection and production of books and papers and other matters dealing with the production of evidence. (*Redfern v. Redfern,* 236 N. W. 399, 401, Iowa.) Three sections of the Act in question deal expressly with these topics. (§§ 17083, 17084 and 17085, Bus. and Prof. Code.) Section 17083 incorporates the provisions of Chapter 3 (§§ 2002-2056) of Title III, Part IV of the Code of Civil Procedure, but expressly expands § 2021 so as to include all witnesses and not merely the particular type of witness therein named. In addition, the section (17083) expressly pro-

vides that the books and records of a party to the cause, or of a witness therein, may be required to be produced at the trial or at the taking of a deposition. However, the section does not state whether the Court by its order or its Clerk through the issuance of a subpoena may cause the books and records to be produced. At all events, the section does not incorporate Chapter 2—wherein is found Code of Civil Procedure section 1985—the section under which the Clerk issued the subpoena *duces tecum*—as does the Act with respect to Chapter 3.

The next section of the statute (17084) provides that any party to the action may apply to have an inspection and a copy or permission to take a copy "of entries of accounts in any book, or of any documents, papers or memoranda in any such party's possession or under his control containing evidence relating to the merits . . ." But this may be achieved, by the terms of the section, only by an order upon an application to the court, upon notice. If then a mere inspection of documents cannot be had except by court order, it would seem apparent that nothing short of a court order would be sufficient to cause the production of *books and records* upon a hearing in court or upon the taking of a deposition. That this is the true construction of the language of the Act is implied by the next section of the Act (17085), which provides that if "it *appears to the court* that an extensive examination of books . . . records . . . is or may be material or relevant . . . *the court* may in its discretion, upon application . . . or upon its own motion order a reference in the manner and form provided in . . . the Civil Code of Procedure."

The foregoing sections of the Act seem to make it indubitably clear that the books and records of a party to an action under the Act may not be ordered produced, except on an order of court, and hence, that the Clerk, short of such an order, is without authority to do so notwithstanding the provisions of C. C. P. § 1985. In support of that contention based strictly on the terms of the Act and well-established principles of law, it is not amiss to observe that the terms of the Act are drastic and so quite necessarily the legislature felt that there should be a safeguard for innocent traders against any one of his competitors who might seek to use the Act as an instrumentality to personally profit from a disclosure of the details of his business, the names of his customers and other important business facts not otherwise available.

In coming to the conclusion reached, the Court is not unmindful of the fact that the California Act is the pattern almost in *haec verba* for the statutes of more than 44 states and that no decision so far has passed upon the question herein raised by the court on its own motion. Nevertheless, the law is clear and the mere fact that in this state, in case after case, C. C. P. § 1985 has been assumed to be applicable for the purpose of producing books and records is of no moment. The law is otherwise.

For the reasons stated the defendant rightly refused to produce its books and records. The citation is discharged.

[¶ 62,284] United States v. American Bosch Corporation, and Donald P. Hess.

In the United States District Court for the Southern District of New York. Civil Action No. 20-164. June 4, 1948.

Sherman Antitrust Act

Amended Final Judgment—Sales and Patent Agreements—Performance Enjoined.—An amended consent judgment entered against a manufacturer of fuel injection equipment, automotive electrical equipment and accessories, and magnetos for the operation of aircraft and other engines, cancels a sales agreement, a patent agreement, and two manufacturing agreements between defendant manufacturer and a German manufacturer. Defendant is directed to grant to any applicant unrestricted licenses to manufacture, use and sell certain patented products, without any conditions except that a reasonable and non-discriminatory royalty may be charged after the war. Defendant is enjoined from enforcing any general marketing agreement with the German manufacturer to effect the transfer of any patent rights, except with the approval of the Court, or from enforcing any individual agreement without filing a copy with the Attorney General.

See the Sherman Act annotations, Vol. 1, ¶ 1270.176, 1560.40.

For plaintiff: John F. Baecher, Acting Assistant Attorney General; Sigmund Timberg, Robert A. Nitschke, Special Assistants to the Attorney General; Maurice Silverman, Special Attorney; David L. Bazelon, Assistant Attorney General, Director, Office of Alien Property.

For defendants: Root, Clark, Buckner & Ballantine.

Amended Final Judgment

The complainant, United States of America, having filed its complaint herein on December 29, 1942; the defendants having appeared and filed their answers to such complaint denying the substantive allegations thereof; all parties hereto by their attorneys herein having severally consented to the entry of a final judgment herein on December 29, 1942, and to the entry of this amended final judgment, without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein; and upon consent of all parties hereto, it is hereby

ORDERED AND DECREED as follows:

I

That this Court has jurisdiction of the subject matter herein and of all the parties hereto; that the petition states a cause of action against each of the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto, and under Section 74 of the Act of August 27, 1894, entitled "An Act to Reduce Taxation to Provide Revenue for the Government and for other Purposes" and the acts amendatory thereof and supplemental thereto.

II

(Whenever an agreement is defined below the definition shall be taken to include all amendments, renewals or extensions of the particular agreement defined)

As used in this judgment the term:

A. "American Bosch" means American Bosch Corporation (formerly known as American Bosch Magneto Corporation and as the United American Bosch Corporation), a corporation organized and existing under the laws of the State of New York and having its principal place of business in Springfield, Massachusetts.

B. "Robert Bosch" means Robert Bosch, G. m. b. H. (formerly known as Robert Bosch Aktiengesellschaft), a corporation or association organized and existing under the laws of Germany and having its principal place of business in Suttgart, Germany.

C. "CAV-Limited" means CAV Limited, a corporation or association organized and existing under the laws of Great Britain and having its principal place of business in Acton, England, and its predecessor corporation, CAV-Bosch, Limited.

D. "Lavalette" means Ateliers de Construction Lavalette, S. A., a corporation or association organized and existing under the laws of France and having its principal place of business in Paris-Saint-Ouen-France.

E. American Bosch, Robert Bosch, CAV-Limited, and Lavalette, in each case includes its successors, subsidiaries, affiliates and assigns and its directors, officers, agents, and employees and all persons acting or claiming to act under, through, or for them, or any of them.

F. "Sales Agreement" means the agreement dated November 3, 1930, between Robert Bosch and American Bosch, a copy of which is attached hereto as "Exhibit 1".

G. "Bosch Patent Agreement" means the agreement dated May 22, 1931, between Robert Bosch and American Bosch, a copy of which is attached hereto as "Exhibit 2".

H. "Manufacturing Agreement No. 1" means the agreement dated January 1, 1934, between Robert Bosch and American Bosch, a copy of which is attached hereto as "Exhibit 3".

I. "Manufacturing Agreement No. 2" means the informal agreement, entered into in or about November 1939 between Robert Bosch and American Bosch, relating, among other things, to electric windshield wipers, generators and regulators.

J. "Necessary operative techniques" means the knowledge of all of the technical processes necessary to put into operation a patented process or to manufacture a patented product.

K. "Bosch products" means any and all devices and equipment for the feed, distribution and injection of fuel in connection with internal combustion engines, including fittings and accessories commonly called fuel injection equipment, automotive electrical equipment and accessories, magnetos for the operation of aircraft engines and other engines or any such product, by whomsoever manufactured or distributed.

III

The Sales Agreement, the Bosch Patent Agreement, Manufacturing Agreement No. 1, and Manufacturing Agreement No. 2, are hereby cancelled, and American Bosch and Donald P. Hess and all persons acting under, through or for any of them, are hereby individually enjoined and restrained from the further performance of any of their provisions, *provided* that this injunction against further performance of such agreements shall not affect rights of American Bosch to manufacture, use, or sell under any existing patent or patent application, manufacturing right, design, or necessary operative technique heretofore received from Robert Bosch, *provided further* that American Bosch and Donald P. Hess and all persons acting or claiming to act under, through, or for them or any of them be, and they hereby are, enjoined and restrained from enforcing or claiming as an exclusive right, whether as an exclusive right to territory, product, or otherwise, any such right heretofore received from Robert Bosch.

IV

Defendant American Bosch is hereby ordered and directed:

A. In connection with:

(1) All United States letters patent issued on or before March 6, 1946, and owned or controlled by it on that date;

(2) All applications for United States letters patent filed on or before March 6, 1946 and owned or controlled by it on that date and all patents issued pursuant to such applications; and

(3) All divisions, continuances, renewals, reissues, or extentions of the patents and applications described in Clause (1) and in Clause (2),

to grant to any applicant therefor, absolutely unrestricted licenses or sub-licenses to manufacture, use, and sell without any conditions except that a reasonable and nondiscriminatory royalty may be charged. Where such royalty is charged provision may be made for the inspection of the books and records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. A list of the patents and applications subject to this Section IV, including all divisions, continuances, renewals, reissues, and extensions thereof, is attached to this judgment as "Exhibit A".

B. To file with the Attorney General of the United States, or the Assistant Attorney General in charge of the Antitrust Division, copies of all applications for licenses under the terms of this judgment, immediately upon receipt thereof, and of all licenses issued, and to furnish the Attorney General of the United States, or the Assistant Attorney General in charge of the Antitrust Division, with full information as to the status of all negotiations between applicants and American Bosch with regard to the failure to grant a license or sub-license where an applition therefor has been pending for a 90-day period. In case of failure by American Bosch to agree with the applicant for a license as to any of the terms thereof, or in case of dispute between American Bosch and the Attorney General of the United States, or the Assistant Attorney General in charge of the Antitrust Division, with regard to whether or not the terms of a license are in accordance with the provisions of this judgment, American Bosch shall issue the license or sub-license applied for in a form approved by this Court.

C. To take such steps as may be necessary to list and keep current the patents and applications subject to this Section IV, including all divisions, continuances, renewals, reissues, and extensions thereof, with the United States Patent Office for inclusion in its "Register of Patents Available for Licensing or Sale".

V

A. Defendants American Bosch and Donald P. Hess, and all persons acting or claiming to act under, through, or for them, or any of them, be and they are hereby enjoined and restrained from:

(a) Entering into, carrying out, adhering to, maintaining or furthering, or enforcing, directly or indirectly, any combination, conspiracy, contract, agreement, understanding, plan or program, with Robert Bosch, CAV-Limited, Lavalette, or any other corporation, association, firm,

or person engaged in the business of manufacturing Bosch products:

(1) to allocate or divide markets, customers, or fields of business;

(2) To refrain from production or distribution;

(3) To restrict or limit production or distribution;

(4) To limit, restrict, or prevent importation into or exportation from the United States, its territories or possessions;

(5) To exclude any manufacturer or distributor from any market or from any class of business or field of business;

(6) To fix, maintain or adhere to prices, terms or conditions for sales in the United States, its territories and possessions, or for imports therein to or for exports therefrom;

(7) To effect the transfer to or from third persons of any rights under patents, patent applications, or patents hereafter acquired, United States or foreign, of any necessary operative techniques, or of any manufacturing rights, designs, or know-how;

(b) Selling or otherwise distributing Bosch products through:

(1) Robert Bosch, CAV-Limited, Lavalette, or any other corporation, association, or person, which is engaged in the business of manufacturing Bosch products outside the United States, except that the defendants American Bosch and Donald P. Hess and all persons acting or claiming to act under, through, or for them, or any of them, may sell or otherwise distribute Bosch products through any corporation, association, or person engaged in the business of manufacturing such products outside the United States, other than Robert Bosch, CAV-Limited, and Lavalette, on a non-exclusive basis within the territory in which it manufactures such products (but any such excepted corporation, association, or person shall be considered a common distributor to which subparagraph (2) immediately following shall be applicable), or

(2) A common distributor, i.e., any corporation, association or person acting, with authority to act, or claiming to act for any corporation, association, or person referred to in subparagraph (1) above, except upon compliance with the following conditions:

(i) No common distributor may be made any defendant's exclusive distributor of Bosch products for any foreign territory;

(ii) No defendant may refuse to sell, on nondiscriminatory terms, any Bosch products being sold by a common distributor to any person desiring to resell such products in the territory assigned to a common distributor;

(iii) No defendant may refuse to sell or otherwise distribute Bosch products in the territory assigned to a common distributor through any qualified person, or refuse to permit such person to hold himself out as an authorized seller or distributor of American Bosch products, unless at least one other person not a common distributor has been made an authorized seller or distributor for such territory;

(c) Selling to Robert Bosch, CAV-Limited or Lavalette unless American Bosch shall offer to sell to other foreign concerns or persons on prices, terms, and conditions at least as favorable as those offered to such persons;

(d) Acting as agent for Robert Bosch, CAV-Limited, or Lavalette;

(e) Forwarding any order or inquiry to Robert Bosch, CAV-Limited or Lavalette, or forwarding any order or inquiry relating to Bosch products to any other corporation, association, firm, or person doing business outside the United States and also engaged in manufacturing Bosch products or in distributing Bosch products manufactured by someone other than American Bosch;

(f) Assigning or granting to Robert Bosch, CAV-Limited or Lavalette, or any other manufacturer or distributor of Bosch products located outside of the United State, any exclusive licenses for any country of the world in or to any trademark or tradename;

(g) Instituting or threatening to institute or maintaining any suit or proceeding for infringement or to collect royalties or damages for infringement alleged to have occurred prior to the date of this judgment of any United States letters patent or patent applications heretofore described in Clauses (1), (2) and (3) of Section IV(A);

(h) Interfering with or preventing, by suit for trademark infringement or other action based on trademark or tradename rights, Robert Bosch, CAV-Limited, Lavalette or any other corporation, association, firm or person whomsoever which manufactures, sells or distributes Bosch products, from shipping such products into, or disposing of them in, the United States under any name or designation rightfully attached to such products in the territory from which exported, provided such parties take appropriate steps to prevent confusion of such products with those produced by American Bosch;

(i) Entering into any individual contract or agreement with Robert Bosch,

CAV-Limited, or Lavalette, without filing within thirty days after the execution thereof, copies with the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The failure of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to take any action following receipt of any information pursuant to this paragraph shall not be construed as an approval of the matter and things so filed, and shall not operate as a bar to any action or proceeding, civil or criminal, in this or any other case, that may later be brought or pending pursuant to any law of the United States, based on things and matters so filed.

B. American Bosch is hereby ordered and directed, upon bona fide request or demand for any Bosch products manufactured by it and bearing a trademark or tradename under which Robert Bosch, CAV-Limited, Lavalette, or any other corporation, association, firm, or person producing Bosch products can assert any right in any foreign country or area, in good faith to take such steps and do such things as will eliminate any interference, because of the trademark or tradename used therewith, with the importation of any Bosch products into such country or area. Such steps may include, without limitation, the making available of Bosch products which do not bear, to the defendants' knowledge, infringing trademarks or tradenames, the preparation and dissemination of appropriate trade literature, and changes in the methods of packaging and handling.

VI

Defendant American Bosch is hereby ordered and directed:

A. To file within 30 days after the execution of or entrance into any contract or agreement for the distribution of Bosch products outside the United States, a copy thereof with the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The failure of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to take any action following receipt of information pursuant to this Section shall not be construed as an approval of the matters and things so filed, and shall not operate as a bar to any action or proceeding, civil or criminal, in this or any other case, that may later be brought or pending, pursuant to any law of the United States, based on things and matters so filed.

B. To maintain for a period of 10 years complete and intact, in an orderly classification and not in storage, permitting prompt and selective examination of particular documents or categories of documents, all its books and records, correspondence, memoranda, reports and other writings relating to the distribution of Bosch products outside the United States.

VII

For the purpose of securing compliance with this judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the defendants, be permitted, subject to any legally recognized privilege, (1) access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any matters contained in this judgment; (2) subject to the reasonable convenience of defendants, and without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; (3) the defendants, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this judgment; *provided, however;* that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of securing compliance with this judgment or as otherwise required by law.

VIII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

IX

This amended final judgment supersedes from the date hereof the final judgment entered in the Court on December 29, 1942; but this amended final judgment shall not be construed to make proper or lawful any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited, or the non-performance of any acts prior to the date hereof which were ordered or directed to be done, by said final judgment of December 29, 1942.

[¶ 62,285] United States v. United States Pipe and Foundry Company, James B. Clow & Sons, Glamorgan Pipe and Foundry Company, Lynchburg Foundry Company, McWane Cast Iron Pipe Company.

In the United States District Court for the District of New Jersey. Civil Action No. 10772. July 21, 1948.

Sherman Antitrust Act

Consent Judgment—Lease-License Agreements—Acts in Restraint of Trade Enjoined. —A consent judgment entered against five manufacturers of cast iron pressure pipe and of machinery for the manufacture of such pipe terminates certain lease-license agreements, and enjoins defendants from conditioning licenses, disclosures of technical information, or sales or leases of machines for the manufacture of pipe upon the requirement that the other party to the agreement shall agree: to accept a license under any other patent owned by any defendant; to pay royalties under any unused patent; to manufacture pipe of specified kinds and sizes; not to manufacture pipe on machines not leased or sold by any defendant; to cross-license any patent owned or controlled by said other party, to any defendant; to maintain or adhere to prices or price ranges, or other terms of sale, for pipe; to maintain any restrictions as to quantity of pipe produced, or as to the exportation of pipe from the United States, or which limit the market or territories in which pipe may be sold or distributed in the United States. The defendants are enjoined from entering into any agreement to restrict, allocate or limit production of pipe; to allocate customers, markets or fields; to fix, determine, maintain or adhere to prices or other terms or conditions of sale of pipe; or to attempt to limit the manufacture of pipe to any specified standards, grades or qualities. A defendant is enjoined from acquiring or holding any interest in the assets or capital stock of any other person engaged in manufacturing and selling pipe or machines for the manufacture of pipe, where such acquisition substantially lessens competition or tends to create a monopoly. That defendant is ordered to dedicate certain patents to the public, and to grant licenses of certain other patents on a reasonable royalty basis.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10, 1530.40, 1530.50, 1590.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; Sigmund Timberg, Special Assistant to the Attorney General; Isaiah A. Matlack, Acting United States Attorney; Victor H. Kramer, Morton H. Steinberg, Special Assistants to the Attorney General; Herbert Maletz, Special Attorney.

For defendants: J. W. Brennan, John A. Hartpence.

Final Judgment

Plaintiff, the United States of America, having filed its complaint herein the 23rd day of October, 1947; and all parties hereto by their attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue:

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

[*Jurisdiction*]

I.

The Court has jurisdiction of the subject matter herein and of all of the parties to this judgment, and the complaint states a cause of action against the defendants, and

each of them, under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and monopolies", as amended, commonly know as the Sherman Act (15 U. S. C. Secs. 1, 2).

[*Terms Defined*]

II.

As used in this judgment, the following terms have the meaning assigned respectively to them below:

A) "USP" means the defendant, United States Pipe and Foundry Company;

B) "Lease-license agreements" means each, every and all agreements, letter contracts and contracts, existing and in full force and effect as of the date of this judgment, between defendant USP and other defendants, whereby licenses have been granted to manufacture, use and sell pipe under USP patents and whereby USP machines have been leased, or licenses granted for the manufacture and use thereof;

C) "Pipe" means centrifugally cast cast-iron pressure pipe for use in the conveyance of liquids and gases under pressure;

D) "USP machines" means machines and apparatus covered by one or more of USP patents, for the production of pipe;

E) "Patent" or "patents" means United States Letters Patent and all reissues and extensions thereof.

F) "USP patents" means the United States Letters Patent and applications therefor, listed in Exhibit A attached hereto and made a part hereof, all of which are owned by USP.

III.

The provisions of this judgment applicable to any defendant herein shall apply to each of its subsidiaries, successors, and assigns, engaged in the production of pipe, and to each of its officers, directors, agents, and employees, and to each person acting, or claiming to act, under, through or for such defendant.

[*Agreements Terminated*]

IV.

The lease-license agreements, as defined in this judgment, are, and each of them is, hereby terminated; and the defendants are hereby jointly and severally enjoined and restrained from any further performance in whole or in part of such lease-license agreements, and from any further performance of any of the obligations assumed under or in furtherance of any such agreements. The defendants are hereby jointly and severally enjoined and restrained from directly or indirectly, maintaining, reinstating or enforcing such lease-license agreements.

[*Acts Enjoined*]

V.

The defendants herein are individually and jointly restrained from conditioning:

1) a license or immunity granted under any patent;

2) a disclosure made of technical information or data; or

3) a sale or lease made of machines;

for the manufacture of pipe, upon the requirement that the other party to such transaction shall agree:

a) to request or accept a license or immunity under any other patent owned or controlled by any defendant;

b) to pay royalties under any patent or patents which are unused by said other party;

c) not to challenge the validity of any patent or patents owned or controlled by any defendants;

d) to manufacture only pipe of specified kinds and sizes or to manufacture only pipe covered by specified patent or patents or the production of which is covered by specified patent or patents;

e) to adopt and to use trademarks or trade names owned or controlled by any defendant;

f) to maintain standards, grades or qualities of pipe prescribed or suggested by any defendant;

g) not to manufacture pipe on machines not leased or sold by defendant;

h) to buy or lease from any defendant any other machines for the manufacture of pipe;

i) not to buy or lease machines, for the manufacture of pipe, manufactured by other than any defendant;

j) to cross-license or assign any patent, or patents, or to disclose technical information or data, owned or controlled by said other party, to any defendant;

k) to maintain or adhere to prices or price ranges, or other terms and conditions of sale, for pipe;

l) to maintain or adhere to any restrictions as to quantity of pipe produced;

m) to maintain or adhere to any restrictions which limit the exportation of pipe from the United States, its territories, or possessions, or which limit the market or territories in which pipe may be sold or distributed in the United States.

VI.

The defendants are severally and jointly restrained from entering into, executing, maintaining or adhering to, any contract, agreement, understanding or arrangement with any manufacturer of pipe:

a) to restrict, allocate or limit production of pipe;

b) to allocate customers, markets or fields for the manufacture, sale or distribution of pipe in the United States, its territories or possessions;

c) to fix, determine, maintain or adhere to prices or other terms or conditions of sale of pipe;

d) to prohibit or restrict the sale of pipe for export from or import into the United States, its territories or possessions;

e) to limit or attempt to limit the manufacture of pipe to any specified standards, grades or qualities;

f) to provide for the inspection of any records, files or other documents and papers of any manufacturer of pipe except that an independent public accountant may be employed for the purpose of determining amounts of royalties or rentals due.

VII.

Defendant USP is hereby enjoined and restrained from hereafter acquiring, or holding after such acquisition, any interest in the assets or capital stock of any other person engaged in manufacturing and in selling pipe, or machines for the manufacture of pipe, where such acquisition substantially lessens competition or tends to creat a monopoly in the manufacture and sale of pipe.

[*Title To Be Conveyed*]

VIII.

Defendant USP is hereby ordered and directed to convey, within sixty (60) days from date of entry of this judgment and without further consideration, or conditions, legal title to any USP machines, now in possession of any other persons under lease-license agreements with defendant USP, to such other persons.

[*Dedication To Public*]

IX.

Defendant USP is hereby ordered and directed to dedicate to the public, within thirty (30) days from the date of entry of this judgment, all of the USP patents listed in Exhibit A.

[*Licenses To Be Made Available*]

X.

Upon the grant of a license or immunity under any patent, for the manufacture of pipe, acquired by any defendant within a period of three (3) years from the date of entry of this judgment, a license or immunity under such patent shall be available to any other applicant on non-discriminatory terms.

[*Inspection for Compliance Purposes*]

XI.

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and upon reasonable notice to any defendant herein made to the principal office of such defendant be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding such matters. Upon written request of the Attorney General, or an Assistant Attorney General, on reasonable notice to any defendant herein made to its principal office, such defendant shall submit such reports as might from time to time be reasonably necessary to the enforcement of this judgment, *provided* however that no information obtained by the means provided in this Section XI shall be divulged by the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party for the purpose of securing com-

pliance with this judgment or as otherwise required by law.

[*Jurisdiction Retained*]

XII.

Jurisdiction of this action is retained by this Court for the purpose of enabling any of the parties to this judgment to apply to the Court any time for, and for the Court to make, such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification thereof, or for the enforcement of compliance therewith, and for punishment of violations thereof.

Exhibit A

Patent No.	Inventor	Title	Date
1,833,025	Langenberg, F. C.	Method for Hardening the Inner Surface of Cylindrical Metal Bodies	Nov. 24, 1931
1,834,128	Langenberg, F. C.	Method and Apparatus for Improving the Texture of Hollow Metal Bodies	Dec. 1, 1931
1,845,127	Clark, S. B.	Conveyor Mechanism	Feb. 16, 1932
1,849,072	Clark, S. B.	Runner Trough for Centrifugal Casting Machines	Mar. 15, 1932
1,856,863	Clark, S. B.	Pipe Annealing Furnace	May 3, 1932
1,856,874	Langenberg, F. C.	Manufacture of Centrifugal Pipe Molds	May 3, 1932
1,856,890	Stokes, D. B.	Pipe Joint Packing	May 3, 1932
1,890,498	Daniel, R. E. Haughton, R. K. Clark, S. B.	Runway for Pipes	Dec. 13, 1932
1,897,631	Clark, S. B.	Method for Casting Pipes	Feb. 14, 1933
1,899,383	Clark, S. B.	Centrifugal Pipe Casting Apparatus	Feb. 28, 1933
1,903,220	Lemert, L. J.	Flange Protector	Mar. 28, 1933
1,939,703	Hunt, H. S. Arnold, P. L.	Feeding Device for Finely Divided Material	Dec. 19, 1933
1,949,433	Russell, N. F. S. Langenberg, F. C.	Method and Apparatus for Casting Pipes Centrifugally	Mar. 6, 1934
1,953,180	Langenberg, F. C. Reddick, H. G.	Cast Iron Annulus and Method of Manufacturing the Same	Apr. 3, 1934
1,954,892	Russell, N. F. S. Langenberg, F. C.	Centrifugally Cast Cast Iron Pipe	Apr. 17, 1934
1,963,146	Russell, N. F. S. Langenberg, F. C.	Method of Casting Centrifugal Pipes	June 19, 1934
1,963,147	Russell, N. F. S. Langenberg, F. C.	Centrifugal Pipe Casting Apparatus	June 19, 1934
1,963,148	Russell, N. F. S. Langenberg, F. C.	Centrifugal Pipe Casting Machine	June 19, 1934
1,963,149	Russell, N. F. S. Langenberg, F. C.	Centrifugal Pipe Casting Apparatus	June 19, 1934
1,963,150	Russell, N. F. S. Langenberg, F. C.	Centrifugal Pipe Casting Machine	June 19, 1934
1,971,376	Hunt, H. S. Arnold, P. L.	Apparatus for Coating Centrif. Pipe Molds	Aug. 28, 1934
1,971,385	Russell, N. F. S. Langenberg, F. C.	Cast Iron Pipe	Aug. 28, 1934
1,979,141	Clark, S. B. Langenberg, F. C.	Pipe Joint and Pipe Joint Gasket	Oct. 30, 1934
1,982,044	Clark, S. B.	Pipe Joint	Nov. 27, 1934
1,982,762	Russell, N. F. S. Langenberg, F. C.	Method for Casting Metallic Annuli	Dec. 4, 1934
1,986,985	Stuart, H. W. Hunt, H. S. Arnold, P. L.	Coated Metallic Centrifugal Pipe Mold	Jan. 8, 1935
1,988,470	Arnold, P. L.	Centrifugal Pipe Casting Apparatus	Jan. 22, 1935
1,988,471	Arnold, P. L.	Centrifugal Pipe Casting Apparatus	Jan. 22, 1935
2,018,025	Langenberg, F. C. Hunt, H. S.	Method of Centrifugally Casting Pipe	Oct. 22, 1935
2,027,453	Russell, N. F. S. Langenberg, F. C.	Centrifugal Pipe Casting Apparatus	Jan. 14, 1936

Patent No.	Inventor	Title	Date
2,032,576	Hering, E.	Pipe Joint	Mar. 3, 1936
2,128,327	Russell, N. F. S. Langenberg, F. C. Hunt, H. S.	Method and Apparatus for Coating Molds	Aug. 30, 1938
2,162,829	Stuart, H. W. Hunt, H. S.	Mold Coating Mechanism for Metallic Centrifugal Pipe Molds	June 20, 1939
2,165,051	Hering, E.	Flexible Pipe Joint	July 4, 1939
2,165,052	Hering, E.	Flexible Pipe Joint	July 4, 1939
2,239,530	Langenohl, Max Projahn, Heinrich	Lining Composition for Centrifugal	Apr. 22, 1941
2,246,063	Projahn, H.	Method of Producing Refractory Linings	June 17, 1941
2,255,896	Projahn, H.	Production of Centrifugal Castings	Sept. 16, 1941
2,262,184	Ireton, S. R. Jr.	Method and Apparatus for Coating Molds	Nov. 11, 1941
2,267,896	Bridewell, W. G. Jordan, F. M.	Centrifugal Casting Apparatus	Dec. 30, 1941
2,267,958	Szwed, V. A.	Centrifugal Casting Apparatus	Dec. 30, 1941
2,278,555	Myers, W. S.	Centrifugal Casting Apparatus	Apr. 7, 1942
2,289,681	Projahn, Heinrich A. von Frankenberg	Mold for Centrifugal Casting	July 14, 1942
2,313,926	Daniel, R. E.	Centrifugal Casting Apparatus	Mar. 16, 1943
2,346,861	Montgomery, W. A.	Method and Apparatus for Grinding Molds	Apr. 18, 1944
2,349,646	Arnold, P. L.	Apparatus for Radially Contracting Tubular Metal Bodies	May 23, 1944
2,437,626	Tinsley, C. R.	Method for Reclaiming Used Metal Molds	Mar. 9, 1948

Application Serial Number	Inventor	Title	Filing Date
585,467	Koch, R. H.	Slurry Distributing System	Mar. 29, 1945
729,219	Koch, R. H.	Apparatus for Lining Hollow Bodies with Mortar	Feb. 18, 1947
22,375	Kurtz, R. W.	Centrifugal Casting Apparatus	Apr. 21, 1948

[¶ 62,286] Harry Norman Ball, Trustee v. Paramount Pictures, Inc., Pennware Theatre Corporation, A. N. Notopoulos, R. K. O. Radio Pictures, Inc., Loew's, Inc., Twentieth Century-Fox Film Corporation and Paramount Film Distributing Corporation.

In the United States Circuit Court of Appeals for the Third Circuit. No. 9233. Filed July 21, 1948.

Appeal from the United States District Court for the Western District of Pennsylvania.

Sherman Antitrust Act

Refusal to Lease Films—Conspiracy to Destroy Value of Theatre—Plaintiff Entitled to Damages and Injunctive Relief.—A theatre owner who charges a former lessee of the theatre and several motion picture distributors with a conspiracy to destroy the value of the theatre by depriving it of first-run films in violation of the antitrust laws is entitled to damages and injunctive relief where the evidence indicates that the concert of action could not possibly have been sheer coincidence. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. The lower court, in dismissing the complaint, failed to accept the clear implications arising from defendants' acts and conduct. The dissenting opinion states that the majority fails to give the findings of fact made by the trial judge their required effect.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

For plaintiff: Joseph W. Henderson, Philadelphia, Pennsylvania.

For defendant: Bernard G. Segal, Philadelphia, Pennsylvania; John G. Buchanan, James H. Beal, Pittsburgh, Pennsylvania.

[*Nature of Action*]

McLaughlin, C. J.: This is a conspiracy suit under the Sherman and Clayton Acts.[1] Plaintiff-appellant is the owner and operator of the Penn motion picture theatre in Ambridge, Pennsylvania. The defendants-appellees are Pennware Theatre Corporation, formerly lessee of the Penn Theatre and later owner and operator of the State Theatre, also in Ambridge; A. N. Notopoulos and Paramount Pictures, Inc., each owning fifty per cent of the Pennware stock; R. K. O. Radio Pictures, Inc., Loew's, Inc., Twentieth Century-Fox Film Corporation and Paramount Film Distributing Corporation, producers, distributors and exhibitors of motion pictures. It is alleged that the appellees conspired to deprive the Penn Theatre of showing first run pictures as it had been doing for some years previously. The case was partly heard below by Judge Schoonmaker, who died before the case was completed. The trial was finished before the succeeding Judge under a stipulation which provided that "all proceedings before Judge Schoonmaker * * * shall be deemed to have been before such assigned Judge." The succeeding judge found no conspiracy. This appeal is from his decree dismissing the complaint.

Appellees urge that under Rule 52 of the Federal Rules of Civil Procedure we should not set aside the findings of fact of the court below unless clearly erroneous. The same rule provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *", but it is to be remembered half the witnesses, presenting the main portion of plaintiff's case, had been heard by Judge Schoonmaker. Nor does the rule operate "to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings." *Kuhn v. Princess Lida of Thurn and Taxis,* 3 Cir., 119 F. 2d 704, 705. Finally, if the mass buying power of appellees[2] was unlawfully employed, then, under the particular facts, the findings were not only inadequate but erroneous. *United States v. Griffith,* — U. S. —, opinion filed May 3, 1948, pp. 9, 10, slip opinion.

[*Facts*]

In August of 1943, appellant for himself and his family group purchased the Penn Theatre. At the time, Pennware was lessee thereof, its lease expiring on April 30, 1944. Pennware's capital stock was owned one-half by Atlantic States Theatre Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., and one-half by A. N. Notopoulos, who operates a chain of motion picture theatres in the area. For at least the ten years preceding the expiration of the lease, Pennware had been licensed to exhibit all of Paramount Film Distributing Corporation's feature motion pictures first run at the Penn Theatre and one-half of the feature motion pictures first run of R. K. O., Loew's and Twentieth Century-Fox. Negotiations for renewal of the lease failed to produce an agreement between the parties and the lease was not renewed. Meanwhile Pennware was busy reconverting a garage property into a theatre which was thereafter named the State.

Pennware had vacated the Penn Theatre by April 30, 1944. Under its lease it was entitled to remove its furnishings and equipment. Appellant contends that in doing this Pennware deliberately did what it could—which is said to have been considerable—to wreck the theatre. While the negotiations for the renewal of the lease were proceeding, appellant talked with Mr. Goldenson, vice president of Paramount Pictures, Inc., in charge of his company's theatre interests. Ball tried to persuade Goldsenson that in the event the parties could not agree on a renewal of the lease, it would be unfair for Paramount to move its product from the Penn Theatre or to do anything to get the other film companies to do likewise. According to Ball, Goldenson said that after the Pennware lease was terminated, the product which the Penn Theatre had enjoyed would be given over to the new theatre Paramount, Pennware and Notopoulos were building; none of the first run Paramount product would go to the Penn Theatre unless the lease was renewed; and, as to the other producers, he would use the power of Paramount to see to it that their product went to the new theatre they were building.

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[1] Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U. S. C. Sections 1-7). Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730; 15 U. S. C. Sections 12-27).

[2] Unquestionably here involved even if each distributor were assumed to have acted independently of the others as the court below found.

Following the termination of the lease with Pennware and the removal by the latter of its property, appellant had his theatre repaired and re-equipped. This was completed by June 23, 1944. He was, however, then or thereafter unable to obtain any first run pictures either from Paramount or from any of the other distributor appellees, and this despite the fact that he was willing to agree to terms which would have been far more favorable to the distributors than those which they had received previously from Penn Theatre showings. All the first run of the pictures of the appellees which, under the Pennware regime, had been displayed at the Penn Theatre was transferred to the State Theatre at the request of Pennware. In such action, according to Finding Number 32 of the District Court, "each distributor acted independently without consulting any other distributor and without concert of action. No representative of Paramount had any active part in obtaining such licenses." And then the District Court found that "In obtaining licenses for first run exhibition of motion pictures in the State Theatre, neither Pennware nor Notopoulos combined or conspired with any of the defendants in restraint of trade or commerce." The Conclusions of Law reiterated this thought.

[*Implication of Conspiracy*]

In so holding we think the lower court failed to accept the clear implications arising from appellees' acts and conduct. " 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' " *William Goldman Theatres v. Loew's, Inc.*, 3 Cir., 150 F. 2d 738, 743. As held in that case, conspiracy may be inferred when the concert of action "could not possibly be sheer coincidence". "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 227. That conspiracy cannot be explained away by allegations of "normal processes of competition; * * * theatres * * * less attractive; * * * service * * * inferior;" or because the new theatre operators are "not as efficient business men as the defendants". *United States v. Crescent Amusement Co.*, 323 U. S. 173, 183. In *United States v. Paramount, et al.*, — U. S. —, opinion filed May 3, 1948, the court says at page 5 of the slip opinion: "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." Most of the present appellees are among the defendants in the *Paramount* litigation who are there characterized as having shown "a proclivity to unlawful conduct." The second of the recent United States Supreme Court opinions in motion picture matters, *United States v. Griffith, supra*, concerned a chain theatre owner similar to Notopoulos, the court holding that he is legally presumed to be tending toward monopoly if his chain ownership is influential in obtaining business. That case also reiterates that specific intent is not necessary in such a situation as is before us. Says the court, page 5 of the slip opinion, "It is sufficient that a restrain of trade or monopoly results as the consequence of a defendant's conduct or business arrangements." *Schine Chain Theatres v. United States*, — U. S. —, is the last of the group of motion picture opinions handed down by the Supreme Court on May 3rd last. Petition for clarification was denied on June 1, 1948. Again, the special facts there are not our case, but generally the pattern is very similar, and it is noteworthy that the District Court was specifically sustained "in drawing the inference of unlawful purpose from the ambiguous episodes" in connection with the question of the use of monopoly power. (p. 7 of the slip opinion.)[8]

[*Unanimity of Action*]

There is the distinction, more apparent than real, that in the *Interstate* case there were no witnesses to deny plaintiff's allegations. Here the defense witnesses explain their refusal to deal with Ball by saying they preferred to patronize their old and reliable customer Notopoulos, who, as Para-

[8] And see *United States v. Columbia Steel Co., et al.*, — U. S. —, opinion filed June 7, 1948, which holds, page 28 of the slip opinion: "When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."

mount's partner, incidentally could have been designated as having an even closer relationship to the defense group than that simply of a trustworthy purchaser of their pictures. In any event Ball was ready to meet and better the terms offered by Notopoulos. It is also suggested that the State Theatre had a finer location and more seats. Without going into detail, the question of location is at least arguable. The two theatres were on Merchant Street, the main business thoroughfare of Ambridge, and within a few blocks of each other. The larger seating capacity of the State would hardly appear overwhelming in view of Ball's cash propositions and longer playing time. Appellees urge, as another ground for discarding the *Interstate* decision, the presence there of an "extraordinary and unexplained unanimity of action by the distributors." The *Interstate* facts differ considerably from the ones at bar, but it would be difficult to describe more exactly the gravamen of the instant offense than as set out in the above quoted language from appellees' brief.

[*Cases Cited*]

Appellees suggest that the *Goldman* opinion has no bearing primarily because half of the pictures of the defendant distributors other than Paramount are shown in the two Warner theatres in Ambridge. This does not affect the illegality of the conspiracy, if conspiracy there be. *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 237; *United States v. Yellow Cab Co.*, 332 U. S. 218, 229; *William Goldman Theatres, Inc. v. Loew's, Inc., supra*, page 744. They say further that each appellee simply did not know the others were shunning the Penn, and that statement is incredible. They all knew Paramount's vital interest in the State. This was Paramount's ordinary theatre arrangement throughout the United States with which the other distributors were constantly dealing. Cf. *United States v. Paramount, supra*. They, experienced, shrewd business people as they claim to be and as, in fact, they are, had to know the picture bookings and entire situation at the State. Ball's testimony tends to support this when, among other things, he says he informed R. K. O. that the others had declined to sell to him, and he read a letter he states he sent to Fox during the negotiation period informing the latter of Paramount's plan "to cause the run of the product to be taken from the [Penn] Theatre." The record fails to reveal a convincing basis for accepting the actions of appellees as merely an amazing coincidence. The District Judge was unjustified in so explaining it.

There is no serious attempt to distinguish the *Crescent Amusement* opinion by appellees. Instead they rely on two other decisions, *Westway Theatre, Inc. v. Twentieth Century-Fox Corp.*, D. C. Md., 30 F. Supp. 830, affd. 4 Cir., 113 F. 2d 932, and *Schad v. Fox*, 3 Cir., 136 F. 2d 991. *Westway* concerned a peculiarly local situation in Baltimore. It was a suit by an owner of a new theatre. His neighboring competitors sought clearance protection in their already existing contracts with their distributors, and this was allowed. It was held not an unreasonable restraint of trade because it amounted to the protection of existing customers as permitted at common law. No evidence tending to show conspiracy was observed by the court. As seen, the comparison between the matter before us and *Westway* is neither close nor controlling where, as here, the conspiracy of appellees is so apparent.

While the doctrine of *Goldman v. Loew's, supra*, has superseded any possible inference to the contrary in the *Schad* decision as the law of this circuit, on its facts the *Schad* case, which has to do with an isolated exhibitor-distributor agreement, has no bearing here. The *Crescent Amusement* opinion, *supra*, clearly outlines the distinction at page 183, saying: "We may assume that if a single exhibitor launched * * * a plan of economic warfare he would not run afoul of the Sherman Act. But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action."

When an industry is so powerful that it can and actually does refuse to permit the existence of an individual enterprise such as appellant's within its confines (and that's what the shutting off of first runs from Penn probably amounts to) that industry is going beyond its freedom to trade as it chooses. It comes into sharp conflict with the salutory provisions of the Sherman and Clayton Acts. It is acting unlawfully in restraint of trade. We think that is what happened here. The appellees representing all branches of this tremendous industry are engaged in a conspiracy against the appellant that is both horizontal and vertical. Cf. *United States v. Paramount, supra*. Collaterally,

much could be said about the fairness of appellant's own actions, but careful study of these develops no excuse for the stoppage by appellees of Penn Theatre's first runs. The second and third runs tendered were from the evidence unreasonable, and they were themselves part of the violation of the restraint of trade acts. *United States v. Paramount, supra.*

[*Reversed and Remanded*]

The decree of the District Court will be reversed and the cause remanded to that court with directions to enter a decree in favor of the appellant and for the injunctive relief presently sought. The amount of appellant's damages and the form of the decree are for the court below.

[Dissenting Opinion]

GOODRICH, J.: The reason for this dissent is that the majority does not give the findings of fact made by the Trial Judge the effect which, it seems to me, Rule 52 requires. If those findings are accepted there is nothing to the plaintiff's case. I think on this point there is no dispute among the parties, their counsel, or the members of the Court.

There is no disagreement among us in rejecting the "cloak and dagger" requisites to prove conspiracy. Nor is there any doubt that the fact that this plaintiff failed to get first run pictures from any of the distributors is certainly a circumstance to be considered in the question whether there was an agreement among them to act together to freeze the plaintiff out, or at least a knowing participation in such a scheme. Nor could I quarrel with the majority's allusion to the Supreme Court opinion in which reference is made to the "proclivity to unlawful conduct" by some of the defendants here. The mistake which it seems to me the majority makes, is to substitute its judgment for that of the Trial Court in saying what conclusions are to be drawn from all the evidence. This is not a case where a plaintiff sets out a set of facts and circumstances and the question is whether they will warrant a finding of conspiracy on the part of the defendants. The defendants fully presented their side of the case which completely contradicts the facts relied upon by the plaintiff. The simple question of fact is whether those witnesses told the truth or whether they lied.

The majority opinion quotes the plaintiff as claiming that one of the defendants, in removing fixtures from the theatre which the plaintiff had bought maliciously wrecked it. The plaintiff did make that charge, but it was vigorously denied by witnesses who were the very people who did the job and the Trial Court's finding on the point is squarely against the plaintiff. He said:

> "26. Pennware caused its furnishing[s] and equipment to be removed from the Penn Theatre from April 27, 1944 [*sic*] to April 30, 1944. The removal was accomplished in a careful and workmanlike manner, without malice, or any intent to delay operation of the Penn Theatre by plaintiff (R. Notopoulos Exhibits Nos. 7-12, and 14-25, R. 1079, 1086, 1116)."

But this is not the only instance in which an important finding is ignored. It is still the law that if one is not engaged in public utility or a similar activity he may pick and choose his customers as he pleases. If one of these defendants decided he did not want to do business on the plaintiff's terms, there was nothing to compel him to do so. Of course, if he agrees with other people not to do business with the plaintiff or knowingly enters into a plan not to do business with the plaintiff, an entirely different kind of question is presented, and if such is found and the subject-matter is interstate commerce there is a violation of the Sherman Act. No one doubts this, least of all the defendants themselves.

Now on this point the trial judge made specific, direct, clear, and forthright findings of fact. Here they are:

> "32. In licensing Pennware for first run exhibition of motion pictures in the State Theatre, each distributor acted independently without consulting any other distributor and without concert of action. No representative of Paramount had any active part in obtaining such licenses."
>
> "33. In obtaining licenses for first run exhibition of motion pictures in the State Theatre, neither Pennware nor Notopoulos combined or conspired with any of the defendants in restraint of trade or commerce."
>
> "34. Loew's, R. K. O. and 20th Century Fox each had knowledge that Paramount Pictures, Inc., had an interest in the Pennware Theatre, but had dealt only with Notopoulos, or his sons in licensing pictures to that theatre. When each of them decided to license the State Theatre, as opposed to the application of

plaintiff for the Penn Theatre, it did not know of the intention of the others to license the State Theatre. In concluding to license the Pennware Theatre each considered the fact that that theatre was managed by an experienced exhibitor of moving pictures, whose credit had been good over a number of years, and who had a theatre equally located and considerably larger than the Penn Theatre, and which promised greater revenue, while the Penn Theatre was to be operated by a stranger in Ambridge whose ability and credit was unknown. Neither Loew's, R. K. O., nor 20th Century Fox, in their respective decisions to license the State Theatre were influenced by Paramount Pictures, Inc., or its power in the moving picture industry."

The very able and experienced trial judge did not pull these conclusions out of thin air. The defendants took their case seriously. They called top executives of their respective companies and by direct testimony traced the course of dealings in the licensing of motion pictures in general and in particular as to this plaintiff and the former occupant of the Penn Theatre in Ambridge. All that testimony made categorical denials of any arrangement, express or implied, intimation, or understanding among the defendants with regard to selling or not selling to the plaintiff. A conversation outlined at some length in the majority opinion about how Paramount was alleged to have threatened to use its power to crush the plaintiff was discussed in the defendant's testimony, too. All of the defendants' witnesses say that the words came from the mouth of the plaintiff and that at least one of the witnesses said at the time that the plaintiff was building up, or endeavoring to build up, lawsuit material for himself.

Each defendant-distributor was informed of the other defendant-distributors' conclusion not to furnish first run pictures to the plaintiff, but according to their testimony this information came from the plaintiff himself. Furthermore, it came at a time when their decision not to furnish plaintiff with first run pictures had already been communicated to him. In other words, the testimony which is in the record does not show that one powerful distributor acted with knowledge of what the others had done, but rather supports the conclusion, made by the trial judge, that each acted independently and got his information about the others' action from the plaintiff, himself, after his own decision had been made.[1]

The view, stoutly maintained by the defendant-distributors, that each made his own decision with regard to the offerings to be made to the plaintiff, finds corroboration outside the direct testimony of the motion picture officials on this point. For instance, there was ample evidence that Mr. Notopoulos and his Pennware Corporation had been good customers of the various distributors for a good many years. His bills were promptly paid, the kind of theatre run by him through his corporation was a good thing, sales managers thought, for their business. The new theatre which Pennware Corporation occupied following the termination of the lease on the plaintiff's theatre was a larger building than the former building is. There is dispute as to which location was the better. There was no dispute, however, that the distance between the two was short and that the busi-

[1] Three of the defendant-distributors by oral testimony stated that their decisions to sell to Pennware rather than Ball were made by certain dates which were previous to the time Ball's witnesses had stated they communicated the information as to what the others were going to do to a particular distributor. Friedman, witness for plaintiff, stated that he told the officials of Loew's early in May, 1944. The official to whom Friedman stated that he made the statement denies any knowledge of it. That person, however, says that one of Notopoulos' sons told him in April, 1944, but the testimony of another witness shows that Loew's had reached its decision previous to that after discussing the matter among themselves in January, February, March, and the early part of April, 1944.

As to R. K. O.'s knowledge, Ball said he informed its officials of the others' action in June, 1944, but the officials of R. K. O. stated that the matter had been tentatively settled on April 3, 1944 and on May 8, 1944 the top executives communicated their decision to members of their organization. Twentieth Century-Fox, on the other hand said that its decision was made on April 17, 1944 and that it had notice of what the others had decided to do only through a letter sent to it by Ball under the date of May 1, 1944.

Plaintiff's testimony attempts to establish that Pennware had an understanding with Paramount that it would take the first run product to State. This agreement, according to plaintiff, was made even before Pennware's lease on the Penn had expired. Paramount, however, says its decision was made on May 17, 1944 and that it was not aware of what the other distributors had done or would do. Under either version we must accept the fact that the Trial Judge found that Paramount made its decision without the knowledge of what the others had done.

ness section of the community was not such as to exhaust anyone in the walking from one end to the other of the whole area.

The above pieces of evidence are not related to prove that the defendants were circumspect in this case and the plaintiff was wrong. That, of course, is not a determining factor. They are cited to show that the case presented a conflict in evidence and that the defendants presented testimony on very vital points. I earnestly urge that where a question is that of the credibility of people who testify in a case it takes a very, very strong set of circumstances to reject a conclusion reached as to truth telling by the trier of the fact. When his conclusion as to which witnesses to believe and which witnesses not to believe is backed up by circumstances which show that his conclusion is a rational one, it seems to me that so far as a case turns upon questions of fact the answers given to these questions by the trier of the fact should be accepted. We should not substitute a hunch, however judicial, for facts advertently found.

[¶ 62,287] J. T. Miller v. Minneapolis Underwriters Association, Inc., et al.

In the Supreme Court of the State of Minnesota. No. 71. Filed June 11, 1948.

Minnesota Trusts and Combinations Act

Restraint of Trade—Insurance Underwriters' Association—By-Laws and Practices Thereunder.—In an action to adjudge a forfeiture of the corporate franchise of an association of underwriters, and to enjoin its officers from enforcing certain by-laws, on the ground that such by-laws and certain practices thereunder violate the Minnesota Trusts and Combinations Act by so unreasonably restricting competition in the insurance business as to constitute a conspiracy and boycott in restraint of trade, it is held that a mere showing of a purported violation of a criminal statute, without a showing that plaintiff, a nonmember of the association, has been injured, is insufficient to entitle plaintiff to injunctive relief. It is further held that although the attorney general in seeking to vacate a corporate charter may proceed either by civil action under the Minnesota Trusts and Combinations Act or by *quo warranto,* any other person, in the absence of express statutory authorization, must rely exclusively on *quo warranto* as a remedy. Since no such authorization exists, the judgment for defendants must be affirmed.

See the Minnesota Trusts and Combinations Act, Vol. 2, ¶ 8435.

For plaintiff: Willard C. Lindsay, Russell Smith, Minneapolis, Minnesota.

For defendants: Stanley V. Shanedling, Mark J. Woolley, Minneapolis, Minnesota; Walter H. Bennett, New York, N. Y.

MATSON, J.: Action to adjudge a forfeiture of the corporate franchise of the Minneapolis Underwriters Association, Inc., (hereinafter called the association) and to enjoin its officers from enforcing certain by-laws of the association on the ground that such by-laws and certain practices thereunder violate M. S. A. 623.01 by so unreasonably restricting and restraining competition in the insurance business as to constitute a conspiracy and boycott in restraint of trade. The appeal by plaintiff, a nonmember of the association, from a judgment for defendants presents the question whether the trial court's findings, conclusions, and judgment are sustained by the evidence.

The association, organized in 1883 and incorporated in 1923, is a voluntary, nonstock, nonprofit membership corporation composed of fire insurance agents in the city of Minneapolis. Its membership is not open to insurance companies but is limited to their agents. Out of a total of 254 companies writing insurance in Minneapolis, 173 are stock companies and 81 are mutuals. The agents (inclusive of approximately 150 firm agencies) of 159 stock companies are members of the association and write from 70 to 80 per cent of the premium volume of all fire insurance written in Minneapolis. The balance of the insurance is written by nonmember agents, who represent 81 mutual and 14 stock companies. The number of agent members is not indicative of the number of licensed agents represented in the association, because any agent member may have in his employ, or affiliated with him, other individual sales agents who are regis-

tered as solicitor members. Plaintiff, who is not a member of the association, is the general agent for several insurance companies and as such employs numerous subagents.

We are particularly concerned with three provisions of the by-laws of the association, namely, (1) the "Maintenance of Rates Rule," whereby all members are required to write insurance at the rates promulgated by a statutory bureau known as the Minneapolis Fire Underwriters Inspection Bureau; (2) the "In-or-Out Rule," whereby members are prohibited from representing any company whose agents are not all members of the association; and (3) the "Non-Intercourse Rule," whereby members agree not to place insurance on Minneapolis property with any agent or company except in compliance with the by-laws, and further agree not to accept brokerage risks except from fellow members. For a first violation of the by-laws a member is subject to a fine, and for a second violation to both fine and expulsion from membership.

The Minneapolis Fire Underwriters Inspection Bureau (hereinafter called the bureau), referred to in the "Maintenance of Rates Rule," is a rate-making bureau legally established pursuant to the Minnesota fire insurance rating bureau law (M. S. A. 71.01 to 71.06), and any rates established by such bureau, in order to prevent discriminatory and unjust rates, *are at all times subject to review and revision by the state insurance commissioner*. In establishing rates, the bureau, under a credit and debit system, classifies the risks according to the presence or absence of fire protection and fire prevention facilities. The basic premium rate may be increased by charging against a particular risk certain debits for a deficiency of minimum fire protection safeguards. On the other hand, another risk may receive a reduction in the basic rate by virtue of credits allowed for the presence of fire protection facilities. Among the insurance agencies, inclusive of the members of the association, there is considerable competition in securing for their respective customers all credits to which they are justly entitled, as well as in avoiding unjustifiable debits.

The rating bureau statute expressly provides that any insurer may deviate from the bureau rate, but if the deviation is downward, then such insurer must maintain the lower rate for a minimum period of one year with respect to the class of property involved. An insurance agent is not compelled to join the association, but if he elects to do so he thereby subjects himself to the by-laws, which are designed to compel all members to charge the rates fixed by the bureau, and not to deviate therefrom without first obtaining permission from the association. In order to meet competition from a deviating nonmember, the association may, in so-called "relief cases," give a member express permission to broker a specified line of insurance at a variation rate with a nonmember agent who represents a deviating company. With the exception of such relief cases in which permission to deviate has been granted, it is the practice of the association to require the members not only to charge the bureau rate, but also not to place, or to renew, any insurance with a nonmember. Aside from the relief case exceptions, it appears that on certain occasions members have refused to become agents for companies represented by plaintiff, a nonmember, and that by reason of the by-laws, members have refused to place or continue insurance with plaintiff's (as well as with other) companies. It has been the regular practice of the association to remind individual members of their obligations whenever a threatened violation of the by-laws has come to light.

1. Plaintiff is not entitled to injunctive relief. The entire case has been tried on the theory established by plaintiff's pleadings, which simply allege that defendants by certain acts of conspiracy and boycott have brought about a restraint of trade for the purpose of stifling competition in the insurance business and in order to maintain maximum insurance premium rates in violation of §§ 623.01 and 623.02. The basic antitrust section, namely, § 623.01, is a criminal statute, and has been so recognized. *Campbell v. Motion Picture M. O. Union*, 151 Minn. 220, 186 N. W. 781. Here, we have nothing more than a purported violation of a criminal statute. We have no allegation or showing that plaintiff's property or plaintiff's rights of a pecuniary nature have been actually injured or threatened. An inference might be drawn that certain practices of the association have been detrimental to plaintiff, but such an inference cannot supply the positive proof of the actual or threatened injury required for a granting of injunctive relief. It is not the province of a court of review to draw infer-

ences as to the showing that could have been made, but which in fact was not made upon the trial below. Equity will not enjoin purely criminal acts, but on the other hand the criminality of an act will not bar injunctive relief if there is otherwise ground for it. *Higgins v. Lacroix,* 119 Minn. 145, 137 N. W. 417. Although equity will not enjoin a criminal act, it does have jurisdiction to enjoin an act which actually injures or threatens to injure property or rights of a pecuniary nature, and such jurisdiction is not destroyed by the fact that the act is accompanied by, or is itself, a violation of the criminal law. *Glover v. Malloska,* 238 Mich. 216, 213 N. W. 107, 52 A. L. R. 77. The criminality of the act neither gives nor ousts jurisdiction in chancery.[1] An injunction will be granted against a criminal act on the ground of actual or threatened injury to the property rights of an individual only if the complainant clearly shows facts and circumstances justifying the relief desired. 28 Am. Jur., Injunctions, § 150.

Obviously, § 613.70 is not involved on this appeal. The general rule, with certain exceptions not here applicable, is that litigants are bound in this court by the theory upon which the action was tried below. *Skolnick v. Gruesner,* 196 Minn. 318, 265 N. W. 44.

2. The remaining issue relates to plaintiff's attempt to vacate or annul the association's corporate charter pursuant to § 623.02, which provides that every domestic corporation violating, directly or indirectly, any provision of § 623.01 "shall forfeit all of its corporate franchises." Section 623.02 further provides:

> "* * * The attorney general and the several county attorneys shall begin and conduct, in the district court, *all actions and proceedings* necessary to enforce the provisions of this section, *and any citizen may do so.*" (Italics supplied.)

Defendants contend, however, that both sections of the statute, as part of the same criminal chapter, involve criminal proceedings, and that plaintiff as a private citizen cannot begin or conduct a criminal prosecution. Whether a private citizen may be authorized to conduct a criminal action need not be determined. It is sufficient to point out that defendants are in error as to the nature of the proceedings for declaring a forfeiture of a corporate charter under § 623.02. The preceding section, 623.01, is a criminal statute, and we have so held. *State v. Minneapolis Milk Co.,* 124 Minn. 34, 144 N. W. 417; *State v. Creamery Package Mfg. Co.,* 115 Minn. 207, 132 N. W. 268, L. R. A. 1915A, 892, Ann. Cas. 1912D, 820. The fact that the succeeding section, 623.02, is part of the same criminal chapter is not controlling as to the nature of the proceedings thereby authorized. It is true that the forfeiture of a corporate charter thereunder is a consequence of violating a criminal statute, but it is not a penal consequence. See, *State v. Harris,* 50 Minn. 128, 134, 52 N. W. 387, 388; *State ex rel. Connolly v. Parks,* 199 Minn. 622, 625, 273 N. W. 233, 235. An action to adjudge a vacation or annulment of a corporate charter is a civil remedy employed by or in behalf of the state to cancel or recall a franchise privilege which the domestic corporation proceeded against has abused. In this respect the statute is merely declaratory of the common law. The action is no more criminal than is an action for damages resulting from the commission of a crime. *State v. Standard Oil Co.,* 61 Neb. 28, 84 N. W. 413; *State v. Central Lbr. Co.,* 24 S. D. 136, 123 N. W. 504; *Ames v. Kansas ex rel. Johnston,* 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482; 36 Am. Jur., Monopolies, Combinations, etc., § 218; see, 12 Minn. L. Rev. 422, 41 Harv. L. Rev. 244; High, Extraordinary Legal Remedies, § 597. In holding that actions for the termination of a corporate charter have not been recognized as criminal proceedings since the early days of the common law, the supreme court of Missouri in *State ex inf. Hadley v. Delmar Jockey Club,* 200 Mo. 34, 71, 98 S. W. 539, 543, said:

> "* * * The violation of a corporation's contract with the State by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under

[1] *State v. Sportsmen's Country Club,* 214 Minn. 151, 7 N. W. (2d) 495; *State v. Preuss,* 217 Minn. 100, 13 N. W. (2d) 774; *Fitchette v. Taylor,* 191 Minn. 582, 254 N. W. 910, 94 A. L. R. 359; *Town of Linden v. Fischer,* 154 Minn. 354, 191 N. W. 901; *Campbell v. Motion Picture M. O. Union,* 151 Minn. 220, 186 N. W. 781; *State v. Vaughan,* 81 Ark. 117, 98 S. W. 685, 7 L. R. A. (N. S.) 899, 118 A. S. R. 29, 11 Ann. Cas. 277; Annotations, 52 A. L. R. 79, 40 A. L. R. 1154, 91 A. L. R. 320, 94 A. L. R. 363; 28 Am. Jur., Injunctions, §§ 148, 150, 155; 3 Dunnell, Dig. & Supp. § 4483a.

the statute and fixing punishment permitted by the statute. It is the only way the State has of preventing the abuse of the confidences it has reposed in these corporate creatures which are of its own making."

3. It is undoubtedly true that if a domestic corporation is indicted and convicted for a violation of § 623.01 such criminal conviction may be made the basis for charter forfeiture proceedings under § 623.02. See, *State v. Minneapolis Milk Co.,* 124 Minn. 34, 144 N. W. 417. An action for cancellation of a corporate charter is, however, so distinctly a civil proceeding that, in absence of a statutory requirement to the contrary, a criminal conviction for the violation of the antitrust statute is neither a condition precedent to the commencement of the action nor to a judgment of forfeiture. In establishing a basis for charter forfeiture, a violation of the antitrust statute, § 623.01, may be determined independently of any criminal prosecution or conviction. *State ex inf. McAllister v. Blattner Bros.,* (Mo.) 226 S. W. 253; *State ex rel. Hadley v. Standard Oil Co.,* 218 Mo. 1, 116 S. W. 902 (affirmed, 224 U. S. 270, 32 S. Ct. 406, 56 L. ed. 760, Ann. Cas. 1913D, 936); 41 C. J., Monopolies, § 262; Ferris, Extraordinary Legal Remedies, § 142. The primary purpose of the proceeding is to establish an abuse of the corporate franchise privilege, irrespective of whether a crime has been committed, as a basis for adjudging that such abuse constitutes a forfeiture of the charter. See, *State ex rel. Hahn v. Minnesota Cent. Ry. Co.,* 36 Minn. 246, 258, 30 N. W. 816, 817.

4. Clearly, plaintiff was and is qualified to begin and conduct charter forfeiture proceedings. Has he, however, pursued the right remedy? Section 623.02 gives him the right to begin proceedings, but does not designate the form of action. Obviously, the right to begin the necessary proceedings does not dispense with the need for selecting the proper remedy. In *Dennistoun v. Davis,* 179 Minn. 373, 229 N. W. 353, this court pointed out that although the attorney general in seeking to vacate a corporate charter may proceed either by civil action under § 556.07 or by quo warranto, any other person, in the absence of express statutory authorization, must rely exclusively on quo warranto as a remedy. See *Ray v. Homewood Hospital, Inc.* 223 Minn. 440, 443, 27 N. W. (2d) 409, 411. The civil actions authorized by §§ 556.07 and 301.57 are available only to the attorney general, and it should be noted that, in absence of these two sections, aside from any revocation of a corporate charter as part of a direct criminal proceeding, the attorney general himself would be limited to a writ of quo warranto. In failing to use the only remedy available to a private relator, plaintiff's action must fail. See, 2 Dunnell, Dig. & Supp. § 2130; 5 *Id.,* §§ 8060, 8065, and 8074.

The judgment of the trial court is affirmed.

Affirmed.

Mr. Justice Oscar R. Knutson, not having been a member of the court at the time of the argument, took no part in the consideration or decision of this case.

[¶ 62,288] Alden-Rochelle, Inc., et al. v. American Society of Composers, Authors and Publishers, et al.

In the United States District Court for the Southern District of New York. Civil 18-6. July 19, 1948.

Clayton Antitrust Act

Musical Compositions—Licensing of Performing Rights—Suit for Damages and Injunctive Relief.—In an action brought by the operators of 200 motion picture theatres against an association of composers, authors and publishers for engaging in activities in restraint of trade, in violation of the antitrust laws, it is held that it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement. The combination of the members of the association in transferring all their non-dramatic performing rights to the association is a combination in restraint of trade and commerce. The power of the association, as a monopoly, to demand higher license fees, coupled with the combination of the members' copyrights, constitutes an unlawful restraint of trade. Plaintiffs are not entitled to damages, inasmuch as it is found that they were not injured

by the antitrust violations. No private right of action arises unless a plaintiff is injured in his property or business by such violations. The threatened use of the power which the association has unlawfully acquired to demand unfair and exorbitant license fees furnished sufficient grounds for the exercise by the court of its ordinary equitable powers to prevent any threatened injury to plaintiffs.

See the Clayton Act annotations, Vol. 1, ¶ 2024.49, 2024.62, 2036.15.

For plaintiffs: Weisman-Celler, Quinn & Allan, New York, N. Y.

For defendants: Schwartz & Frohlich, New York, N. Y.

[*Nature of Action*]

LEIBELL, D. J.: Two claims are asserted in this suit by each of the 164 plaintiffs who operate 200 motion picture theatres. Both claims are based on violations of the Federal anti-trust laws by the American Society of Composers, Authors and Publishers (Ascap) and its members and officers. The first claim is a private right of action for treble damages, which is specifically conferred by statute [Title 15 U. S. C. § 15] on any one who has been injured in his property or business by conduct of another which violates the provisions of the anti-trust laws. The second claim is a suit for injunctive relief [Title 15 U. S. C. § 26] against threatened loss or damage by a violation of the anti-trust laws.

The complaint was filed in this Court on April 9, 1942. Between July 1943 and August 1946 the litigation was dormant. A pre-trial hearing was had before Judge Knox in December 1947, and an order was made after the hearing which was very helpful when the case was tried early in March 1948. Counsel filed their briefs and proposed findings of fact and conclusions of law late in April. After reviewing the record, considering the arguments of counsel and the cases cited in their briefs, I have concluded that Ascap has violated the anti-trust laws, but that plaintiffs have failed to prove that they have been injured thereby and have sustained damages. Plaintiffs have shown, however, that the power which Ascap had acquired in violation of the anti-trust laws and which Ascap attempted to use in August 1947 in a way that would have increased, many times, the license fees charged exhibitors for the right to perform publicly for profit musical compositions synchronized on films, is a constant threat which may cause loss or damage to the plaintiffs and plaintiffs are entitled to an injunction. The court's findings of fact and conclusions of law are being filed herewith. For a complete understanding of the factual situation, referred to only generally in this opinion, the findings of fact should be consulted.

§ 1 of the Copyright Law (Title 17 U. S. C. § 1) enumerates the exclusive rights which a person who owns a copyrighted work receives under the statute, including the right [§ 1(e)] "to perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof [to print, reprint, publish, copy and vend the copyrighted work] to make any arrangement or setting of it or of the melody of it in any system of arrangement or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced". In *Buck v. Jewell-LaSalle Realty Co.,* (1931) 283 U. S. 191, Mr. Justice Brandeis held that the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which had been broadcast from a radio transmitting station, constituted a performance of the composition within the meaning of the act, even though no detailed choice of selections was given to the hotel proprietor who had to accept whatever program was transmitted. "Intention to infringe is not essential under the Act."

Origin and Activities of Ascap

The defendant Ascap is a voluntary association which was organized in 1914 for the purpose of licensing the public performance of musical compositions, of which its members owned the copyrights. Acting alone, the individual authors and composers were unable to detect infringement of their copyrights by those who performed their compositions publicly for profit. Even the corporate publishers of musical composi-

tions could not do so. It was felt that an organization, with branches throughout the United States, could "police" the public performances of musical compositions by bands and orchestras, in hotels, theatres and places of amusement. If infringements were detected, Ascap would endeavor to get the infringer to take a blanket license covering all the works of Ascap's members, for a reasonable annual fee; and if the infringer refused to take a license, Ascap would have a suit filed for infringement.

So that Ascap might act for all its members most effectively, each member assigned to Ascap the non-dramatic performing rights of his copyrighted musical compositions. The sums that Ascap collected were kept in a common fund and a division of the proceeds, less expenses, was made at regular intervals. The division was one-half to the publisher members, and one half to the composer and author members.

Ascap is governed by a board of directors of 24 members. Prior to 1941 they were self-perpetuating, but since then 12 members are selected by the publishers and 12 by the composers and authors. The 12 who represent the publishers determine how the publishers' share of the fund shall be divided among the publishers; the 12 directors who represent the composers and authors perform a like service in allotting their respective shares to the composers and authors. From their determination there is a right of appeal to a Board of Appeal; and from its decision an appeal may be taken to the full board of directors.

The division of the publishers' share among the publisher members is based upon the popularity, earning capacity, seniority and the number and quality of the compositions in a publisher member's catalog. Popularity or vogue is determined by a survey of the compositions played over certain broadcasting chains in a given period.

The composers and authors are classified into a number of groups and grades, 19 in all. Many elements are considered in fixing a composer's classification. Length of membership, quality of compositions, popularity or vogue, earning power for the Society and the like, are duly weighed and the classification determined in the manner provided by the Articles of Association.

When silent pictures were shown in theatres the music was supplied either by a piano player or by an orchestra, which varied in size according to the size and importance of the theatre. The theatre owners refused to pay any royalties or license fee for performing the musical compositions played in the theatres. Ascap brought a number of suits for infringement. In 1923 theatre owners took a blanket license for each theatre and paid Ascap an annual fee based on seating capacity. The form of the license and the fees paid were the result of negotiations between Ascap and trade organizations of theatre operators.

When motion pictures with sound were introduced in 1928, new problems were presented to Ascap and its members. The so-called "talkies" showed the action of the members of the cast and reproduced their speech. Music was employed as part of the background for some of the scenes. At first the sound part of talkies was recorded on phonograph discs which were so operated that they synchronized with the pictures projected on the screen. Later, the speech of the actors, the music and sound effects, were recorded on the "sound track" of the film, which paralleled the pictures, so that when the pictures were projected on the screen the sound was heard by the audience. The Columbia Encyclopedia explains this as follows: "The sound track method (now commonly used)" is one "by which the sound is recorded on a strip of sound cells attached to the film itself and projected with the aid of the photo-electric cell". The development and application of this invention are described as follows: "In 1926 the first successful efforts were made to add sound to sight; in 1927 sound effects and bad music gave way to steadily improving spoken dialogue, and 'The Jazz Singer' with the well known Al Jolson, made a sensation with its spoken sequence; in 1928 the first all talking picture, 'The Lights of New York' appeared."

After the introduction of music on films, motion picture producers began acquiring the catalogs of music publishers, many of them members of Ascap. Ascap's writer members were requested by producers, as the need arose, to license the recording of specific musical compositions on films. From all of this the following arrangements evolved. A member of Ascap, on request, licensed a motion picture producer to record, *i. e.,* to synchronize his musical compositions on the film, but expressly excepted the performing rights of the musical composition. Motion

picture producers rented their films to the exhibitors (theatre operators) with a provision in the contract that the film would be exhibited only in a theatre for which Ascap had issued a license to perform publicly for profit the musical composition of Ascap's members. The exhibitor in order to show the film had to obtain a license from Ascap. His contract with the producer barred him from altering or deleting any part of the rented film. Licenses were issued by Ascap to exhibitors in blanket form, good for at least one year, and covering all music of which Ascap held the performing rights. The license fee was based on the seating capacity of the theatre. The charge per theatre per annum was very reasonable. On the basis of 25 compositions per film and 6 shows a day for every day in the year, the charge averaged about one mill per musical composition performance in a 500 seat house. The form of the license, which was in effect during the period in suit, was worked out at conferences of various organizations representing the exhibitors with representatives of Ascap in 1933 and 1934. Over 17,000 motion picture theatres have been licensed by Ascap. Ascap has also issued about 13,000 licenses covering the performing rights of the copyrighted music of its members to hotels and places of entertainment.

The motion picture producers through their ownership of a number of music publishing corporations who were members of Ascap, shared in the funds collected by Ascap from all sources, including the licensing of motion picture theatres. The producer publishers drew down 37 per cent of the 50 per cent of the net proceeds of Ascap's licenses, allotted to publisher members by Ascap. For the 10 years of 1937 to 1947 the total amount of Ascap's annual distributions varied between three million and seven million dollars. Almost every film contained some Ascap music and frequently the majority of the musical compositions on a film were Ascap music. The motion picture producers employed talented composers to write the background music for their motion pictures. These musical compositions were never printed and sold, but as a rule they became the property of the producer's music publishing subsidiary. The Ascap catalog, including foreign societies for which Ascap has acted, is estimated to include a million musical compositions.

A "per piece" license would be commercially impracticable. Exhibitors frequently contract for films before they are produced. The "cue sheets" for the film are made available when the picture is released for exhibition purposes. They list the musical compositions included in the picture. The extra labor and great expense of getting "per piece" licenses for the musical compositions on a film is evident when we consider the film needs of an average neighborhood house, which exhibits two double feature shows weekly. Each feature contains parts or selections from about 20 musical compositions. 80 per cent of the musical compositions on films is Ascap music. That would require 64 "per piece" licenses a week, not including licenses for music which is used on newsreels and short subjects. Exhibitors naturally prefer a blanket license good for a year, covering all musical compositions controlled by Ascap. For a "per piece" license Ascap charges $10.00, plus. For a yearly blanket license the cost to the average neighborhood theatre is less than $100.00. Not a single theatre ever requested a "per piece" license from Ascap.

The motion picture producer, when he obtains from an Ascap member the right to record his musical composition on the film, bargains for that right only and does not obtain the right to perform publicly for profit the composition thus recorded. The producer may pay as little as a few hundred dollars or, in rare cases, as much as $25,000 for the right to record the musical composition—the right to synchronize it with the picture on the film. When the producer acquires that right from one who is not a member of Ascap he insists upon buying also the right to perform the musical composition publicly for profit. The exhibitors complain that the producer should follow the same course when he acquires the film recording rights from a member of Ascap. If he did so, then the exhibitors would not need any license from Ascap.

The producer does not acquire the performing rights from Ascap members, because they are prohibited by their arrangement with Ascap from licensing the performing rights to motion picture producers. The major producers also have a financial interest in the license fees Ascap collects, because those producers own music publishing corporations which are publisher members of Ascap, and thus they share in the one-half of Ascap's net receipts which are allotted to the publisher members.

Ascap's Violation of the Anti-Trust Laws

Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. Although each member of Ascap is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights. *Straus v. Amer. Publishers Assoc.,* 231 U. S. 222; *Ring v. Spina,* 148 F. 2d 647; *Watson v. Buck,* 313 U. S. 387 at p. 404; *Interstate Circuit Inc. v. U. S.,* 306 U. S. 208. The result of such a combination "is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses" (*U. S. v. Paramount Pictures,* decided by the United States Supreme Court May 3, 1948).

That Ascap is a monopoly, within the language of § 2 of the anti-trust laws, was clearly established at the trial. In *United States v. Aluminum Co. of America,* 148 F. 2d 416, at p. 424, the court expressed the view that a ninety per cent share of the market was enough to constitute a monopoly although it was "doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not". In the same case Judge Learned Hand held that "In order to fall within § 2 (of the Sherman anti-trust act) the monopolist must have both the power to monopolize and the intent to monopolize. * * * Alcoa meant to keep and did keep that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded". In the case at bar it was shown that Ascap in the course of 34 years has built up a monopoly of the music that is used in the production of motion pictures, and in so doing it has violated § 2 of the anti-trust laws. "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise the prices or to exclude competition when it is desired to do so". *American Tobacco Co. v. U. S.,* 328 U. S. 781 at p. 811. Ascap has that power.

The combination of the members of Ascap in transferring all their non-dramatic performing rights to Ascap, is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the anti-trust laws. It restrains competition among the members of Ascap in marketing the performing rights of their copyrighted works. And by barring a member from assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from Ascap covering the performing rights of the Ascap music synchronized on the film. That result is accomplished through an unlawful combination with the motion picture producers in violation of § 1 of the anti-trust laws. The arrangement by which the producers consent that there be specifically reserved to Ascap the right to lisense the performing rights, is supplemented by a provision in the contract between the distributor of the motion pictures and the exhibitors which limits the public exhibition of the film for profit to theatres which have an Ascap license. The producers and Ascap's members thus combine the monopoly of the copyright of the motion picture with the monopoly of the copyright of the musical compositions, which constitutes an unlawful extension of the statutory monopoly of each and violates the anti-trust laws, as a combination in restraint of trade.

The fact that Ascap is a membership association gives it no immunity. "Arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose". *Associated Press v. United States,* 326 U. S. 1 at p. 19. Nor is Ascap shielded by its purpose to prevent the infringement of the copyright of its members. The purpose of the Fashion Guild to prevent "style piracy", *i. e.,* the copying of "original creations", did not take it outside the scope of the anti-trust laws. *Fashion Guild v. Trade Comm'n,* 312 U. S. 457. "The necessities or conveniences of a patentee do not justify any use of the monopoly of the patent to make another monopoly". *Mercoid Corp. v. Mid-Continent Co.,* 320 U. S. 661 at p. 681.

Many of the cases which have held that patent owners may not combine their patents so as to extend the monopoly of the one patent by the monopoly of the other, state the legal principles which prevent two copyright owners from doing a similar thing.

The leading cases, which hold that such a combination of patents constitutes an illegal restraint of interstate commerce, are reviewed in a recent decision, *United States v. Line Material Co., et al.,* 333 U. S. 287. There Mr. Justice Reed wrote for the Court as follows, p. 315:

"The mere fact that a patentee uses his patent as a whole or part consideration in a contract by which he and another or other patentees in the same patent field arrange for the practice of any patent involved in such a way that royalties or other earnings or benefit from the patent or patents are shared among the patentees, parties to the agreement, subjects that contract to the prohibitions of the Sherman Act whenever the selling price, for things produced under a patent involved, is fixed by the contract or a license, authorized by the contract."

The combination of the authors, composers and publishers in the Ascap organization, their obligations to the association, the rights they conferred on Ascap and the reservations they made in their arrangements with the motion picture producers, have given Ascap the power to fix the prices at which the performing rights are sold to the exhibitors. The members share in the license fees collected through the unlawful combination. By pooling their rights and pooling the license fees derived therefrom, each in some way shares in the copyrighted work of the others. This has all the evils of "block booking" which was analyzed and condemned in *U. S. v. Paramount Pictures,* 66 F. Supp. 323 at pp. 348-349; and in the opinion of the U. S. Supreme Court May 3, 1948.

That Ascap was moderate in its demands in 1934 and considerate in the prices it fixed after negotiation with the exhibitors, does not detract from the fact that as a monopoly Ascap had the power to increase those prices to an unreasonable figure by demanding higher license fees, to the financial gain of its members. Ascap showed to what extent that power could be exercised when in August, 1947, it attempted to increase the license fees as much as 200 per cent to 1500 per cent. This price fixing power coupled with the combination of the members copyrights constitutes an unlawful restraint of trade.

Where the power to fix prices is created by an agreement among those who control a substantial part of an industry and who should do business on a competitive basis in a free market, the reasonableness of the prices or the good intentions of the combining units would not absolve them from the charge that they have violated the anti-trust laws. *United States v. Trenton Potteries Co.,* 273 U. S. 392. In the *Trenton Potteries* case the court said: "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. * * * Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed". The above was quoted in the opinion of Mr. Justice Douglas in *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150 at p. 213. See also *Ethyl Gasoline Corp. v. U. S.,* 309 U. S. 436.

Damages

The right to perform a copyrighted musical composition publicly for profit has some intrinsic value. It is one of the rights that a copyright owner receives under § 1(e) of the Copyright Law. As the result of negotiations in 1933-4, Ascap and the exhibitors who acted through their trade organizations, arrived at a schedule of rates which were very reasonable and were based on the seating capacity of the theatre operated by the exhibitor. The contract was a blanket contract covering all Ascap music on films shown at the theatre.

In 1947 Ascap tried to increase those rates, using one filled capacity house at the highest established admission prices as the annual charge for the license. This new proposed rate, when applied to some theatres, meant an increase of 1500 per cent; for other theatres the increase was about 200 per cent. The exhibitors protested and a new set of rates, based on the old formula of a per seat basis, was approved. This resulted in an average increase of about 25 per cent or 30 per cent over the old 1934 rates, the increase to be effective as of March 1948.

At the trial, plaintiffs did not attempt to prove that the 1934 rates, which cover the period of this suit, were excessive. Nor did plaintiffs attempt to prove that a proper rate would be. Plaintiffs' position was that they should not have been obliged to obtain a license for the public performance

rights from Ascap; that the copyright owner of the musical compositions when he sold the synchronization rights to the motion picture producer should have included the public performance rights in the deal; and that if that course had been followed the exhibitor would not have been required to pay anything more to the producer than he pays as the rental for the film. Plaintiffs argue that copyright owners who are not members of Ascap include the public performing rights when they license a motion picture producer to record a musical composition on a film; and that the producer does not have to pay the copyright owner any additional amount for the performing rights of the musical composition. The second half of this statement is disproved by the testimony of Harry Fox.

The acquisition of the synchronization rights from the copyright owners of musical compositions is generally arranged by Mr. Fox, who has operated an agency for that purpose since 1937. He testified that when he is asked by a producer to obtain the rights for a musical composition which is to be incorporated in a motion picture he gets in touch with the owner of the copyright. Apparently he has the records and the organization to do that work. If the copyright of the musical production is owned by a person who is not a member of Ascap, Fox tells the owner that both the synchronization rights and the right to publicly perform the music on the film are to be acquired by the producer. When the producer wants the performance rights as well as synchronization rights, the figure is a little higher. There is no separate figure fixed for the performance rights and another figure for the synchronization rights, in making the deal. Fox tells the copyright owner that he has to include the right to perform with the synchronization rights; and the owner of the copyright usually takes that into consideration in fixing a lump sum price. In most cases the owners consider the performance rights as having some value.

If the owner of the copyright is a member of Ascap, Mr. Fox does not include the performance rights in acquiring the synchronization rights for the producer. The producers know, of course, that the performing rights have a value distinct from the synchronization rights, because of their ownership of music publishing corporations, which are members of Ascap, and through which the producers derive considerable revenue from Ascap's separate licensing of the performance rights to the exhibitors. If the producer lost that source of revenue and also had to pay the copyright owner for the performing rights, the producer would try to pass that extra cost on to the exhibitor. Mr. Brandt who operates 73 of plaintiffs' theatres, admitted that the producer might use this as another argument to get increased rentals; but he expressed the opinion that if the exhibitor did not have to pay a license fee for the performing rights, he would not have to pay any increased film rental to the producer. Brandt based his belief on his feeling that the exhibitors were already paying as much as they could carry. But the load the exhibitors carry includes the amount they pay to Ascap. It is not at all likely that the producers would absorb the cost of the performing rights.

Unquestionably it would be a simpler and a proper arrangement for the owner of the copyright to deal directly with the producer on both the synchronization rights and the performing rights, and thus have the motion picture producer acquire both rights at the same time, so that he in turn could rent the film without requiring the exhibitor to obtain the performance rights from Ascap. But that in some way the value of the performing rights would be claimed by the copyright owner and eventually would be passed on to the exhibitor, I have no doubt at all. The ultimate result would be that the exhibitor would not be separately charged for the performance rights, as he now is through Ascap, but he would be charged for those rights in the total rental he would pay for the film.

The charges made the exhibitor for the performing rights in the formula used from 1934-1947 were in my opinion fair and reasonable. The license fee negotiations were between the two organized groups; Ascap on the one hand and the exhibitors' trade associations on the other. The amount charged was paid, year after year, for 13 years, although the contracts contained 30 day cancellation clauses. Plaintiffs submitted no proof that the performing rights were worth any less than the amount charged under the blanket contract of Ascap. I am satisfied that plaintiffs were not injured by Ascap's violations of the anti-trust laws for the period covered by this lawsuit.

Even if the court should presume injury to plaintiffs from Ascap's violations of the

statute, there would still be no evidence before this court on which it could approximate plaintiffs' damages. Plaintiffs got something under the Ascap contracts. What they got, the performing rights, had some value. Plaintiffs admit that a copyright owner could separately grant the performing rights. The exhibitors themselves agreed with Ascap as to what their value was. Plaintiffs can not recover unless they were led to pay "more than the worth" of the performing rights. *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390. They must show that they were injured. *Twin Ports Oil Co. v. Pure Oil Co.,* 119 F. 2d 472; *Northwestern Oil Co. v. Socony Vacuum Co.,* 138 F. 2d 967.

To apply the principle of forfeiture plus a 200 per cent penalty, for which plaintiffs in effect contend, would be to go far beyond any sanctions the Supreme Court has approved in a private right of action for a violation of the anti-trust laws. The anti-trust laws have been liberally construed. In prosecutions and civil proceedings instituted by the government, the Supreme Court has condemned monopolies and contracts and combinations in restraint of trade. In suits on a private right of action brought by a person claiming that he has been injured by another's violations of the anti-trust laws, the high court has applied a very liberal rule as to the quantum of proof on the issue of damages and has held that the amount thereof need only be approximated, although they should not be the subject of speculation or guesswork. *Bigelow v. R.K.O. Radio Pictures,* 327 U. S. 251. In the case at bar there is no evidence which affords a sufficient basis for approximating plaintiffs' damages, assuming plaintiffs have been injured. No standards of comparison are given to determine if there was any overcharge. No experts were called on the question of the value of the performing rights. *Sheldon v. Metro Goldwyn Corp.,* 309 U. S. 390 at p. 404. In the case at bar the judge is both court and jury. The same rules that should guide a jury in estimating damages should be followed by the judge. In *Bigelow v. R.K.O. Radio Pictures* (*supra* at p. 264) Chief Justice Stone wrote:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

The Supreme Court in applying the equitable principle of "unclean hands" has ruled that the aid of the Court should be denied a holder of a patent in an infringement suit when he has misused his patent and has violated the anti-trust laws. The patent owner is barred from enforcing his patent rights, as long as he continues in his violation of the anti-trust laws. *B. B. Chemical Co. v. Ellis,* 314 U. S. 495; *Morton Salt Co. v. Suppiger Co.,* 314 U. S. 488. The court has also recognized the right of the alleged infringer to counterclaim for damages, based on the private right of action section (§ 15) of the anti-trust laws. *Mercoid Corp. v. Mid-Continent Co.,* 320 U. S. 661 at p. 671. But there is no case that has come to my attention where it has been held that the licensee of a patent is entitled to recover back threefold from the owner of the patent the license fees or royalties he has paid, because the patent owner violated the anti-trust laws in his use of the patent.

Plaintiffs assert that the amount of their damages and the total of the license fees paid are the same, just as a matter of "coincidence".[1] They add that the "coincidence" is due to the fact (a further assumption on their part) that if they did not have to pay Ascap for the performing right they would not have to pay any one for them, and they would get the performing rights for nothing.

Plaintiffs also argue that since Ascap violated the anti-trust law, the license which Ascap granted to the exhibitor was illegal, that therefore the defendant Ascap was never entitled to collect any license fees, and further that the license fees represent the amount of plaintiffs' damages. This argument overlooks the fact that Ascap acquired legal title to the performing rights by assignment from each of Ascap's members. If Ascap had as such assignee collected for each member a "per piece" license fee for the performing rights, and in effect acted only as a collecting agency, there would have been no violation of the law. The blanket licenses were a violation of the anti-trust law and were issued pursuant to an illegal combination. Apart from the statute, the

[1] Plaintiffs have paid about $300,000 in license fees for the period in suit.

license agreements were not inherently vicious and unlawful. The license agreements were unenforceable because of their statutory illegality. The exhibitor got something of value and received what he paid for. The license fees paid were received on completed transactions.

Unless an exhibitor has been injured in his business or property by Ascap's violations no actionable wrong has been done to him. The conduct of Ascap may be a public wrong for which penalties and other remedies are afforded the government under the statute. But no private right of action arises unless a plaintiff is injured in his property or business by the violations of Ascap. True, the cases hold that "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done" and that "difficulty of ascertainment is no longer confused with right of recovery" *(Straus v. Victor Talking Mch. Co. supra.)* "While the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate". *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555. That relates to the damages flowing from the injury.

None of the cases hold that those who have paid a monopolist a price for its product, may claim that the extent of their damage is the full amount paid. The amount of any overcharge may be recovered, but the purchaser should offer some evidence from which the trial court may reasonably approximate the overcharge. The fact that the thing sold is something intangible, a right instead of merchandise, does not alter the requirement of the anti-trust laws that the plaintiff must show that he has been injured. The burden of proof is on plaintiff to show that part of his case by a fair preponderance of the evidence. When it comes to proving the extent of his damage the burden a plaintiff carries in an anti-trust action is lighter; all he need prove are the basic facts from which the court may reasonably approximate the amount of the damages. A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator.

Injunctive Relief

The conduct of Ascap in notifying the theatre exhibitors in August 1947 that the rates for an Ascap license would be increased to such an extent that some theatres would be required to pay 15 times as much as the license fees under which they had been operating since 1934, is an indication of the power that Ascap has unlawfully acquired by its own arrangements with its members and by their arrangements with the motion picture producers. The threatened use of that power to demand unfair and exhorbitant license fees furnishes sufficient grounds for the exercise by the court of its ordinary equitable powers to prevent any threatened injury to plaintiffs. The Clayton Act (15 U. S. C. § 26) "does not go farther than to give an injunction to private persons against threatened loss" (Mr. Justice Holmes in *Fleitman v. Welsbach Co.,* 240 U. S. 27 at p. 29). To avail himself of § 26 a plaintiff must show threatened injury for which he is without adequate remedy and for which a court of equity is able to provide a remedy. (Dissenting opinion of Chief Justice Stone in *Georgia v. Pennsylvania R. Co.,* 324 U. S. 439 at p. 475). The Clayton Act "gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the anti-trust laws, under the conditions and principles regulating the granting of such relief by courts of equity" *Duplex Co. v. Deering,* 254 U. S. 443 at pp. 464-5. It has been held that prior to the passage of the Clayton Act in 1914, "a private party could not maintain a suit for injunction" under the Sherman Act. *Duplex Co. v. Deering,* 254 U. S. 443, 465.

In the case at bar Ascap and various groups or organizations of exhibitors in February 1948 arrived at a new set of rates which represented an average increase of 25 per cent to 30 per cent over the 1934 rates. The August 1947 demands were abandoned by Ascap. Plaintiffs have been offered the same type of contract (a long term contract) that other exhibitors accepted in February 1948. Does this remove the need for injunctive relief? I have concluded that it does not. Plaintiffs are entitled to have this court exercise its equitable powers to prevent a recurrence of what happened in August 1947 and to have their rights adjudicated and protected by a decree of the court, because the unlawful arrangements between Ascap and its members, and between the members and the motion picture producers, is a continuing one and is a clear violation of the anti-trust laws.

The Defense of "Unclean Hands"

Defendants have pleaded as a special defense that a great number of the plaintiffs are themselves a monopoly and therefore are barred from equitable relief on the doctrine of "unclean hands". Brandt, who owns a majority interest in 53 theatres also buys films for 90 other theatres. The Supreme Court has condemned combinations of exhibitors and has pointed out the evil practices of such combinations and the unlawful advantages they have been able to obtain through their practice of group buying. *U. S. v. Crescent Amusement Co. et al.*, 323 U. S. 174; *U. S. v. L. C. Griffith et al.* (decided by the Supreme Court May 3, 1948); *Schine Chain Theatres Inc. et al. v. U. S.* (decided by the Supreme Court May 3, 1948). Brandt's testimony indicates that he has obtained some of those advantages. But the alleged anti-trust violations of a plaintiff in this case cannot properly be said to have an "immediate and necessary relation to the equity that he seeks in respect of the matter in litigation". Equity applies the doctrine of unclean hands "only for such violations of conscience as in some measure effect the equitable relation between the parties in respect of something brought before the court for adjudication." *Keystone Co. v. Excavator Co.*, 290 U. S. 240 at p. 245. The methods employed by plaintiff exhibitors, who negotiated for the films with the distributors, are only remotely related to the issue in this litigation, which concerns the defendants' practices in licensing the exhibitors to perform publicly for profit the music that is synchronized on the film. The special defense of "unclean hands" is therefore dismissed.

Attorneys' Fees

I have concluded that plaintiffs have not shown any injury from defendants' violations of the anti-trust laws and that, even if we presume injury, plaintiffs have not proved any thing from which the court could approximate the damages. It follows that plaintiffs are not entitled to a money judgment and therefore cannot be awarded "a reasonable attorney's fee" under 15 U. S. C. § 15. "The court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws". *Allen Bradley Co. v. Local No. 3*, 51 F. Supp. 36 at p. 40. In *Decorative Stone Co. v. Building Trades Council*, 23 F. 2d 426, it was held that "the allowance of an attorney's fee * * * is incidental to the statutory right to damages, and was properly denied in the equity proceedings", brought under 15 U. S. C. § 26. Even though plaintiffs have made out a case for equitable relief under 15 U. S. C. § 26 they may not recover "a reasonable attorneys' fee" because they have failed to establish their claim for damages under 15 U. S. C. § 15.

Plaintiffs' claims for money damages and for a reasonable attorney's fee under § 15 are denied. Plaintiffs' claims for injunctive relief under § 26 are granted to the extent indicated in the Court's Conclusions of Law.[3] Settle a judgment and decree accordingly.

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[3] "XXVII. Plaintiffs are entitled to injunctive relief under Title 15 U. S. C. § 26, as follows:

(a) Directing ASCAP to divest itself with all reasonable speed of all rights of public performance for profit through the exhibition of motion picture films, as musical compositions which have been synchronized with motion picture films, and to assign said performance rights to the owners of the copyright of said musical compositions;

(b) Restraining ASCAP from obtaining the right of public performance of any musical composition synchronized with motion picture films when such musical composition is performed publicly for profit in conjunction with the exhibition of such motion picture films;

(c) Restraining ASCAP's members from refusing to grant to motion picture producers the right to publicly perform for profit through the exhibition of motion picture film, all musical compositions which they allow motion picture producers to synchronize with motion picture film;

(d) Restraining ASCAP's members from licensing, except to motion picture producers, the right of public performance for profit through the exhibition of motion picture films, of musical compositions synchronized with motion picture films;

(e) Restraining ASCAP and its members from conspiring with motion picture producers for the purpose of including a clause in contracts issued by producers to exhibitors directly or indirectly requiring exhibitors to obtain a license from ASCAP as a condition to the exhibition of the licensed pictures."

[¶ 62,289] Mayer Bros. Poultry Farms v. Ely Meltzer, individually and as president of the Poultry Shochtim Union of Greater New York, Local 370, an unincorporated association, and George Latterman, impleaded, etc.

In the New York Supreme Court, Appellate Division, First Department. Nos. 1172, 1173, 1174. June 30, 1948.

Norris-LaGuardia Act

Restraint of Trade by Labor Union—State Regulation Affecting Interstate Commerce—Concurrent Federal and State Jurisdiction.—A secondary boycott against poultry slaughtered in another locality is an unlawful restraint of trade. The Norris-LaGuardia Act, as read in connection with the Sherman and Clayton Acts, does not preclude all state antitrust regulation, but rather leaves exclusively to the state courts the granting of injunctive relief from restraint of trade by labor organizations. The Norris-LaGuardia Act does not prevent a New York court from issuing an injunction, permissible under the New York Anti-Injunction Act, against unlawful restraint of trade by a union, merely because such restraint occurs in interstate commerce.

See the Norris-LaGuardia Act, Vol. 1, ¶ 706, and the Sherman Act annotations, Vol. 1, ¶ 1280.275.

For plaintiff: Newman & Bisco, Allan Rogow, George B. Balamut and Judson W. Pearl, New York, N. Y.

For defendants: Ashe & Rifkin, David I. Ashe, New York, N. Y.

[*Statement of Case*]

Van Voorhis, J.: The plaintiff, in the state of New Jersey, is engaged in the business of slaughtering, freezing, packaging and selling kosher poultry, according to allegations in the complaint. It is further alleged that during the latter part of 1947, plaintiff changed its policy of disposing of its frozen poultry through caterers, and other institutional buyers, and prepared to sell exclusively to retail kosher butcher stores and frozen food stores. This entailed packaging its products in individual packages, for eventual purchase and consumption by the public. Plaintiff took steps to enter and develop the New York City market, including the leasing of office space in the City of New York, contracting for advertising, hiring a sales manager and salesmen for said territory, obtaining trucking service, and arranging with retailers for the installation of suitable freezing units to preserve the frozen poultry while awaiting sale in their stores. The complaint alleges that a substantial expenditure of money was made for these purposes, that its frozen poultry actually was sold to numerous kosher retail butcher stores and frozen food stores, and that there was general retailer and consumer acceptance of its products in this city. Defendant has picketed the retailers handling plaintiff's products, in an endeavor to monopolize the market for the benefit of operatives in New York City by excluding all poultry that has been killed elsewhere, and is alleged to have been so successful in doing so that all kosher butcher shops and retail stores in the City of New York have either discontinued or refused to handle plaintiff's poultry.

This action has been brought for an injunction, to restrain the defendant union from interfering with the plaintiff's business by preventing the kosher retail butcher shops and retail food stores in New York City from buying its frozen poultry.

[*Issues on Appeal*]

Three appeals by plaintiff are before this Court: (1) from an order dismissing the complaint on the ground that it fails to state facts sufficient to constitute a cause of action against the defendant union; (2) from an order dismissing the complaint on similar grounds as against the individual defendants Ely Meltzer and George Lederman; and (3) from an order denying plaintiff's motion for a temporary injunction for the relief demanded in the complaint. The order dismissing the complaint as against the individual defendants should be affirmed without further comment. The rest of this opinion is concerned with whether the complaint was rightfully dismissed as against the union, and whether plaintiff's motion for a temporary injunction against defendant union should have been granted.

The defendant union is known as Poultry Shochtim Union of Greater New York, Local 370 (hereinafter described as the defendant), which is affiliated with Amalgamated Meat

Cutters and Butcher Workmen of North America, A. F. of L. "Shochtim" is the plural of "shochet", who is a Hebrew religious official, certified in writing by one or more rabbis as being qualified to slaughter animals in accordance with the ritual requirements and precepts of the Hebrew Orthodox faith.

Plaintiff's poultry is slaughtered and frozen in New Jersey by a duly authorized shochet, and is conceded to be kosher. There is consequently no religious question in this case. It has been stated that in order to conform to the Talmud, meat and poultry must be slaughtered in the same city in which it is consumed, but manifestly no such tenet is recognized by the Orthodox Hebrew community, nor does such a contention appear to be urged seriously in the affidavits. It is not contended that the mere circumstance that meats or poultry are frozen deprives them of the religious sanction to which they are otherwise entitled.

[*Absence of Labor Dispute*]

There is no labor dispute between these parties. The controversy involves no existing nor prospective agreement concerning employment, wages, hours or working conditions. The defendant is not seeking to enroll plaintiff's employees as members of its union, which would be impossible, in any event, inasmuch as defendant's membership[s] are required to be New York City operatives, whereas plaintiff's poultry is slaughtered in New Jersey. There is no question concerning the handling of nonunion products nor of inter-union rivalry. Plaintiff's employees are members of locals affiliated with the same parent union as the defendant. The shochet who slaughters plaintiff's poultry in New Jersey is a member at large of the same parent union. It is not necessary to consider whether, or to what extent, it would alter the result if some of these circumstances were absent. This is not a labor dispute under the broadest construction of that term.

The purpose of defendant's activities which are sought to be enjoined, as alleged in the complaint and moving affidavits and admitted in an affidavit by defendant's president, is to keep away from the New York City market all frozen kosher poultry slaughtered elsewhere. Plaintiff's frozen products had been making inroads in this area, and were evidently resulting in reductions in prices to consumers and in the quantity of poultry slaughtered in New York City. Defendant's aim is to limit this market to poultry which is slaughtered in this city, so as to obtain better wages due to a more favorable economic climate than would otherwise prevail.

The defendant contends that since wages may indirectly be affected, this is a legitimate labor objective. It is true that the pay of the shochtim from their employers varies with the quantity of animals which they kill, and that their remuneration is affected by the number of fowl that they slaughter. This is not different in principle from the basis on which any pieceworker is paid, and it does not transform into a labor matter every economic question affecting the volume of the employer's business. The defendant's contention overlooks the fact that there is no dispute concerning wage scales. It does not appear that any demands for a higher rate of pay have been made against the employers of defendant's members, let alone against plaintiff.

[*Private Embargo*]

A private embargo to prevent foodstuffs from entering New York City is not a lawful objective, and is not made so by using procedures which would be legitimate if directed toward the accomplishment of other purposes. The effectiveness of this embargo is attested by the number of kosher retail stores enumerated in plaintiff's moving affidavits which have discontinued buying plaintiff's products, since defendant has been picketing their places of business. The effect of the picketing was drastically to curtail the sales of all of the wares of these stores, and not merely their sales of plaintiff's poultry. Many of their regular customers would not cross a picket line, regardless of the nature or justice of the dispute. It is uncontradicted that these and other stores were told that they must return all of plainitff's products, and accept and sell no more of them. The effect was what had been planned and expected. The stores which had taken plaintiff's products returned or disposed of them, and discontinued all future purchases. Word spread throughout the trade to prospective customers that if they handled plaintiff's products they would be similarly treated. Moving affidavits by retailers have been submitted verifying these facts.

Except under the police power, even the legislatures of the states are not permitted to erect embargoes, which is a prerogative of the Congress alone, and even that is forbidden except against foreign trade (Constitution of the United States, Article I, sections 8, 10). If the courts were to tolerate the erection of effective barriers of this sort by employers or employees whenever either shall think it to be to their economic interest to do so, what has been done in this case respecting poultry could be done with regard to other kinds of food or merchandise. In the case of foodstuffs alone, the disastrous consequences of such embargoes need not be left to the imagination, in a community which is as independent upon outside sources of supply as the City of New York. That is the interest of the consuming public in this issue. The law does not ignore these realities.

The complaint has been dismissed, and a temporary injunction refused by Special Term upon the ground that, regardless of whether a labor dispute exists, as defined by state law, the Supreme Court of the United States has held in *Bakery Drivers Local v. Wohl* (315 U. S. 760) and the Court of Appeals in *People v. Muller* (286 N. Y. 281), that peaceful picketing unaccompanied by false statements, is protected under all circumstances by the Fourteenth Amendment to the Constitution of the United States guaranteeing the right of freedom of speech. On appeal, respondent further relies upon *Allen Bradley Co. v. Union* (325 U. S. 797). That case held that it is in violation of the Sherman Anti-Trust Act for labor unions, and their members, to further their own interests as wage earners by combining with manufacturers, and other employers, to exclude out-of-state competition. The injunction which had been granted by the District Court was limited, however, so as not to enjoin the union from doing this by itself without complicity with an employer or employers. These cases require further discussion of these problems.

[*Allen Bradley Case Distinguished*]

Allen Bradley Co. v. Union bears considerable resemblance to the present case in so far as the facts are concerned. It is urged that the refusal by the Supreme Court of the United States to enjoin alone from engaging in the activities which were prohibited if performed in combination with non-labor groups, precludes the issuance of an injunction against the defendant union and its members in the case at bar. We have arrived at a different conclusion.

In the first place, there was no controversy over this point in the *Allen-Bradley* case, since the only activities there sought to be enjoined were carried on by the union in conjunction with employers; in the decision of the issue it was not necessary to consider what would have been the result if the union had acted alone, and the employers had stood aside as silent co-beneficiaries, participating only in the fruits of the enterprise.

In the second place, the *Allen-Bradley* suit was brought under the Sherman Anti-Trust Act, as modified by the Clayton Act, and as further modified by the Norris-LaGuardia Act. The Supreme Court recognized that after the adoption of the Clayton Act, but before the Norris-LaGuardia Act, secondary boycotts were held to be in violation of the Sherman and the Clayton Acts. (*Loewe v. Lawler,* 208 U. S. 274, 303-304; *Duplex Co. v. Deering,* 254 U. S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.,* 274 U. S. 37.) The opinion in the *Allen Bradley* case continues:

> "Again the unions went to Congress. They protested against this Court's interpretation, repeating the arguments they had made against application of the Sherman Act to them. Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the *Duplex* and *Bedford* decisions, passed the Norris-LaGuardia Act, 47 Stat. 70." (325 U. S. at p. 805).

It thus appears that the anti-trust laws, as at present interpreted by the United States Supreme Court, have been limited and restricted by the Congress in their effect so as to remove from their scope the type of restraint of trade represented by the secondary boycotting which has been held to be in restraint of trade in the *Loewe, Duplex* and *Bedford* decisions. This exclusion from the impact of these Federal statutes, the first of which was enacted to give the Federal courts jurisdiction to apply the common law doctrines against monopoly and restraint of trade where interstate commerce was involved (*United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271, C. C. A. 6, per Wm H. Taft, J.), does not have the effect of abrogating such rules in so far as they have been adopted and remain in force in the several states.

The secondary boycott decisions of the Supreme Court of the United States, before the adoption of the Norris-LaGuardia Act emphasize that such activities are in restraint of trade, and would have continued to be held so by the Federal courts under the anti-trust laws, unless their jurisdiction under said acts over that phase of the subject had been withdrawn. This withdrawal has left in force the statute and common law of the states upon the same subject, which in many instances antedated the adoption of the Sherman Act, and the power of the state courts to enforce their own law remains, even in cases involving interstate commerce, where the Federal Government has not occupied the entire field (*Standard Oil Co. v. Tennessee,* 217 U. S. 413, 421). In that case the court overruled the following contention (p. 431):

"It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendant's oil against interstate competition, it could not be made the subject of punishment by the State; that the offense, if any, is against interstate commerce alone."

[*State Regulation Not Excluded*]

The question whether state jurisdiction has been ousted is accustomed to arise where a state has imposed a burden upon interstate commerce (e. g., *State of Missouri ex rel. Barrett v. Kansas Natural Gas Co.,* 265 U. S. 298), not where, as here, the state law prevents burdens from being laid upon commerce, whether interstate or intrastate (*S. C. Highway Dept v. Barnwell Bros.,* 303 U. S. 177, 189; *Parker v. Brown,* 317 U. S. 341). An intention of Congress to exclude states from asserting their police power must be clearly manifested (*Allen Bradley Local v. Board,* 315 U. S. 740).

The present case involves interstate commerce, inasmuch as the frozen poultry is imported into New York City from New Jersey; but the circumstances that it comes from without the state is coincidental, inasmuch as the barrier which the defendant has established applies equally to poultry slaughtered in Westchester County, for example, or in any of the other counties in this State.

In *Leader Theatre Corp. v. Randforce Amusement Corp.,* 186 Misc. 280, aff'd 273 App. Div. 844, there was occasion to consider the statute of section 340 of the General Business Law, outlawing contracts or combinations for monopoly or in restraint of trade, in the light of the Federal anti-trust laws. It was states at the Trial Term, per Botein, J. (pp. 283-4):

"It is now well established that States, under their police power, can enact and implement legislation which affects interstate commerce, when such commerce has significant local consequences (see *S. C. Highway Dept. v. Barnwell Bros.,* 303 U. S. 177; *Duckworth v. Arkansas,* 314 U. S. 390; *Parker v. Brown,* 317 U. S. 341; *U. S. Underwriters Assn.,* 322 U. S. 533, 548). Of course, State legislation which conflicts with Federal legislation (e. g., *McGoldrick v. Gulf Oil Corp.,* 308 U. S. 414; *Cloverleaf Co. v. Patterson,* 315 U. S. 148, or which discriminates against interstate commerce, is unconstitutional (The Federalist, No. 41; *Di Santo v. Pennsylvania,* 273 U. S. 34; *Hartford Indemnity Co. v. Illinois,* 298 U .S. 155; *Robbins v. Shelby Taxing District,* 120 U. S. 489, 494; *Caldwell v. North Carolina,* 187 U. S. 622). And State legislation purporting to affect interstate commerce is likewise ineffective if such state legislation has been specifically precluded by Congressional action. * * * More particularly, the Supreme Court of the United States has sustained the applicability of a State antitrust act while the Sherman Act was in effect, although that State act affected interstate commerce (*Standard Oil Co. v. Tennessee,* 217 U. S. 433). Indeed, the joint applicability of the Sherman Act and State antitrust legislation has scarcely ever been questioned (*Paine Lumber Co. v. Neal,* 212 F. 259, affd. 214 F. 82, affd. 244 U. S. 459; *Straus v. Am. Publishers' Assn.,* 231 U. S. 222)."

[*Interpretation of State Act*]

It is not deemed that Section 676-a of the New York State Civil Practice Act was intended to have the effect of amending the substantive state law (common or statute) respecting restraint of trade and kindred subjects which, in the *Allen Bradley Co.* case, the United States Supreme Court ascribed to the Norris-LaGuardia Act (47 Stat. 70, 15 U. S. C. §§ 101-115) as amending the Federal antitrust laws. That there is a difference in the judicial construction of the two acts is illustrated by *Bakery Drivers Local v. Wohl,* where the Court of Appeals (284 N. Y. 788) held that the situation there presented did not fall within Section 876-a, which was recognized by the United States Supreme Court to be a final adjudica-

tion upon construction of the state statute (315 U. S. 769, 775), but it was nevertheless held to be a labor matter as a Federal question.

In *Marsich v. Eastman Kodak Co.,* 244 App. Div. 295, aff'd without opinion 269 N. Y. 621, it was stated by the Appellate Division (pp. 296-7):

"A Federal decision contrary in principle is not binding upon a State court in respect of a State statute or of a domestic doctrine not involving a Federal question. (*People ex rel. Central Park, etc., R. R. Co. v. Willcox,* 194 N. Y. 383, 386, per Cullen, Ch. J.; *Johnston v. Compagnie Generale Transatlantique, 242 id.* 381, 386, per Pound, J.; *People ex rel. Rice v. Graves,* 242 App. Div. 128.)

"In considering the matter here involved, as was said in a similar situation, 'We may eliminate the Federal Anti-Trust Laws' (*Barns v. Dairymen's League Co-operative Assn., Inc.,* 220 App. Div. 624, 635), and, as a consequence, the decisions thereunder. The enforcement of rights under such Federal statutes may be had in the Federal courts only. (*Barns v. Dairymen's League Co-operative Assn., Inc., supra,* p. 635; *Eastman Kodak Co. v. Powers Film Products, Inc.,* 189 App. Div. 556, 560.)

"Federal cases interpreting Federal statutes, or relating to interstate situations, are not controlling when there are State decisions relating to the State statute invoked which may, in some respect, place upon a State statute an interpretation different from that placed by the Federal courts upon a different though somewhat similar Federal statute."

[*Secondary Boycott*]

The New York courts have held repeatedly that labor unions engaged in the conduct of secondary boycotts may be enjoined even where, unlike the present case, they were conducted in aid of a legitimate primary labor objective (*Auburn Draying Co. v. Wardwell,* 227 N. Y. 1; *Canepa v. Doe,* 277 N. Y. 52; *Opera on Tour, Inc. v. Weber,* 285 N. Y. 348; *Scharf v. Doe,* 247 App. Div. 882; *Chapman v. Doe,* 255 App. Div. 893; *Gulf Oil Corp. v. Smallman,* 270 App. Div. 129; *Jacobs v. Eisen,* 272 App. Div. 946; *Brennan v. Eisen,* 188 Misc. 672, aff'd 272 App. Div. 799; *Elizabeth Arden Sales Corporation v. Hawley,* 176 Misc. 821, aff'd 261 App. Div. 953).

The following cases held secondary boycotts to be in violation of Section 722 (2) of the Penal Law: *People v. Bellows,* 281 N. Y. 67; *People v. Fleishman,* 36 N. Y. S. (2d) 559; *Miller v. Tobin,* 189 Misc. 296.

To a limited extent, under facts different from those involved herein, secondary boycotts have been allowed in *People v. Muller,* 286 N. Y. 281 and *Goldfinger v. Feintuch,* 276 N. Y. 281, but we believe, without reversing the general rule (*Enterprise Window Cleaning Co., Inc., v. Slowuta,* decided May 10, 1948, App. Div., First Department.

In the present instance, unlike most of the other secondary boycott cases, no question is involved of picketing other firms for handling goods of non-union manufacture, nor is any other kind of labor dispute at issue affecting the manufacturer. It is not disputed that plaintiff's frozen poultry has been slaughtered by an employee who is a member at large of defendant's parent union, and who would be ineligible for membership in defendant union due to his place of occupation in New Jersey.

[*Freedom of Speech*]

It remains to consider the effect of the Fourteenth Amendment to the Constitution (which has been held to include the First Amendment) respecting free speech. Picketing was held to be akin to free speech in *Thornhill v. Alabama,* 310 U. S. 88 and in *Carlson v. California,* 310 U. S. 106, in striking down a state statute and a municipal ordinance prohibiting all picketing in every kind of labor dispute. These were held to infringe labor's form of utterance to make its position known in legitimate labor matters. In *A. F. of L. v. Swing,* 312 U. S. 321, it was ruled that the constitutional guaranty of freedom of discussion is violated by the common law policy of a state limiting peaceful picketing by labor unions to cases in which the controversy is between the employer and his own employees, and in *Bakery Drivers Local v. Wohl,* 315 U. S. 769, the constitutional guaranty was applied to what was held to have been in reality a labor dispute, although one which fell outside of the definition of Section 876-a of the New York Civil Practice Act. In none of these cases were the facts at all similar to those at bar. In none of them, as here, was the United States Supreme Court dealing with an unlawul objective, one which is not a labor objective at all.

It is clear that, although partaking in some respects of the nature of free speech,

the other aspects of picketing were not ignored. Thus in the *Wohl* case, in the prevailing opinion it is said (p. 775):

"A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

Likewise in his concurring opinion, Justice Douglas said (p. 776):

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

Ludwig Teller in an article entitled *"Picketing and Free Speech"* (1942), 56 Harvard Law Review 180, says (198):

"The *Allen Bradley* case, in which the Supreme Court sustained the Wisconsin court's injunction restraining picketing of employees' homes, cannot be reconciled with the identification of picketing with free speech."

He adds (p. 203): "Freedom of speech has never been conceived of as a means of carrying on economic warfare by private groups, one against the other," and further adds (p. 201) that often "the picket depends upon the observance by union members of the rule—either formally embodied or tacitly understood—forbidding the crossing of picket lines."

These conclusions have recently been upheld in carefully considered opinions by the Supreme Judicial Court of Massachusetts (*Colonial Press, Inc. v. Ellis,* 321 Mass. 497 [13 LABOR CASES ¶ 63,914]; *Seavall v. Demers,* — Mass. —, 76 N. E. (2d) 12).

In *Carpenters Union v. Ritter's Cafe,* 315 U. S. 722, the court expressly recognized that picketing is a form of economic pressure and not alone the exercise of free speech.

The matter is summed up by E. Merrick Dodd in an article entitled *"Picketing and Free Speech: a Dissent"* in 56 Harvard Law Review, 513, 518:

"The right to free speech is not absolute; and the right to indulge in conduct which is speech and something more is still less absolute, as Mr. Justice Frankfurter indicated in *Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe.* But a prohibition of picketing is under some circumstances an infringement of the right of free speech."

[*Unlawful Purpose*]

Controlling features in this case are that the purpose of defendant's picketing to erect an embargo against importation of frozen kosher poultry into New York City is an unlawful objective; that no labor controversy of any kind is involved; that the information on the signs carried by the pickets, informing customers of the retail stores and butcher shops handling plaintiff's goods that poultry is used which has not been slaughtered by members of defendant's union, while technically accurate, is actually misleading as indicating that there is a labor dispute whereas none exists; that these signs are not displayed for the purpose of publicizing any legitimate grievance of the union, but rather as a verbal act in a conspiracy to accomplish an unlawful purpose. "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part." Holmes, J. in *Aikens v. Wisconsin,* 195 U. S. 194, 205 Justice Holmes continued by saying: "The most innocent and constitutionally protested of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

No charges of a criminal nature are made against this defendant, but the reasoning applies that the means do not justify the end. To identify the cherished constitutional protection of the right of free speech with immunity to impose private embargoes on foodstuffs entering New York City, would be as unwarranted as to assume that free speech allows license to shout "Fire!" in a crowded theatre, to cite Justice Holmes' famous example.

[*"Respective Interests"*]

Section 876-a of the Civil Practice Act does not apply. The only portion of it which is contended to reach this suit is the part which refers to controversies "arising out of the respective interests of employer or employee, regardless of whether or not the disputants stand in the relation of employer and employee." Apart from the illegality of the objective as a secondary boycott, Section 876-a does not apply where the controversy has no relation to terms or

conditions of employment, or relates to something which could not even properly be the subject of collective bargaining (*Opera on Tour, Inc. v. Weber*, 285 N. Y. 348; *Baillis v. Fuchs*, 283 N. Y. 133).

[*Amended NLRA*]

We have not taken into account any effect upon this case of the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, except to note that in providing for the institution of injunction proceedings thereunder by the General Counsel of the National Labor Relations Board, it was clearly not intended to divest the state courts of jurisdiction which they had in cases of this kind before its adoption.

[*Rulings*]

The order granting the motion to dismiss the complaint against defendant Union should be reversed with $10 costs and disbursements to the appellant and said motion denied, and the order denying plaintiff's application for a temporary injunction for the injunctive relief demanded in the complaint should be reversed with $10 costs and disbursements to the appellant and the said application for a temporary injunction should be granted. The order dismissing the complaint against the individual defendants should be affirmed, with $10 costs and disbursements to said defendants-respondents.

PECK, P. J., GLENNON and DORE, JJ. concur.

[Dissenting Opinion]

SHIENTAG, J. (dissenting): I dissent and vote to affirm the order below dismissing the complaint as to the defendant Union and denying the motion for a temporary injunction on the authority of *Allen Bradley Co. v. Local Union*, 325 U. S. 797 [9 LABOR CASES ¶ 51,213]; *Bakery & Pastry Drivers and Helpers Local v. Wohl*, 315 U. S. 769 [5 LABOR CASES ¶ 51,136]; *People v. Muller*, 286 N. Y. 281 [4 LABOR CASES ¶ 60,638]; *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260; *Goldfinger v. Feintuch*, 276 N. Y. 281 [1 LABOR CASES ¶ 18,057]; *Nann v. Raimist*, 255 N. Y. 307; *Stillwell Theatres, Inc. v. Kaplan*, 259 N. Y. 405. The complaint does not charge violence or that the picketing is accomplished by false statements. There was a "labor dispute" within the meaning of Section 876-a of the Civil Practice Act for there is here involved a "controversy arising out of the respective interests of employer and employee regardless of whether or not the disputants stand in the relation of employer and employee."

In any event the defendants were not engaged in an unlawful labor objective. The case of *Allen Bradley Co. v. Local Union*, 325 U. S. 797 [9 LABOR CASES ¶ 51,213], *supra*, is authority for that proposition. It is true that that case involved the application of the Sherman anti-trust law but practically all of the contentions here made by the appellant concerning the absence of a labor dispute, the legality of the labor objective and the restraint upon interstate commerce were urged in that case. Mr. Justice Roberts, who refused to concur in the court's opinion, pointed out that the effect of the Labor union's conduct was to set up a "wall" of exclusion but that view was rejected by the rest of the court. The labor objective not being unlawful, the peaceful picketing and non-misleading appeal to the consuming public come within that area of freedom of speech which is guaranteed by the federal constitution (*A. F. of L. v. Swing*, 312 U. S. 321 [3 LABOR CASES ¶ 51,112]). Unlike *Carpenters & Joiners Union v. Ritter's Cafe* (315 U. S. 722 [5 LABOR CASES ¶ 51,137]) we are confronted here with a limitation upon speech in circumstances where there exists an "interdependence of economic interest of all engaged in the same industry" (p. 727); the retail establishments here being picketed have a direct connection industrially with the controversy.

Moreover, there is here present the "human relationship" and the "actual employment" which were absent in *Opera on Tour v. Weber*, 285 N. Y. 348, 357 [4 LABOR CASES ¶ 60,474]; and unlike that case we have here a "controversy arising out of the respective interests of employer and employee whether they stand in such relationship or not." (p. 357) The object of the picketing and of the appeal to the consuming public in this case is to prevent loss of jobs, wages and welfare benefits to members of the respondent union already employed in the industry. The members of defendant union do not receive a steady weekly wage but are paid according to the number of pounds of poultry slaughtered by employee members with all the earnings pooled each week and then divided among all members of the union.

The economic and social soundness, the wisdom or the practical expediency of the position taken by the union in this industrial controversy are not for this court to determine. (Cf. *United States v. Hutcheson,* 312 U. S. 219, 232 [3 LABOR CASES ¶ 51,110].) The consuming public, which is interested, should be afforded the opportunity of deciding these questions and a peaceful and truthful appeal to that public, by way of picketing the retail establishments directly involved in the dispute, is not unlawful; rather is it protected by the fundamental law of the land.

The complaint does not allege (although the affidavits in support of the application for a temporary injunction do) that the frozen kosher poultry slaughtered outside of the state is slaughtered by a member of a recognized union affiliated with the American Federation of Labor of which defendant union is itself an affiliate. A deficiency in the complaint (and appellants did not avail themselves of the right to amend accorded below) may not be supplied by the injunction affidavits. Moreover, assuming that the complaint did contain the allegation referred to, that precise question was passed upon adversely to the appellants' contention in the case of *Allen Bradley Co. v. Local Union,* 325 U. S. 797 [9 LABOR CASES ¶ 51,213]. That case by the modification of the injunction there involved ruled upon the issues here presented. Whether or not it be called dictum, it was something more than a passing observation by the court. The ruling expressly permitted the union to do the very things here complained of by the appellant. (See also *United States v. Hutcheson,* 312 U. S. 219 [3 LABOR CASES ¶ 51,110]; *Gundersheimers, Inc. v. Bakery Union,* 119 Fed. (2d) 205 [4 LABOR CASES ¶ 60,372]; *Donnelly Garment Co. v. Dubinsky,* 154 Fed. (2d) 38 [10 LABOR CASES ¶ 63,018]; *Nann v. Raimist,* 255 N. Y. 307; *Stillwell Theatres, Inc. v. Kaplan,* 259 N. Y. 405; *Sachs Quality Furniture, Inc. v. Hensley,* 269 App. Div. 264 [9 LABOR CASES ¶ 62,665]).

It is urged that the Federal Taft-Hartley Act prohibits the peaceful picketing and persuasion here resorted to and specifically that *Allen Bradley Co. v. Local Union* 325 U. S. 797 [9 LABOR CASES ¶ 51,213], *supra,* has in effect been superseded by that Act. It is unnecessary for this Court to determine that question in the instant case. We have no law corresponding to the Taft-Hartley Act in this State. True, interstate commerce is here directly affected but the state courts have no jurisdiction to issue injunctions for violation of the Taft-Hartley Act. We do have jurisdiction over actions for damages for violation of certain provisions of that Act. However, this complaint is not framed under that statute. Primarily it is an action in equity for injunctive relief and, if the plaintiffs base their claims to that relief on the provisions of the Taft-Hartley Act, they should resort to the procedure therein specified and apply to the tribunals which are therein given sole jurisdiction.

The complaint was properly dismissed with leave to amend and the application for an injunction *pendente lite* properly denied.

[¶ 62,290] Lyophile-Cryochem Corporation, Essdee Patents, Inc., Tabor-Olney Corporation v. Cutter Laboratories, Inc.

In the United States District Court for the Northern District of California, Southern Division. No. 26970-R. Filed August 9, 1948.

Sherman Antitrust Act

Patent Infringement Suit—Cross-claim for Declaration of Rights—No Unlawful Monopoly.—In an action for infringement of patents, it is held that plaintiffs' patents are valid and have been infringed, and that the plaintiffs have not used the monopoly granted by the patent improperly to create a monopoly upon or to control the supply of unpatented substances and apparatus. Contracts which involve consolidation of patents for mutual advantage and a division of spheres of activity, which assigns to one of the subsidiaries the role of holding the patents and dealing in the licenses, and to the others the production of the materials under the processes of the pooled patents, are legitimate exercises of the rights conferred by the patent monopoly. Defendant is not entitled to injunctive relief.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201.

For plaintiffs: Naylor and Lassagne, Theodore H. Lassagne, San Francisco, California; Frank E. Barrows, Roger T. McLean, New York, N. Y.

For defendant: Mellin and Hanscom, Oscar A. Mellin, LeRoy Hanscom, Jack E. Hursh, San Francisco, California.

Decision on Counterclaim and Cross-Claim

YANKWICH, D. J.: The counterclaim and cross-claim of the defendant, Cutter Laboratories, Inc., seeking a declaration of rights against the plaintiff, heretofore tried, argued and submitted, is now decided as follows:

[*Validity and Infringement*]

I

On stipulation of counsel, declaration is ordered in favor of the defendant that the Barr Patent, Letters Patent No. 2,353,986, is invalid.

II

Declaration is ordered in favor of the plaintiffs that Reichel Reissue Patent No. 20,969 and Florsdorf Patent No. 2,345,548 are, and each of them is, valid and infringed as found by the verdict of the jury returned and filed on July 31, 1948. The court adopts the verdict of the jury as to the claims submitted to them, and finds that the other claims in said two patents not submitted to the jury are also valid. The court makes no finding as to the infringement of any of these claims, as no such issue was framed as to them.

[*No Unlawful Monopoly*]

III

The court finds that the plaintiffs have not used and are not now using the monopoly granted by the Letters Patent or either of them improperly to create a monopoly upon or to control the supply of unpatented substances and apparatus, and have not used and are not now using the said patents or either of them contrary to the public interest and/or contrary to law; and orders declaration to that effect.

[*Equitable Relief Denied*]

IV

The court finds that the defendant is not entitled to injunctive or any other equitable relief against the plaintiffs or any of them.

Counsel for the defendant are directed to prepare findings and decree on the counterclaim and cross-claim, under local Rule 5 (e).

Comment

A study of the so-called "patent pooling" agreements confirms me in the impression I received at the trial that these agreements are not in unreasonable restraint of trade or commerce under the Sherman Anti-Trust Law (15 U. S. C. A., Sec. 1); and do not tend to substantially lessen competition, or to create a monopoly under the Clayton Act (15 U. S. C. A., Sec. 14).

I have had occasion in two recent opinions filed in my own district on June 7th and 21st, 1948 (*U. S. v. Standard Oil* [CCH *Trade Regulation Reports,* ¶ 62,261, 62,269]) to review the latest decisions of our highest courts interpreting these statutes. Those opinions and others on the same subject written in past years by me and referred to therein, contain a detailed examination of the leading cases on the subject of monopoly arising from the misuse of patents or other practices. So I need not elaborate here. For our purpose, it is sufficient to state that the contracts under consideration fall into that group of agreements among owners of patents, which our highest courts have sustained as legitimate exercises of the control incident to the patent monopoly, (See, *Standard Oil Co. v. United States,* 1931, 283 U. S. 163; *Transwrap Corporation v. Stokes & Smith Co.,* 1947, 329 U. S. 637; *Sbicca-Del Mac v. Milius Shoe Co.,* 8 Cir., 1944, 145 F. (2) 389, 399). For they merely involve consolidation of patents for mutual advantage and a division of spheres of activity, which assigns to one of the subsidiaries the role of holding the patents and dealing in the licenses, and to the others the production of the materials under the processes of the pooled patents. They are clearly what I have designated as "contracts in the nature of joint ventures" entered into for mutual benefit and protection. They are legitimate exercises of the rights conferred by the patent monopoly. More, the evidence in the record shows conclusively that not only were the products manufactured under the process to be supplied to other laboratories, but that their trade was actually solicited. Indeed, the con-

tracts themselves called for the granting of licenses to outsiders. To illustrate: The agreement of February 2, 1941, between Sharp & Dohme and Stokes contains the following clause:

"4. The parties agree as prospective shareholders of the new corporation to cause said corporation to grant licenses to others on such terms as, consistently with the maintenance of the strength of its patent rights and the good reputation of the products made pursuant to the patents, shall encourage maximum sales of the products and minimize sales resistance, and such licenses shall not be unreasonably withheld."

And the contracts with the subsidiary denominated "X" contain similar clauses.

There is no restraint upon the use of unpatented materials or attempts to control the materials which go into the process of the type which the courts have condemned. (*Ethyl Gasoline Corporation v. United States,* 1940, 309 U. S. 436; *United States v. Masonite Corporation,* 1942, 316 U. S. 265; *Mercoid Corporation v. Mid-Continent Company,* 1944, 320 U. S. 661). So the contracts involved here cannot and did not result in any of the evil practices which the anti-trust laws denounce, or which the courts have disapproved. Hence, the rulings above made.

[¶ 62,291] United States v. St. Louis Dairy Company, et al.

In the United States District Court for the Eastern District of Missouri, Eastern Division. Criminal No. 25,713. Filed July 19, 1948.

Sherman Antitrust Act

Conspiracy to Fix Prices—Verdict Against Corporate Defendants—Motions for Acquittal, New Trial, and In Arrest of Judgment.—Motions of Defendant dairy companies for acquittal or for a new trial, and in arrest of judgment, upon a verdict of guilty in a suit charging a conspiracy to fix fluid milk prices, are overruled. It is held that the conceded fact that representatives of the defendants conferred over a period of years on the subject of the price of milk and as to price changes to be made by them, before the changes were made, the uncontroverted testimony that one of the defendants could not sell at a higher price than the other without losing business, which situation furnished a motive for the concerted action to fix prices, with the result that defendants' price increases were identical in every instance, constitute sufficient evidence to warrant the jury in finding that the defendants had some unity of purpose, or some common design, and the conclusion that a conspiracy has been established is justified. The acquittal of the agent who committed the alleged wrongful act does not operate *ipso facto* as a discharge of the principal. The acquittal of agents, even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporations.

See the Sherman Act annotations, Vol. 1, ¶ 1240.195, 1630.585.

For plaintiff: Drake Watson, United States Attorney, New London, Mo.; George B. Haddock, Special Assistant to the Attorney General; and John R. Niesley, Walter D. Murphy and Joseph R. Cannon, Special Attorneys, Department of Justice, all of Washington, D. C.

For defendants St. Louis Dairy Company and Basil M. Lide: Jacob M. Lashly of St. Louis, Mo.

For defendants Pevely Dairy Company, Arthur Kerckhoff, Richard D. Kerckhoff, Elmer M. Kerckhoff, Daniel M. Kerckhoff and Alexander Kerckhoff: James A. Finch of Cape Girardeau, Mo.; E. C. Hartman and William H. Allen, both of St. Louis, Mo.

Memorandum on Separate Motions of Defendants St. Louis Dairy Company and Pevely Dairy Company for Judgment of Acquittal and in the Alternative For a New Trial, and Motion of Defendant Pevely Dairy Company in Arrest of the Judgment.

HULEN, J.: The two corporate defendants and certain of their officers by indictment were charged with conspiracy to fix uniform and non-competitive retail and wholesale prices for fluid milk sold by the corporate defendants in the St. Louis area, under

Section 1, Title 15, U. S. C. A., commonly known as the Sherman Antitrust Act. Trial by jury resulted in acquittal of all individual defendants. The corporate defendants were found guilty. Defendants assert:

(1) There is no substantial evidence to support the verdict.

(2) The guilt of the corporations could have been established only through the defendant officers and the officers having been acquitted the conviction of their principals cannot stand.

(3) The Government proved two separate conspiracies, if any, and therefore the record cannot support a single continuing conspiracy as charged.

The indictment charged that—during a period of ten years immediately preceding its return the defendants continuously engaged in an unlawful conspiracy to fix uniform and non-competitive retail and wholesale prices for fluid milk sold and distributed by the defendants in the St. Louis area; the conspiracy consisted of a continuing agreement and concert of action among the defendants that the defendants would charge uniform and non-competitive retail and wholesale prices for fluid milk sold by them, and neither corporate defendant would make any change in price until an agreement had been reached between them that the other would make an identical change. Changes in price during 1946, 1947 and 1948 are specifically mentioned in the indictment.

There is little dispute in the testimony. The Government would draw an inference of guilt and the defendants an inference of innocence from the record. The Government's evidence in substance was that in 1938 the defendant dairies "were losing money"—their "sales were deteriorating rapidly"—when a Mr. Gee, sales manager for defendant St. Louis Dairy Company, and Mr. Wasser, sales promotion agent for defendant Pevely Dairy Company, commenced a regular course of conduct of conferring with each other on the subject of change by them in the retail price of milk, wholesale and retail, in the St. Louis area. These conferences, at intermittent times, continued to 1941. The parties last named testified that when either of their principals had decided on a price change he (Wasser or Gee) would meet with the representative of the other defendant dairy to notify him of "proposed price changes". In "every instance" where this was done the corporate defendant to whom the information was conveyed "increased its price exactly the same amount." The corporate defendants changed, by increase, their price on retail and wholesale milk in exactly the same amount, even to a fraction of a cent, simultaneously on April 8, 1938, August 7, 1939, February 9, 1940, December 1, 1940, and July 1, 1941. The defendants decreased their price in exactly the same amount, retail and wholesale, simultaneously on June 12, 1939. Defendant Pevely Dairy increased its price on retail and wholesale sales one cent on September 1, 1941, and defendant St. Louis Dairy made the same change on the following day. The record does not show prices or dates on which prices were changed of either defendant prior to April 8, 1938. During the period defendants operated under the Emergency Price Control Act there were some changes by defendants in the price of milk from January 19, 1943 to June 19, 1946. The jury was instructed to disregard these price changes. During the year 1946 there were three price changes by the two corporate defendants. They follow a different pattern from the price changes prior to the period of the Emergency Price Control Act. On July 3, 1946 defendant Pevely Dairy increased its price one cent. Defendant St. Louis Dairy followed with a like increase on the next day. On July 9, 1946 St. Louis Dairy raised its price a cent and a half and Pevely Dairy followed with a like increase the next day. On October 4, 1946 defendant Pevely Dairy raised its price two cents and defendant St. Louis Dairy followed with the same increase the next day. For the year 1947 the price change pattern reverts to that of the time prior to "O. P. A." The two defendants made a reduction in retail and wholesale price of milk in exactly the same amount, to a fraction of a cent, simultaneously on January 20, 1947. The two defendants made an increase of exactly the same amount, to a fraction of a cent, simultaneously on August 1, 1947. The two defendants made an increase of exactly the same amount, to a fraction of a cent, simultaneously on September 16, 1947. Commencing on January 27, 1948 Pevely Dairy increased its price to 22½ cents on retail and 20½ cents on wholesale price of milk and on the following day defendant St. Louis Dairy made the same increase.

Witness Gee was asked the following question:

"On every time, every occasion that either of these dairies, Pevely or St. Louis, has

increased the price, the other dairy has immediately put into effect a corresponding increase in price, hasn't it?
His answer was:

"Yes, but that is confined to our two dairies."

The two defendants set the price of milk in the St. Louis area and when the defendants raised their price "the other companies raised almost immediately or within several days usually * * *".

The witness Wasser was asked why he communicated the proposed price changes to the sales manager of the defendant St. Louis Dairy. His answer was:

"Because I knew it was impossible for us to sell at a higher price than our competitor, and I wanted to tell him what our price was, what the increase was, hoping that their company would increase their price, too."

"Q. And your hope was never disappointed, was it?

"A. I don't think so.

"Q. As a matter of fact, you wanted a stable market, didn't you?

"A. We all want that.

"Q. In fact, you wanted to avoid any competition in price, didn't you?

"A. Well, it was impossible for us to get a higher price than our competitor."

Neither Wasser nor Gee testified to a specific agreement with the agent of the other corporate defendant for a price change. Gee testified he never agreed with Mr. Wasser to a price change. Mr. Wasser testified that Mr. Gee never assured him that his principal would go along with the price change. The corporate defendants sell and distribute over sixty per cent of the fluid milk consumed in the St. Louis area.

St. Louis Dairy Company, on page 3 of its brief, states its position on the Government's case as follows:

"The foregoing facts upon which the government rests exclusively, by themselves, would support two logically permissible inferences: one of conspiracy and one of normal, law-abiding, business-like conduct on the part of defendants. Either inference perhaps would have been legally permissible, had the evidence in the case been limited to those facts."

The evidence of the defendants consisted of a mass of company records and exhibits together with testimony of a number of witnesses to the effect that the basic costs which must be met in fixing the price of milk are uniform as to both defendants and that price increases offered as a part of the Government's case were dictated and forced by economic considerations over which the defendants had no control. A Federal milk order fixes the *minimum* price handlers such as defendants must pay in the St. Louis division. (See *Bailey Farm Dairy Co. v. Marvin Jones, et al.,* (C. C. A. 8th, 1946) 157 F. 2d 87.) Generally the defendants in the St. Louis division pay the minimum. Some milk purchased by the defendants in the Chicago division is at a higher price. Labor contracts of the defendants are uniform for the employees covered by them. Each of the defendants allocates to the milk division a certain proportion of the administrative expense and overhead; in turn a certain proportion of this overhead and administrative expense is allocated to fluid milk and in turn used in determining the cost of fluid milk and whether there is a profit or loss in the sales of fluid milk. Both defendants objected to the Government inquiring into its general overhead and administrative expense and sought to confine the Government's inquiry to the overhead and administrative expense allocated to fluid milk. Defendant Lide took the stand. The other individual defendants did not.

Defendants argue, "The inferences which the government relies upon are conclusively rebutted by the whole evidence in this case". Did the evidence of the defendant, together with the evidence of the Government, conclusively as a matter of law answer the Government's case and entitle defendants to a directed verdict?

I.

Argument at hearing and brief offered in support of the pending motion are presented on the premise the Government's case consisted of circumstantial evidence and the jury's verdict resulted from basing inference upon inference. The trial and verdict do not leave us with that impression. That conspiracy cases are difficult to prove of course does not relieve the Government of responsibility of meeting the requirement that guilt of accused must be proven beyond a reasonable doubt, but the character of the offense is such it is seldom susceptible of proof by direct evidence. In *Cooper v. United States,* 9 F. 2d 216, l.c. 224, the Eighth Circuit Court of Appeals said:

"It is practically always established by circumstantial evidence, *and this method*

in no sense amounts to the building of one presumption upon another." (Emphasis added.)

We cannot escape the impression defendants would now have the Judge substitute his conclusions on the evidence for those of the jury. That is not the province of the Judge. The jury having found the defendants guilty we understand that our duty on the pending motion is to view the evidence and inferences reasonably to be drawn therefrom which are most favorable to the Government and determine if there is substantial evidence to support the verdict. A different jury might have drawn different inferences from the testimony. With the trial of this case in its present stage the reasonableness and plausibility of explanations offered by the defendants, the weight to be given to their evidence, the credibility of the various witnesses, and whether their testimony shall be believed, in whole or in part, is not our duty. That is for the jury. (*Cravens v. United States,* 62 F. 2d 261, l.c. 274.) In this case we have the conceded fact representatives—those in charge of sales—of the two defendants conferred over a period of years on the subject of price of Grade A milk and price changes to be made by them, before they were made. We have the uncontradicted testimony—confirming a fundamental law of economics—that one of the defendants could not sell at a higher price than the other without losing business as a pure matter of competition. This situation furnished a prime motive for the two defendants to seek concert of action in price changes and prices charged. Witness Wasser testified, "It was impossible for us to get a higher price than our competitors". With this situation before them sales representatives of the two defendants conferred, with the result, "in every instance", increases in price were exactly the same with the two defendants and, with rare exceptions, on exactly the same date. It was said in *Smith v. United States* (C. C. A. 8th, 1907) 157 Fed. 721, l.c. 728:

> "The effects and results of a conspiracy can be observed and proved, but rarely can one get a glimpse or make proof of the secret conferences which inaugurate it. For these manifest reasons proof of a criminal combination to do an unlawful act can rarely be made except by light reflected from its consequences or results."

One of the defendants argues the Government case can receive no aid from the testimony of Wasser and Gee. This defendant argues that since the witness Gee testified that he never "agreed" with Wasser to a price change and the witness Wasser testified he never was "assured" St. Louis Dairy would go along with the price change, the Government is bound by such testimony. This defendant states its position thus:

> "* * * the Government, having called Gee and Wasser as witnesses and having adduced from them positive testimony that they made no sort of conspiratorial agreement, cannot sustain its case upon the theory that the jury could reject the last mentioned testimony of these witnesses and infer the existence of a fact directly contrary thereto."

First let it be determined if the Government is required to offer proof of a formal agreement between the defendant corporations to fix prices as charged in the indictment. In *American Tobacco Co. v. United States,* 147 F. 2d 93, l.c. 107, the law is stated as follows:

> "No formal agreement is necessary to constitute an unlawful conspiracy. Almost always, the crime is a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. *Stack et al. v. United States,* 9 Cir., 27 F. 2d 16; *Pearlman v. United States,* 9 Cir., 20 F. 2d 113. The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose. *Marino v. United States,* 9 Cir., 91 F. 2d 691, 113 A. L. R. 975. It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result. *United States v. Harrison,* 3 Cir., 121 F. 2d 930; *Allen v. United States,* 7 Cir., 4 F. 2d 688. Often, if not generally, direct proof of a criminal conspiracy is not available, and the common purpose and plan are disclosed only by a development and collocation of circumstances. *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680; *United States v. Manton,* 2 Cir., 107 F. 2d 834; and it is settled that the essential agreement, combination, and conspiracy in violation of the Sherman Act may be implied from, or found in a course of dealing or other circumstances, as well as through an exchange of words. *United States v. A. Schrader's Son, Inc.,* 252 U. S. 85, 40 S. Ct. 251, 64 L. Ed. 471; *United*

States v. Pullman Co., supra, 50 F. Supp. 123, at page 134."

The Supreme Court in *Interstate Circuit, Inc. v. United States,* 306 U. S. 208, l.c. 227, ruled the question:

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States,* 253 F. 212, 213, aff'd, 249 U. S. 47; *Levey v. United States,* 92 F. 2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Assn. v. United States,* 234 U. S. 600; *Lawlor v. Loewe,* 235 U. S. 522, 534; *American Column Co. v. United States,* 257 U. S. 377; *United States v. American Linseed Oil Co.,* 262 U. S. 371."

Speaking for the Eighth Circuit, Judge Gardner, in *Galatas v. United States,* 80 F. 2d 15, l.c. 22, announced the law as follows:

"The agreement need not be in any particular form, but it is sufficient that the minds of the parties met understandingly. A mutual implied understanding is sufficient so far as the combination or confederacy is concerned; and, in fact, the agreement is generally a matter of inference, deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. It is not necessary to prove that the defendants actually agreed in terms to adopt the unlawful purpose and to pursue it by common means. A conspiracy is rarely susceptible of proof by direct evidence, but must be proved by circumstantial evidence. It may be deduced from the conduct of the parties and the attending circumstances."

From these authorities we conclude that where the circumstances are such as to warrant the jury in finding that the conspirators had some unity of purpose, or some common design and undertaking, or some meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified. See *Marx v. United States* (C. C. A. 8th, 1936) 86 F. 2d 245, l.c. 250. See also *Shannabarger v. United States,* 99 F. 2d 957.

As we view the record the finding of the jury is not in conflict with the testimony of the witnesses Gee and Wasser, if the testimony isolated by defendants has probative value. It has elements of conclusions and opinions of the witnesses. Neither of the witnesses testified or was asked to testify what was said at the conferences between them. The jury was left to draw inferences as to what was said and done on the occasion of the conferences from the admitted reason for calling the conferences, and as well what the parties hoped to accomplish and to avoid. Wasser testified as to why the conferences were called, "Because I knew it was impossible for us to sell at a higher price than our competitor, and I wanted to tell him what our price was, what the increase was, hoping that their company would increase their price, too." This witness testified that he wanted a stable market and that his company could not get higher prices than its competitor. Certainly from this explanation of the reason for calling the meeting the deduction could be made by the jury that it was to arrive at uniformity of action on prices, in view of what invariably took place thereafter. The witness said he went into the conference "hoping that their company would increase their price" and that he hoped to accomplish a stable market and to avoid competition in price. When this evidence is considered in the light of each defendant's repeated assertion through the trial that if it raised its price without the other defendant doing likewise it would lose business, and that each conference was followed by a simultaneous raise in price by the defendants to the exact fraction of a cent, we think a fair and reasonable inference from the testimony was that the parties acted in concert by virtue of a mutual understanding to fix prices on milk.

One would be naive indeed to conclude, as defendants urge, that when a representative of one of the defendants initiated a conference with the other to discuss prices, under such circumstances as we set out, that the agent initiating the conference did so solely to tell his competitor's agent "We are going to raise our price on Grade A milk one and one-half cents commencing thirty-six hours hence. Goodbye." Such a message could have been transmitted by telephone, by telegram, by an errand boy. But here the sales representatives of the two corporate defendants had to meet personally —one of the meetings was held in a public park. The meetings were prearranged.

In *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U. S. 600; 58 L. ed. 1490, the Court had before it cer-

tain reports circulated by lumber dealers listing the names of wholesalers who make sales direct to consumers. Nothing was said in the reports regarding trading with the wholesalers by the retailers among whom they were circulated, but the Court said:

> "True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report * * *."

Like terms could be applied to the conferences between the agents of the two corporate defendants to discuss the retail price of milk. The conferences continued until the defendants received information of a grand jury investigation. A Federal grand jury was investigating their conduct. There is no direct evidence of similar conferences thereafter. It would be strange if there was any. After "O. P. A." control was lifted we find the same pattern followed by the defendants as to uniformity of prices and dates of changes of prices that was the practice during the period when there is direct evidence of conferences between the agents of the two corporate defendants.

Of all the dairies in St. Louis only the two defendants could fathom with such minute exactitude as to date and amount when and in what amount the two defendants would make a price change. During the period when conferences were being held they synchronize precisely. During 1946 one day separates the price changes made by the defendants, with the defendants alternating in taking the initiative on price change. This practice ended with the year 1946. In 1947 the practice is again that of the period when representatives of each of the defendants were holding conferences on the subject. We think the comment of the Court in *Davis v. United States,* 107 Fed. 753, l.c. 755, is applicable:

> "The evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

Defendants present the proposition that the Government's circumstantial evidence case was "conclusively" rebutted as a matter of law by defendants' evidence as to the cost of doing business and declaration that prices and price changes for Grade A milk were forced by economic reasons. The jury could have believed the testimony offered by defendants as to the cost to defendants of putting fluid milk on the market, that they had substantially the same expenses in the cost of milk and labor charges and that economic factors did call for the various changes in price of milk shown by the evidence, and still have found the defendants guilty of conspiracy to fix prices as charged in the indictment. They are not inconsistent findings. If defendants did jointly fix prices by unlawful action, the fact (if it be a fact) that the prices as so fixed were reasonable and dictated by economic factors could not excuse such conduct. Any such concert of action between the two corporate defendants to fix prices for fluid milk in the St. Louis area under the circumstances of this case is banned by the Sherman Act. Concededly the defendants control milk prices in the St. Louis area. They control by selling a major portion of fluid milk consumed. They possess the power to make their control effective. Under these circumstances the danger of severe consequences of agreements to fix prices, by destroying price competition, was one of the results which the Sherman Act was intended to prevent. Such agreements are proscribed by the Act and cannot be excused by collateral consideration, such as reasonableness of the prices, if urged in justification of the practice. (*United States v. Trenton Potteries Co.,* 273 U. S. 392.)

Defendants' evidence was offered to support their position that cost of putting fluid milk in the hands of the consumer necessitated their raising prices at the same time to avoid loss of business. If the price changes and prices charged by the defendants were solely the result of these factors and not unlawful combine between the defendants, such is a good defense. If the price changes and uniformity in prices resulted from both factors the jury was authorized to render a verdict of guilty.

Defendant St. Louis Dairy presents the proposition—the record conclusively shows that only its President, Mr. Lide, had authority to determine and fix prices, there is no evidence that Mr. Lide engaged in the conspiracy charged, the defendant corporation can only be liable for acts done by its agents acting in the scope of their authority, and

regardless of what others may have done their acts are not binding on the corporation. Whether this argument would confine the issue too narrowly we do not feel called on to determine. Mr. Gee testified that he always took part in the meetings "when determinations are being made" as to change in prices of fluid milk by the St. Louis Dairy, that he "advised" with Mr. Lide "in regard to the necessity of a price change, and that he with two others was responsible for operating the business during Mr. Lide's absence." True this witness testified—"The final decision rests with Mr. Lide" of prices to be charged by the St. Louis Dairy Company, but he testified that in every instance where he had a consultation with the representative of Pevely Dairy Company on the subject of proposed price changes a price change was made by both corporate defendants in exactly the same amount, on exactly the same date, except in the instances we have noted.

As we understand the law for the purpose of determining legal liability and responsibility a corporation has an existence separate and apart from that of the persons constituting its officers and agents and it may be guilty of violations of law apart and separate from the guilt or innocence of its officers. In this case the jury were informed in substance that in determining the guilt or innocence of the corporate defendants they should look to the acts done and declarations made by the corporate officers, agents and employees, and that a corporation is bound by and legally responsible in a criminal case for acts performed or things done by an officer, agent or employee of the corporation when such officer, agent or employee is acting within the scope of his authority and the acts of such officer, agent or employee are performed for the corporation employing him and are the duties delegated to him. See *New York Central & H. R. R. Co. v. United States,* 212 U. S. 481, 53 L. ed. 613; and *Egan v. United States,* 137 F. 2d 369, l.c. 379. The guilt or innocence of the corporate defendants was a jury issue of fact.

II.

Defendant St. Louis Dairy points to the "acquittal of the agent who committed the alleged wrongful action in issue (and urges that it) operates *ipso facto* as a discharge of the principal, whose liability could be established only through that particular agent by virtue of the principle *respondeat superior*". Argument under this heading is presented on the theory that acquittal of defendant Lide and the five Kerkhoffs establishes innocence of the corporate defendants since the individual defendants were the only ones authorized to fix the price of milk. We call attention to our comments under the last heading without reiteration as applicable to defendant's claim now being considered. What was there said may have served as the basis, in view of the instruction on reasonable doubt, for the jury to acquit defendant Lide. As to the five Kerckhoff defendants, they were not in charge of the business of Pevely Dairy Company during the time conferences were being held by representatives of the two corporate defendants. As to their participation in the business of Pevely Dairy Company subsequent thereto they were identified in the evidence as a group constituting a board. There was no evidence that each of the five Kerckhoff defendants was ever present at any one board meeting. Again, the jury, operating under instruction on reasonable doubt and presumption of innocence, may have voted their acquittal because of the circumstances referred to. Able counsel representing the individual defendants, as well as the corporate defendants, made eloquent and forceful appeals to the jury and, among other things, admonished the jury that a conviction of the individual defendants would be a stain on their records and reputations. The arguments may have been persuasive. If the jury, yielding to this line of argument, acquitted the individual defendants, their action cannot serve also as an acquittal of the corporate defendants whom they convicted. The law appears to be plain. See *United States v. General Motors Corporation,* 121 F. 2d 376, cert. den. 314 U. S. 618; and *American Medical Association v. United States,* 130 F. 2d 233, aff'd 317 U. S. 519. We quote from the opinion in the *General Motors* case:

> "The question on review should not be whether the verdict against the corporations is consistent with the acquittal of the individuals. Rather it should be whether the conviction is consistent with the evidence. In other words, we believe that the acquittal of the officers and agents, *even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporations.* Nor do we attach significance to the argument that the problem of inconsistent ver-

dict in the instant case presents a different problem than that when the verdicts upon two counts are inconsistent. See *Dunn v. United States,* 284 U. S. 390, 393, 52 S. Ct. 189, 76 L. ed. 356, 80 A. L. R. 161; *United States v. Meltzer,* 7 Cir., 100 F. 2d 739, 741. In fact we believe that the same rule is applicable, that consistency in a verdict is not required, and that the language in the *Austin-Bagley* case supra tends in that very direction." (Emphasis added.)

Defendant St. Louis Dairy Company cites in its brief, in support of its position under this heading, a large number of civil cases. Regardless of what the rule may be in the various jurisdictions in civil cases they are not applicable in this case. For that reason we do not discuss them:

III.

Finally, defendant St. Louis Dairy Company urges that the evidence showed two separate conspiracies, if any, therefore the record cannot support the charge of a single conspiracy as set forth in the indictment.

The charge contained in the indictment is a continuing conspiracy commencing in 1938 to return of the indictment. The record would support a finding the conspiracy ended with the alleged cessation of conferences between the two defendant dairies in 1941 although the case was not submitted on that theory directly. During the period when Office of Price Administration regulations governing prices were in effect the statute of limitations did not run on violations of the Sherman Antitrust Act. (See Act of Oct. 10, 1942, c. 589, 56 Stat. 781.) On the point of one continuing conspirary there was substantial evidence on which to base the verdict, in our opinion, in the pattern of prices charged up until the return of the indictment that defendants took up their unlawful concert of action following ending of "O. P. A." where "O. P. A." left it, when price control became effective. The price changes during the "O. P. A." were withdrawn from the jury as not constituting any evidence in support of the charge. This action by the Judge in and of itself did not sever the conspiracy. We see no merit in defendant's contention in this respect.

Whether or not the case should have been submitted to the jury is not to be determined by dismembering the evidence and viewing it in parts, but the evidence must be considered as a whole (*United States v. Patten,* 226 U. S. 525; 57 L. ed. 333). The evidence offered by the defendants as to cost of doing business consisted principally of defendants' company records, exhibits made from company records, and opinions based upon or reflected by records. Such records are not documentary evidence carrying assurance of verity. It was the exclusive province of the jury to determine the weight to be given this evidence. Also the weight to be given testimony that prices and changes in prices of milk made by the defendants was due solely to economic reasons operating on each defendant independently and not resulting from concert of action between them, was for the jury. It is our opinion the evidence in this case is not as consistent with the innocence of the defendants as with their guilt. Taking the record as a whole we conclude the jury was justified, under the instructions, in finding that the facts evidencing conspiracy were consistent with the guilt of defendants and inconsistent with their innocence.

ORDER

Motion of Pevely Dairy Company for judgment of acquittal and in the alternative for a new trial is overruled, and motion of Pevely Dairy Company for a judgment in arrest of the judgment is overruled, and motion of defendant St. Louis Dairy Company for judgment of acquittal and in the alternative for a new trial is overruled.

[¶ 62,292] General Foods Corporation v. Federal Trade Commission.

In the United States Circuit Court of Appeals for the Seventh Circuit. No. 9646. July 27, 1948.

On Petition for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

Combination To Fix Prices—Dismissed for Want of Jurisdiction.—Petition for review of an order requiring a corporation engaged in the sale of salt to file a special compliance

report concerning its pricing practices and those of its subsidiaries in the sale of salt is dismissed for want of jurisdiction.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.493, 6380.30, 6380.62.

Petition for review of Federal Trade Commission order requiring compliance report in Dkt. 4320 dismissed.

For petitioner: Edward R. Adams & William Simon, Chicago, Ill., and Lester E. Waterbury, New York, N. Y.

For respondent: W. T. Kelley, General Counsel, Walter B. Wooden, Associate General Counsel, and Joseph S. Wright, Assistant General Counsel, Federal Trade Commission, Washington, D. C.

Before J. EARL MAJOR and OTTO KERNER, Circuit Judges.

[*Petition for Review Dismissed*]

On motion of counsel for the respondent, it is ordered and adjudged by this Court that the above entitled petition for review of an order entered by the Federal Trade Commission on June 1, 1948, be, and the same is hereby, dismissed for want of jurisdiction.

[¶ 62,293] Opinion of the Attorney General of Louisiana.

Addressed to Tom Gillen, Jr., Director of the United States Brewers Foundation, Inc., Louisiana Division, 613 Louisiana National Bank Bldg., Baton Rouge, Louisiana, by Bolivar E. Kemp, Jr., Attorney General, June 24, 1948.

Louisiana Constitution

Restraint of Trade—Constitutional Provision.—Refusal of brewers and wholesalers to sell beer to retailers who raised the price of beer above the amount of an imposed state tax under the guise that the increase in price was necessitated by the tax involves a serious question in its relation to the Federal Sherman Antitrust Law and Article 19, Section 14 of the Louisiana Constitution, which prohibits monopolies and combinations in restraint of trade and price fixing.

See the Louisiana Constitutional Provisions, Vol. 2, ¶ 8321.

[*Question*]

Your letter of even date is gratefully acknowledged.

A request is therein made for an opinion on the question of whether or not brewers and wholesalers may lawfully refuse to sell beer to retailers who have raised the price of beer above the amount of the tax imposed by the Legislature on each bottle of beer on the pretext and under the guise that the increase in price was necessitated by the tax.

[*Statutes Involved*]

Under the facts mentioned in your letter, there is no merit in the repersentation that retailers were forced to raise the price of beer above the amount of tax as a result of the levy; however, we must caution you that the proposal made by your Foundation may involve a serious question in its relation to the Federal Sherman Anti-Trust Law, as amended, and Article 19, Section 14 of the Louisiana Constitution which prohibits monopolies and combinations in restraint of trade and price fixing.

[¶ 62,294] Opinion of the Attorney General of Minnesota.

Addressed to Mr. James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General, August 6, 1948.

Minnesota Fair Trade and Trusts and Combinations Acts

Fair Trade Price—Wholesale Price Plus Stipulated Amount.—A contract between a wholesaler and a retailer that the retailer will not sell a branded article at retail for less

than the wholesale price plus 55 cents is within the meaning of Section 325.08 of the Minnesota Statutes, which specifies that certain contracts relating to the resale of commodities shall not be deemed in violation of law because they contain an agreement not to resale "at less than the minimum price stipulated." The Attorney General concluded that such contract did not constitute a violation of Section 623.01 of the Minnesota Statutes prohibiting trusts and combinations in restraint of trade even though several competing manufacturers propose to establish similar contracts.

See the Commentary on Resale Price Maintenance, Vol. 2, ¶ 7075, the Minnesota Fair Trade Act, Vol. 2, ¶ 8424, and the Minnesota Trusts and Combinations Act, Vol. 2, ¶ 8435.

[*Facts*]

In your letter of August 4 to the Attorney General, you advise him that it has been proposed by several competing manufacturers of trade-marked commodities that each manufacturer establish a fair trade contract which stipulates a minimum retail price based on the following formula: Wholesale price plus 55 cents equals the contractual minimum resale retail price. You comment that wholesale prices vary according to brands and that the minimum retail prices established by such formula would vary with each fair trade contract.

Question

Are fair trade contracts in violation of M. S. A., Secs. 325.08 and 623.01, if minimum resale retail prices are based on the foregoing formula?

Opinion

M. S. A., Sec. 623.01, prohibits agreements in restraint of trade. It is directed against understandings which, among other things, tend in any way to control prices of articles of trade sold within the state, or which prevent competition in the purchase and sale thereof. I have not attempted to state fully the provisions of this section, but to give a general view of its purpose.

Sec. 325.08 specifies certain contracts relating to the resale of commodities under a trade mark or brand. This section says that the contracts which are there described shall not be deemed in violation of law because they contain the agreement specified in that section. It thus appears that if a contract conforms to Sec. 325.08, it is contemplated that in the performance of such contract, neither of the contracting parties is to be considered as violating Sec. 623.01, that is, having made a contract in restraint of trade.

This appears to make the problem stated in your letter to be in substance this: If a wholesaler and a retailer agree that a certain branded article sold by the wholesaler to the retailer shall be resold by the retailer at a price not less than the wholesale cost to the retailer, plus fifty-five cents, does such agreement offend against Sec. 623.01?

It appears that the answer to that question is "yes," unless the making of such contract is justified by the provisions of Sec. 325.08. In other words, does the formula mentioned meet the language of Sec. 325.08 (1), "That the buyer will not resell such commodity at less than the minimum price stipulated by the seller"? A contract under which the parties agree that the goods shall not be resold at a price less than that which will be determined by a formula is a stipulation fixing the minimum price.

The effect of the proposed formula is that every sale of a branded article involves a certain increase in price.

The conclusion follows that such a contract would not offend against the provisions of Sec. 623.01 because of Sec. 325.08.

[¶ 62,295] Opinion of the Attorney General of Minnesota.

Addressed to Mr. James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General, August 6, 1948.

Minnesota Unfair Trade Practices Act

Fair Practice—Cash Prizes for Winners in Photograph Contest.—Advertising cash prizes for winners in a photograph contest sponsored by a retail store, in the absence of evidence showing that competitors are or will be destroyed, is no violation of Section 325.04 of the Minnesota Statutes.

See the Minnesota Unfair Trade Practices Act, Vol. 2, ¶ 8428.

You have for consideration these

Facts

A retail store advertises in newspapers announcing a children's photograph contest. Cash prizes are advertised to be awarded to winners in the contest. It is limited to children of the age under fourteen years. The parents select the photograph after having examined many proofs and, I understand, that prizes are awarded in accordance with standards prescribed by the store.

[*Statutory Provision*]

M. S. A., Sec. 325.04, provides, among other things, that "Any retailer * * * who * * * advertises the intent to give away any * * * article * * * for the purpose or with the effect of injuring competitors *and* destroying competition" is guilty of unfair discrimination.

It is the claim of the retailer that nothing is being done for the purpose of or with the effect of injuring competitors and destroying competition. I have no evidence before me and I am not informed of any evidence to the effect that such claims of the retailer are untrue.

You have the

Question

Do these facts show an offense against the provisions of Sec. 325.04?

Opinion

As a matter of law, I am unable to say that the facts above stated show a violation of Sec. 325.04.

No attempt is made herein to consider facts not stated. The retailer has clearly stated his position of his purpose. No evidence is submitted of a contrary purpose, or an effect resulting from the conduct showing that competitors are or will be injured or destroyed. That part of the statute is its essence.

[¶ 62,296] United States v. Morton Salt Co. United States v. International Salt Company.

In the District Court of the United States, Northern District of Illinois, Eastern Division. Nos. 48 C 698, 48 C 699. Decided August 19, 1948.

Federal Trade Commission Act

Compliance Reports.—Motion for summary judgment is denied in a proceeding to enforce an order by the Commission requesting manufacturers of salt to file special reports as to compliance with a previous cease and desist order modified by the Circuit Court of Appeals. There is no reference whatever to compliance reports in Section 5 of the Federal Trade Commission Act. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission Act over it has been transferred to the Circuit Court of Appeals. With reference to Rule XXVI, which provides for filing of reports showing compliance with the Commission's orders, the Court comments that nowhere does Section 5 confer upon the Commission authority to make rules, and no rule-making paragraph of any statute can confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act. The Commission may investigate any violation which it has reason to believe such salt manufacturers are committing, notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals. In order to accomplish this, the Commission may (1) file a new complaint against defendant alleging in what manner it considers such manufacturers are violating the Act; (2) initiate penalty proceedings under Section 5(l) for alleged violations of the former decree in the Circuit Court of Appeals; or (3) bring contempt proceedings into the Circuit Court of Appeals.

See Robinson-Patman Act annotations, Vol. 1, ¶ 2212.5336, 2212.5355, 2212.545, and Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.344, 6125.493, 6125.601.

Penalty Provisions Under Section 6 of Act.—Section 6(a) and 6(b) of the Federal Trade Commission Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty

applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which a cease and desist order is being observed. A special report requested of salt manufacturers to observe compliance with a previous cease and desist order modified by the Circuit Court of Appeals is not one required by the Act and is clearly not the kind of report set out in Section 6(a) and 6(b).

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6126.

Penalties Under Section 10 of Act.—In a proceeding to enforce an order by the Commission requesting manufacturers of salt to file special reports as to compliance with a previous order modified by the Circuit Court of Appeals, judgment in the amount of $100 per day for failure to file reports is denied. Section 10 of the Federal Trade Commission Act provides that corporations shall be subject to the forfeiture only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6130.

Motion for summary judgment denied in Dkt. 4319.

For plaintiff: Otto Kerner, Jr., Chicago, Ill.

For defendants: Ashcraft & Ashcraft and Charles H. G. Kimball for International Salt Co.; L. M. McBride, E. H. Baker, Jr., Harvey Wienke & James T. Welch, and McBride & Baker for Morton Salt Company.

PHILIP L. SULLIVAN, Judge.

Memorandum

[*Defendants Requested to File Special Reports*]

PHILIP L. SULLIVAN, Judge: These actions are before the Court upon complaint filed by the United States which seek the enforcement of an order of the Federal Trade Commission dated September 2, 1947, requiring the defendants, and other corporations named in that order, to file special reports with the Federal Trade Commission within thirty days from the date of service. The complaint also seeks judgment against defendants for forfeiture in the sum of $100.00 per day for each day from and after April 1, 1948, that defendants have failed to file with the Federal Trade Commission the reports required by the order of September 2, 1947.

[*Motions for Summary Judgment Filed*]

Each defendant has answered and filed a motion for summary judgment. The Government also has filed its motion for summary judgment. All parties are agreed that there is no genuine issue as to any material fact involved in the case.

Since the issues of law raised by the pleadings in the two actions are identical, the Court is considering both cases as one.

[*Nature of Suits*]

The suits grow out of the order of the Federal Trade Commission dated September 2, 1947, requiring these two defendants among others to file special reports with the Commission, the order reciting that it was issued in the public interest pursuant to the authority granted the Commission by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, and pursuant to Rule XXVI of the Commission's Rules promulgated under subsection (g) of Section 6, claimed to implement the authority granted the Commission by subsection 6(b) "To require, by general or special orders, corporations engaged in commerce * * * to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing." The default order of February 27, 1948, charging that defendants had failed to comply with the order of September 2, 1947, then followed.

[*Basis for Jurisdiction*]

Jurisdiction is founded on Section 9 of the Act which vests this Court with jurisdiction to command corporations to comply with any order of the Commission made pursuant to the Act, and on Section 10 which vests this Court with jurisdiction of suits of the

United States for the recovery of forfeitures if corporations fail to file required reports within the time fixed by the Commission for filing the same.

[*Facts of Prior Proceeding*]

Defendants in their answers have set out certain matters relating to a prior proceeding against them by the Commission under Section 5 of the Act, and it is agreed by both sides that the facts therein are as follows:

The Commission on September 18, 1940, issued its complaint under Section 5 of the Act charging defendants, and others, with engaging in an unlawful conspiracy to fix prices on, and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. Answers were filed by the defendants therein admitting the alleged conspiracy. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint and admitted in the answers. A petition for review of the Commission's order was filed by the defendants in the Circuit Court of Appeals for the Seventh Circuit, which court rendered its opinion on March 8, 1943, reported as *Salt Producers Association v. Federal Trade Commission,* 134 Fed. (2d) 354. On April 20, 1945, the Circuit Court of Appeals entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. On August 10, 1943, the Commission issued its modified order to cease and desist, as required by Section 5(i) of the Act, incorporating the changes directed by the Circuit Court of Appeals, and caused the same to be served on all of the defendants. In August, 1943, the respondents named in the decree of the Circuit Court of Appeals filed reports with the Commission showing the manner and form in which they were complying with the court's decree.

On September 2, 1947, the Commission alleges that it believed it was in the public interest to make a further investigation of the manner and form of compliance, and in aid of that investigation, pursuant to Sections 6(a) and 6(b) of the Act in aid of enforcement proceedings in Docket No. 4320 under Section 5 of the Act and pursuant to the Commission's Rule XXVI, issued its order requiring the defendants and others to file special compliance reports with the Commission within thirty days from the date of service, which was had on September 4, 1947. Later the Commission by letter order extended the time until November 1, 1947. The Government urges that the reports were not filed and that separate notices of default, as it insists is provided for in Section 10 of the Act, as a prerequisite to subjecting defendants to the $100.00 a day forfeiture for failure to file, were issued by the Commission on February 27, 1948, and served on each defendant on March 1, 1948. The Commission alleges that the thirty days specified in Section 10 and in the notices expired on April 1, 1948, and insists that defendants' failure to file the required reports continued, and that each defendant notified the Commission in writing that it would not comply with the order, and therefore these suits were filed to compel them to do so and to obtain judgment in favor of the United States for $100.00 per day from each for each day they are in default.

[*Defendants' Contentions*]

In their answers the defendants set out that pursuant to the requirements of the final decree of the United States Circuit Court of Appeals for the Seventh Circuit, defendants filed their reports of compliance with the Federal Trade Commission, and that the Commission received said reports without making any objection thereto. That the order of September 2, 1947, does not require them to file an annual or special report within the meaning of Section 10 of said Act. That the procedure sought to be pursued by the Federal Trade Commission is not reflected or set forth in any Rule of said Federal Trade Commission, and has not been published in the Federal Register, as required by Section 3 of the Administrative Procedure Act, and that pursuant to the order of September 2, 1947, each defendant has filed an additional compliance report, by stating that it is complying in the same manner set out in its original compliance report.

[*Commission's Purpose in Present Suits*]

The Commission insists that the present suits in this court have nothing whatsoever to do with the prior proceeding under Section 5 of the Act, except in so far as the Commission's authority to investigate compliance with the decree and modified order to cease and desist have been questioned.

The Commission insists that these suits are not for the purpose of enforcing compliance with the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist, nor have the defendants been charged with a violation of that decree or modified order. That the Commission is only seeking by an investigatory process authorized by law, to obtain the facts as to the manner and form in which defendants have complied with that decree and modified order.

Defendants urge that there is no published rule or statement of procedure of the Commission which specifies, outlines or even refers to the use of Sections 6(a) and 6(b) or Section 10 of the Federal Trade Commission Act in aid of decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure to the procedure followed in the present proceedings. The former proceedings referred to as Docket No. 4320 when the matter was before the Federal Trade Commission, and as Case No. 7909 when it was in the Circuit Court of Appeals, were brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and when the matter was on appeal before the Circuit Court of Appeals, that court, in its decree, reserved "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof. * * *"

[*Section 5(l) Quoted*]

Section 5 of the Federal Trade Commission Act itself provides for enforcement proceedings with respect to decrees entered thereunder, and subsection (1) thereof reads:

> "(1) Any person, partnership or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

[*Applicability of Sections 6 and 10*]

A careful reading of the legislative history of the Act shows that Section 6 is only to be invoked in support of general economic surveys and not in aid of enforcement proceedings under a Section 5 decree. The Section 10 penalty provisions, on which the present proceeding is based, can be invoked only in connection with general economic survey proceedings under Section 6, and not in connection with enforcement proceedings under Section 5.

[*Enforcement Proceedings Under Section 5 of Act*]

Where an appeal has been taken to the Circuit Court of Appeals, as was done in Docket No. 4320, Section 5 gives to the Circuit Court of Appeals sole jurisdiction of enforcement proceedings thereunder, and that court in order to enforce compliance with its decree specifically reserved jurisdiction of the cause, subject only to the Commission's right to pursue contempt proceedings in the Circuit Court of Appeals, or to collect the civil penalty provided by Section 5 (1).

[*Requirements of 1947 Order*]

The Commission's order of September 2, 1947, here involved, required these defendants to "file additional reports showing in detail the manner and form in which it has been and is now complying with said modified order to cease and desist." On October 31, 1947, these defendants advised the Commission in writing that they were complying in the same manner as set forth in their original compliance reports filed in 1943, to which original reports no objection had ever been made by the Commission. The September 2, 1947 order also required the defendants, as a part of their additional reports, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."

[*Section 6 (a), (b) of Act Quoted*]

Sections 6 (a) and 6 (b) provide for economic reports. Section 6 (a) provides: "That the Commission shall also have power

> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to

the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

[*Cases Cited*]

A reading of the legislative history of Sections 6 (a) and 6 (b) convinces me that these sections are designed for the purpose of compelling corporations to make annual reports, and giving the Commission authority within its discretion to require special reports when it deemed that advisable, but is not related in any way to the enforcement of the law. The Federal Trade Commission Act, Section 10, provides that corporations shall be subject to the forfeiture of $100.00 a day only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5. At least two courts have in effect specifically denied the existence of any relationship between Section 5 and Section 6 of the Act. *Federal Trade Commission v. Miller's National Federation,* 47 Fed. (2) 428, where the court said:

"The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation."

And in *Federal Trade Commission v. Claire Furnace Co.,* 274 U. S. 160, where the Supreme Court makes the same distinction, quoted in this memorandum *infra.*

[*Federal Trade Commission Act Coverage*]

When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6 (a) and 6 (b) of the present Act. However, Congress added a new section, Section 10 providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6 (a) and 6 (b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. Subsection (a) of Section 5 provides that unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce are declared to be unlawful, and also provides that the Commission has power to prevent the use of such unfair methods. Subsection (b) sets out the jurisdiction and procedure by which the Commission may prosecute acts involving unfair methods of competition. Subsection (c) provides the appellate procedure available to respondents against whom a cease and desist order has been entered. Subsection (d) provides that "The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." Subsections (g), (h), (i) and (j) set out the points of time at which a cease and desist order of the Commission becomes final.

[*Extent of Jurisdiction Under Section 5*]

I find nothing in Section 5 which gives the Commission power to modify or attempt to enforce, independently of the Circuit Court of Appeals, its original cease and desist order of 1943. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder, and therefore the remedies available to the Commission are contempt proceedings in the Circuit Court of Appeals or penalty proceedings under Section 5 (1) of the Act.

[*Cases Cited*]

The United States contends that the Commission's order of September 2, 1947 indicates that the purpose of the Commission's investigation was to determine the manner and form of compliance with the Commission's modified order to cease and desist of November 10, 1941. That the Commission's order of September 2, 1947 only asked that the defendants file reports indicating the manner and form of defendants' compliance with the modified order of the Commission to cease and desist and with the decree of the Circuit Court of Appeals. Defendants did file an additional compliance report with the Commission setting out that they were complying in the same manner as set forth in their original compliance reports filed in 1943. What defendants did not file is the documentary evidence requested by the Commission and not covered by Section 10 at all. Section 10 provides that only upon the failure of a corporation to file the annual or special reports referred to therein shall the penalty provision become operative. *United States v. National Biscuit Company*, 25 Fed. Supp. 329.

Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160, was a bill in equity brought by various coal, steel and related industries to enjoin the Federal Trade Commission from enforcing order issued by the Commission requiring those companies to furnish monthly reports of production, balance sheets and other voluminous information in detail. Without questioning appellee's right to seek relief by injunction, the Federal Trade Commission answered, admitting the issuance of the orders, claiming authority therefor under Sections 6 and 9, Federal Trade Commission Act. The cause was heard on a motion to strike the answer, the court holding the answer insufficient, and granted the injunction. The Supreme Court said:

> "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of September 26, 1914) or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.
>
> "The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties."

[*Provisions of Sections 6 (a), 6 (b) of Act*]

Sections 6 (a) and 6 (b) of the Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed, and the supplemental compliance report here involved is not one required by the Act and is clearly not the kind of report set out in Section 6 (a) or Section 6 (b).

[*Investigation of Violations by Commission*]

Defendants concede, and I agree, that notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate any violations which it has reason to believe defendants are committing. In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5 (1) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals.

[*Purpose of Commission's Investigation*]

The Commission insists that this is not a Section 5 proceeding, nor is it an attempt on the part of the Commission to enforce the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist; that it is purely an investigation to determine whether the defendants are complying with the former decree and the Commission's order. It seems to me, however, that the Commission is attempting indirectly to use the power given to it under Section 5 in order to secure the information it seeks under Section 6 (a) and 6 (b).

[*Extent of Commission's Power Under Section 6 (g)*]

The Commission insists that under Section 6 (g) it has the power to make rules and regulations for the purpose of carrying out the provisions of this Act. That under this authority it has promulgated Rule XXVI providing for the filing of reports and supplemental reports showing compliance with the Commission's orders. Defendants challenge this authority on the ground that nowhere in the Act is any statutory authority given to the Commission to require either compliance or supplemental compliance reports. The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b).

[*Substance of Rule XXVI*]

Subparagraph (a) of Rule XXVI provides for an original report of compliance with the Commission's cease and desist order. Subparagraph (b) sets out the right of the Commission to require from time to time, further supplemental reports of compliance. Subparagraph (c) provides how the reports shall be signed. Defendants urge that no court has ever declared this rule to be lawful, valid and enforceable; and that not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has the Commission made an attempt to enforce subparagraph (b) thereof in a Section 5 proceeding. Nowhere in Section 5 can I find any reference whatever to compliance reports. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission over it has been transferred to the Circuit Court of Appeals, but nowhere does Section 5 confer upon the Commission authority to make rules, and no rule-making paragraph of any statute could confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act.

[*Motion for Summary Judgment Denied*]

For all of the reasons set out herein I am of the opinion that plaintiff's motion for summary judgment for a mandatory injunction commanding defendants to file the reports requested by the Commission's order of September 2, 1947, and for judgment against the defendants in the amount of $100.00 a day for each day from and after April 1, 1948, should be denied.

[*Motions for Summary Judgment Allowed—Complaint Dismissed*]

Defendants' motions for summary judgment that defendants are not liable for the $100.00 a day penalty are allowed, and the complaint herein is dismissed for the reason that I believe this Court is without jurisdiction to entertain the same.

[¶ 62,297] Swiss Watch Dial Co., Inc. v. International Dial Co., Inc., Aaron Goodkind, individually and doing business as Arctic Watch Co., Norman Flaxman and Irving Marcus, individually and doing business as Norman Watch Co., a co-partnership.

In the United States District Court, Southern District of New York. Civ. 43-787. February 4, 1948.

Sherman Antitrust Act

Allegation—Advertising and Circularization No Bar to Claim.—Application by the defendants for injunctive relief is denied in a counterclaim based upon an alleged violation of the Federal Antitrust Laws by plaintiff manufacturer allegedly attempting illegally to extend the monopoly of a patent, and engaging in unfair competition, by circularizing the watch trade, and advertising, in a magazine published throughout the United States, that it is the only one which has the right to make rhinestone watch dials, and that the trade may avoid legal headaches by buying dials from plaintiff. There is no allegation of any contract, combination, conspiracy or monopoly in restraint of trade among the several states or elsewhere. Mere advertisement and circularization of the watch trade does not constitute a violation of the Sherman or Clayton Act.

See the Sherman Act annotations, Vol. 1, ¶ 1660.315.

For plaintiff: Henry L. Burkitt, New York, New York.

For defendants: Peter Fries, Jr., for defendants International Dial Co., Inc. and Aaron Goodkind, individually and doing business as Arctic Watch Co.

[*Motion to Dismiss Counterclaim*]

BRIGHT, JOHN: Plaintiff's motion to dismiss the counterclaim pleaded by the defendants International Dial Co. Inc. and Aaron Goodkind, individually and doing business as Arctic Watch Co. is granted. As I read it, the counterclaim attempts to plead claims for violation of the federal antitrust laws, in that plaintiff is attempting illegally to extend the monopoly of a patent, and for unfair competition, both based on the allegation that plaintiff has circularized the watch trade, and advertised in a magazine published throughout the United States, that it is the only one which has the right to make rhinestone watch dials, the edge of which is reduced in thickness so that the case, movement and dial may be fitted together under Patent No. 2,427,961, and that the trade may avoid legal headaches by buying dials from plaintiff. It is asserted by defendants that plaintiff has violated sections 1 through 7 and 14 and 15 of Title 15 U. S. C. Section 1 makes illegal every contract, combination or conspiracy in restraint of trade or commerce, among the several states, with certain exceptions not here material. Section 2 provides that every person who shall monopolize or conspire with other persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a misdemeanor. Section 3 declares illegal every contract, combination or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or between such Territory and another, or between such Territory and any state or said District. Section 4 invests the several district courts with jurisdiction to prevent and restrain violations of sections 1-7 and 15; and makes it the duty of the several district attorneys of the United States to institute proceedings for that purpose. Section 5 permits the bringing in of additional parties in litigation under section 4. Section 6 authorizes the forfeiture, seizure and condemnation of property owned under any contract, combination or conspiracy, the subject of and mentioned in section 1, while in transit from one state to another. Section 7 merely defines person or persons. Section 14 makes it unlawful for any person engaged in commerce, to sell, lease, or contract for sale any merchandise, patented or unpatented, for use, consumption or resale, on an agreement or understanding not to use or deal in the goods of a competitor where such understanding lessens competition or tends to create a monopoly. Section 15 permits any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to sue in any district court of the United States in the district in which the defendant resides, is found or has an agent, and to recover threefold damages. It is difficult to see how any of sections 3 through 7 to 14 have any reference to the allegations set out in the counterclaim. There is no allegation of any contract, combination, conspiracy or monopoly in restraint of trade or commerce among the several states or elsewhere. The mere advertisement or circularization of the trade in the manner mentioned, in my judgment, would not constitute a violation of the Sherman or Clayton Acts. It might be a defense to the plaintiff's cause of action based on an infringement of a valid patent, but the determination of that is not now necessary. The allegations in the counterclaim do not seem to me to state any claim under the antitrust laws; and inasmuch as there is no diversity of citizenship, I cannot see how, under the facts stated in the counterclaim, this court has jurisdiction of the claim of unfair competition.

[*Application for Injunctive Relief Denied*]

For the reasons stated above, the application by the said defendants for injunctive relief based upon the allegations in the counterclaim must be denied.

Settle order on notice.

[¶ 62,298] United States of America v. United Shoe Machinery Corporation.

In the United States District Court, District of Massachusetts. Civil Action No. 7198. March 3, 1948.

Sherman Antitrust Act

Production of Documents.—In a civil action by the Government under the Sherman Act, plaintiff's motion for production of documents dating back approximately 27 years is allowed. In a civil action under the antitrust laws there are at least two reasons why

the reach into the past might be longer than would be appropriate in a criminal proceeding under the antitrust laws. One consideration is that in a civil case the three-year statute of limitations is inapplicable. Another consideration is that in an equity proceeding the evidence is to be presented to a judge sitting alone and experienced in giving appropriate weight to stale as well as recent conduct whereas in a criminal proceeding the evidence sought is to be presented initially to a grand jury and ultimately to a petit jury. However, plaintiff's motion to obtain defendant's copies of plaintiff's own documents is denied. The mere fact that defendant has already incurred expense and labor in preparing a selection from plaintiff's documents, lists and files of patents, does not make the fruit of that labor available to plaintiff in order to simplify plaintiff's preparation for trial.

See Sherman Act annotations, Vol. 1, ¶ 1610.341.

For plaintiff: James M. Malloy, Boston, Mass.; Grant W. Kelleher, Special Asst. to Atty. General, C. Worth Rowley, Alfred Karstead, Edward M. Feeney, Roy N. Freed, Special Attorneys, Boston, Mass. Tom C. Clark, Attorney General, John F. Sonnett, Asst. Atty. General, Holmes Balbridge, Special Asst. to Atty. General Washington, D. C.; William T. McCarthy, U. S. Attorney, Boston, Mass.

For defendant: Walter Powers, Boston, Mass., John L. Hall; Claude R. Branch, Boston, Mass., Charles P. Curtis, Jr. Boston Mass.

[*Motions Before Plaintiff*]

WYZANSKI, JR., D. J.: There are before me defendant's motion for a more definite statement and for a bill of particulars and plaintiff's motion as amended, for production of documents.

[*Motion for Bill of Particulars Denied*]

I deny *in toto* defendant's motion for a definite statement and for a bill of particulars. My consistent practice in civil cases has been narrowly to restrict the granting of motions for a more definite statement and for bills of particulars. Like the majority of courts whose opinions are cited in the report prepared by the Advisory Committee on Rules of Civil Procedure, I have viewed Rule 12 (e) strictly. Under the standards which I have heretofore consistently applied, I am satisfied that plaintiff's bill states with sufficient particularity the conduct which defendant is alleged to have pursued in violation of law.

[*Parties' Concession as to Rule 34 Set Forth*]

With respect to plaintiff's motion, as amended, for production of documents under Rule 34, I start with the concession made by both parties at the bar: (1) it is a matter of judicial discretion whether a court grants a motion under Rule 34 prior to defendant's answer and (2) there is a conflict in the lower Federal courts as to whether Rule 34 and particularly the word "designated" as used in that rule is satisfied when the demanding party indicates merely the categories of documents which he desires to have furnished by his opponent.

[*Interests of Justice*]

So far as concerns my discretion to allow such a motion at the present time, I conclude that the interests of justice will be furthered by allowing the motion forthwith. Expedition is of the essence of justice in this case. The reasons were sufficiently set forth in the Attorney-General's original certificate and require no elaboration.

[*Cases Cited*]

So far as concerns the conflict in the interpretation of Rule 34, I am mindful that the early view in the Southern District of New York and the view prevailing even now in many districts was perhaps best phrased by Judge Woolsey in *United States v. American Optical Company*, 2 F. R. D. 534 (S. D. N. Y.). In that civil action by the government under the Sherman Act he denied the government's motion for production of documents because it did not point with sufficient precision to each specific document sought. In his opinion the touchstone in a motion under Rule 34 was whether it was possible for "the defendant to go to his files and, without difficulty, to pick the document or other item requested out and to turn to the plaintiff saying *'Here it is.'*" Such definiteness of description, however, no longer appears to prevail in the Southern District of New York where Woolsey J. once sat with such distinction. The latest authoritative decision is by Judge Rifkind in *United States v. United States Alkali Export Associa-*

tion, 7 F. R. D. 256 (S. D. N. Y.). In that anti-trust proceeding Judge Rifkind upheld a motion for discovery of the category type similar to the pattern followed by plaintiff in the case at bar. I am pursuaded that in the instant litigation the sounder course is to follow the broader rule announced by Judge Rifkind and built on the analogies of *Brown v. United States*, 276 U. S. 134, 143, and *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 543-544. Compare also the breadth of administrative subpoenas sustained in *Oklahoma Press Publishing v. Walling*, 327 U. S. 186, 210, footnote 46. The categories of documents here requested seem to me to be sufficiently clearly defined. All of them are on their face material to the issues raised by the complaint. There is no insuperable difficulty in identifying them (as distinguished from the expense and labor of collecting them). Their prompt assembly and production would expedite this case. And an attempt to state more specifically each document requested would primarily serve dilatory purposes.

[*Demand for 1920 Documents Reasonable*]

The demand that the documents in the various categories be produced as far back as 1920 seems to me reasonable in view of the nature of the controversy. It does not indeed cover so long a period as Judge Caffey allowed the government in *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S. D. N. Y.). The propriety of Judge Caffey's ruling is revealed by the scope of the opinion finally written by Judge L. Hand in *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2). I am aware that I have allowed plaintiff to reach into a period earlier than Judge Sweeney permitted in a grand jury matter involving the investigation of this same defendant. However, in a criminal case under the anti-trust laws there are at least two reasons why the reach into the past might be shorter than would be appropriate in a civil proceeding under the anti-trust laws. One consideration is that in a criminal case there is a three-year statute of limitations inapplicable in civil cases. Another consideration is that in a criminal case the evidence sought is to be presented initially to a grand jury and ultimately to a petit jury whereas in an equity proceeding like the present one the evidence is to be presented to a judge sitting alone and experienced in giving appropriate weight to stale as well as to recent conduct.

[*Question as to Limitation of Documents*]

I have considered whether to limit defendant's obligation to production of such documents as are now available in Massachusetts. I have concluded that my order ought not to be so limited, although I should expect that after random sampling of files outside of Massachusetts the government might be content with some rather than all the required documents outside of Massachusetts.

[*Documents Should Be Available to Plaintiff*]

Paragraphs 4 (a), (b) and (c) of the motion seek to reach defendant's copies of plaintiff's own documents, the originals and copies of which are still available in plaintiff's own patent office. There is no reason why plaintiff if it desires these publicly available documents which originated with the plaintiff's own patent office should not be required to procure such documents at its own expense and labor. The mere fact that defendant has already incurred expense and labor in preparing a selection from plaintiff's documents, lists and files of patents does not make the fruit of that labor available to plaintiff in order to simplify plaintiff's preparation for trial. Of course, if the government cooperates by accepting random sampling of defendant's non-Massachusetts files, as I proposed in the previous paragraph, then defendant might voluntarily furnish plaintiff the matters referred to in paragraphs 4(a), (b) and (c) of the motion.

[*Record of Time Spent on Research Ordered*]

In order that the Court can know that compliance with this order has been prompt, full and ungrudging, I direct that defendant shall instruct each of its employees affected by the order to produce (not including its officers or counsel) to keep a detailed record of the hours each such employee spends in finding for and producing to plaintiff (not in conferring with defendant's counsel or officers about, or in considering the value or effect of) the documents required to be produced by this order.

Ordered that defendant's motion for a more definite statement and for a bill of particulars is denied.

Ordered that paragraphs 4 (a), (b) and (c) of plaintiff's motion, as amended, for production of documents is denied.

Ordered that the remaining parts of plaintiff's motion, as amended, for production of documents is granted.

Ordered that each of defendant's employees affected by the aforesaid order to produce shall keep a detailed record of the hours expended by him in finding for, and producing to, plaintiff the documents required under the aforesaid order.

[¶ 62,299] American Machine and Metals, Inc. v. De Bothezat Impeller Company, Inc.

In the District Court of the United States, Southern District of New York. Civil No. 40-166. August 12, 1948.

Sherman Antitrust Act

Allegations—Motion to Strike Denied.—Reformation of an agreement entered into by plaintiff and defendant, under which plaintiff received from defendant patents and equipment for making fans and like products, and for which plaintiff was to pay defendant license fees based on plaintiff's net sales, is being sought by defendant as a result of plaintiff's desire to exercise the contract's right of termination clause. Plaintiff alleges that if the contract is reformed, the agreement would be invalid as an unlawful restraint of trade. Defendant interprets the agreement as barring plaintiff from ever competing with defendant, if plaintiff terminates the agreement. Whether the agreement in defendant's interpretation is violative thereof is not clear. Since it presents a substantial question of law, motion to strike this allegation from plaintiff's reply is denied.

See the Sherman Antitrust Act, Vol. 1, ¶ 1660.315.

For plaintiff: Alphonse Kenison; Leonard P. Moore, Charles Pickett, Edward R. Neaher and Chadbourne, Wallace, Parke & Whiteside of Counsel.

For defendant: Perkins, Malone & Washburn; Watson Washburn, of Counsel.

Memorandum

[*Nature of Litigation*]

RYAN, J.: Defendant moves pursuant to Rule 12 (f), Fed. R. Civ. P., for an order striking, from plaintiff's amended reply to defendant's counterclaims, defenses comprising twenty-three separate paragraphs of the reply—(in effect, everything but the denials therein).

[*Facts*]

A summary statement of this litigation will suffice. Plaintiff and defendant entered into an agreement on April 3, 1934 under which plaintiff received from defendant patents and equipment for making fans and like products and for which plaintiff was to pay defendant license fees based on plaintiff's net sales. The contract contains a right of termination clause which plaintiff now desires to exercise. Defendant claims that if plaintiff terminates the contract plaintiff will not be permitted to continue the manufacture of fans and ventilating equipment. Plaintiff seeks a declaration of the rights of the parties, under this clause, to avoid the possible accrual of damages. He has been seeking such a declaration since serving defendant on February 14, 1947.

[*Cases Cited*]

It has been established that these pleadings alone set forth a cause of action for declaratory judgment, (*American Machine and Metals, Inc. v. DeBothezat Impeller Co.*, C. C. A. 2, March 10, 1948), and that the pleadings in conjunction with defendant's affidavits present a justiciable controversy. *American Machine and Metals, Inc. v. DeBothezat Impeller Co.*, S. D. N. Y., May 10, 1948, (Hulbert J.).

[*Defendant's allegations*]

Defendant has now answered by various denials and has alleged six separate defenses and counterclaims.

[*Plaintiff's Allegations*]

By its reply, plaintiff has alleged various denials in addition to numerous separate defenses. It is to strike out these defenses that defendant moves.

[*Rule Quoted*]

Rule 12 (f) reads:

"Upon motion made by a party . . . or upon the court's own initiative at any time, the court may order *stricken from any pleading any insufficient defense or* any redundant, immaterial, impertinent or scandalous matter." To expedite the administration of justice is the function of this rule, Pursuant thereto the court will delete allegations not responsive [*Morgan v. Patillo,* 1 F. 2d 326, (S. D. Fla., 1924], or relevant [*Kraft v. R. H. Macy & Co.* 3 F. R. D. 54 (S. D. N. Y., 1943)]. An entire defense should not be stricken unless it grossly violates the requirements of Rule 8. [*Cf. Shultz v. Mfrers & Traders Trust Co.* 1 F. R. D. 53 (W. D. N. Y., 1939)].

[*Cases Cited*]

Motions to strike out are not to be freely granted, [*Sinaiko Bros. Coal & Oil Co. v. Ethyl Gasoline Corp.,* 2 F. R. D. 305 (S. D. N. Y., 1942); *Contogeorge v. Spyrou,* 7 F. R. D. 223 (S. D. N. Y., 1946)], and no deletions will be made unless it is clear that the allegations are without the issues. [*Kraus v. General Motors Corp.,* 27 F. Supp. 537 (S. D. N. Y., 1939); *Irving Berlin Inc. v. Anziano,* 4 F. R. D. 33 (S. D. N. Y., 1944)]. Moreover, the movant should show that he will be prejudiced if the attacked allegations are left in the pleadings. [*Eastman Kodak Co. v. McAuley,* 2 F. R. D. 21 (S. D. N. Y., 1941); *Huber Inc. v. Pillsbury Flour Mills, Inc.,* 30 F. Supp. 108 (S. D. N. Y., 1939)]. Finally, a motion to strike a defense will be denied if the defense presents a bona fide question of law or fact which should be heard on its merits. [*Milkman v. Aetna Life Ins. Co.,* 36 F. Supp. 116 (E. D. N. Y., 1941)].

[*Specific Paragraphs To Be Stricken*]

Against all six counterclaims plaintiff alleged that defendant had not set forth the grounds for federal diversity jurisdiction. But, plaintiff has withdrawn this defense. It is ordered, therefore that paragraphs *5, 12, 20, 24, 28* and *31* be stricken from the amended reply.

[*Absence of Prejudice*]

It is to be noted that at no time has defendant alleged that it would be prejudiced were the attacked allegations permitted to remain in the amended reply. While the court will not reiterate this on the consideration of each allegation, it is none the less an important factor.

[*Impertinent Allegations To Stand*]

Plaintiff has not moved against defendant's pleadings, stating that it has refrained from so doing to avoid further delay. The court may on its own motion delete impertinent allegations. [Rule 12 (f), *supra; Gunder v. New York Times Co.,* 37 F. Supp. 911 (S. D. N. Y., 1941)]. This, however, is not customary. In light of plaintiff's expressed desire the court will refrain from determining whether any of defendant's pleadings should be stricken.

[*Reformation of Agreement Discussed*]

Defendant's first separate defense is that it is entitled to a reformation of the 1934 agreement. By reply, plaintiff alleges this is not a legal defense to a complaint seeking a declaratory judgment. Defendant asks that plaintiff's allegation be stricken. We have a substantial question of law raised by plaintiff which cannot be decided on a motion to strike. As to this allegation, defendant's motion to strike out is denied.

[*Conversion of Equipment*]

Defendant's second separate defense is that plaintiff converted defendant's equipment "leased" to plaintiff by the agreement. By reply, plaintiff alleges that neither is this a legal defense to a complaint seeking a declaratory judgment. It is not apparent that this defense would bar plaintiff's plea for a declaratory judgment. Defendant suggests it would render plaintiff's position "inequitable" and that it should be refused its plea, but offers no direct authorities. Why the alleged conversion by plaintiff should prevent its securing a judicial interpretation of the disputed contract is at the least a substantial legal query. Motion denied as to this allegation of plaintiff's reply.

[*Allegations as to Marketing of Products*]

Defendant's third, fourth and sixth defenses all sound in contract and are alleged in this order: that plaintiff breached its agreement by failing to use the name "De Bothezat" in the marketing of the products involved; that plaintiff has refused to furnish a duly certified audit detailing his receipts for 1946 and 1947, as required by

paragraph nine of the 1934 contract; and, finally, that plaintiff has failed to use its best efforts to promote the sale of the products. Plaintiff alleges that these are not legally sufficient defenses to a complaint seeking a declaratory judgment. Plaintiff is seeking an interpretation of a contract clause. Defendant's theory apparently is that these alleged actions of plaintiff as well as those set out in defendant's other defenses raise an equitable bar to the relief sought by plaintiff. There is a serious legal issue present which cannot be determined on a motion to strike. Motion denied as to these allegations.

[*Concessions to Plaintiff Alleged*]

Defendant's fifth separate defense alleges that defendant made certain concessions to plaintiff—evidenced by exhibits 2-13 annexed to the complaint,—in reliance upon plaintiff's representations. Again he suggests that this renders the granting of plaintiff's plea "inequitable" and again plaintiff replies that this is not a legally sufficient defense. Here also is an issue of law, sufficient to prevent our striking this allegation from plaintiff's reply.

[*Counterclaims and Defenses Listed*]

Now as to defendant's counterclaims and plaintiff's defenses thereto—

(1) the first counterclaim is grounded on reformation.

a.) As a defense plaintiff alleges that the pleading is legally insufficient on its face because it does not allege mutual mistake or fraud and mistake, the requisites of a reformation claim [*Metzger v. Aetna Life Ins. Co.,* 227 N. Y. 411].

Defendant's pleading is not ideal. Rule 9 (b) requires that a litigant plead the facts of fraud or mistake. [*Martin v. Clayton,* 6 F. R. D. 214, 215 (S. D. N. Y., 1946)]. This defendant has not done. However, plaintiff indicates that it understands the theory of defendant's claim. The functional requisites the federal rules as epitomized by Judge Clark in *Dioguardi v. Durning,* 139 F. 2d 774 (C. C. A. 2, 1944) are stated. Therefore, paragraph "4" of plaintiff's reply is ordered stricken.

b.) As a further defense to defendant's first counterclaim, plaintiff alleges the bar of the New York Statute of Limitations of 10 years (N. Y. C. P. A. Sec. 53). This raises a question of fact and law as to when the alleged claim of defendant arose and as to the statute applicable. Motion denied on this allegation.

c.) As a further defense, plaintiff alleges that if the contract is reformed as defendant requests, then, the agreement would be invalid as an unlawful restraint of trade. Defendant interprets the agreement as barring plaintiff from ever competing with defendant, if plaintiff terminates the agreement. The Supreme Court has circumscribed the permissible scope of patent monopolies. [*Morton Salt Co. v. Suppiger,* 314 U. S. 488; *Scott Paper Co. v. Marcellus Mfg. Co.,* 326 U. S. 249]. Whether the agreement in defendant's interpretation is violative thereof is not clear. Since it presents a substantial question of law, motion is denied as to this allegation.

d.) As a further defense to defendant's first counterclaim, plaintiff alleges that the oral contract proposed by defendant would be invalid under the Statute of Frauds [N. Y. Pers. Prop. Law, Sec. 31]. The contract states that the right to terminate could not be exercised within one year. Hence, argues plaintiff, defendant's alleged oral agreement could not be performed within one year, and is invalid. This, too, presents issues of contract interpretation and validity which do not lie within the scope of a motion to strike. Motion denied as to this allegation.

(2). Defendant's second counterclaim alleges that plaintiff converted the property "leased" to plaintiff under the 1934 agreement.

a.) As a defense, plaintiff alleges that the conversion claim is insufficient on its face because there is no allegation that the property converted belonged to defendant. However, plaintiff does have due notice of the alleged right of defendant despite the technical inadequacy of the pleadings. Therefore, the motion is granted as to paragraph "11" of plaintiff's amended reply—which is now ordered stricken.

b.) As a further defense, plaintiff alleges that defendant's claim in conversion is barred by the New York Statute of Limitations (N. Y. C. P. A. Sec. 49, subd. 7) of three years. The matter submitted shows a clear issue of fact as to when defendant had knowledge of plaintiff's alleged conversion. The motion is denied as to this allegation.

(3). Defendant's third counterclaim alleges that plaintiff breached its agreement

by failing to use the name "De Bothezat" in the marketing of the products involved.

a.) As a defense, plaintiff alleges that this allegation is legally insufficient on its face because it states merely a conclusion of law and is not sufficiently specific. While defendant's pleading is technically insufficient in the light of the requirements and spirit of the federal rules, the allegations are sufficient. If the plaintiff requires more details to prepare its case, these can be obtained by other privileges of federal pre-trial procedure. Paragraph "19" is ordered stricken from plaintiff's amended reply.

b.) As a further defense, plaintiff alleges that so much of the claim as did not accrue within six years next before the filing thereof is barred by the Statute of Limitations. A substantial issue, as to what part if any of the claim accrued within the six years arises. Motion denied on this allegation.

(5). For its fifth counterclaim defendant alleges it made concessions to plaintiff relying on representations made by the latter, and that termination by plaintiff would be "inequitable" unless prior thereto he pay defendant the aggregate amount of these concessions.

a.) As a defense, plaintiff raises the same procedural objection that it raised against defendant's first counterclaim—to wit, that defendant must allege mutual mistake or fraud and mistake to have legal efficacy in the alleged oral representations. For the same reasons as there expressed, we find the allegations of defendant state a claim. It is ordered that paragraph "27" be stricken from the amended reply.

(6). For its sixth counterclaim, defendant alleges that "plaintiff has failed to use its best efforts to promote the sale of said products, to defendant's damage in the amount of $500,000."

a.) As a defense, plaintiff alleges that so much of the claim as did not accrue within six years before the filing thereof is barred by the Statute of Limitations. That this raises a substantial issue is apparent. Motion denied as to this allegation.

[*Motion Granted in Certain Respects*]

Motion granted to the extent above indicated and in all other respects denied.

[¶ 62,300] **United States v. General Cable Corporation, General Electric Company, The Okonite-Callender Cable Company, Incorporated, and Phelps Dodge Copper Products Corporation.**

In the District Court of the United States for the Southern District of New York. Civil No. 40-76. August 25, 1948.

Sherman Antitrust Act

Consent Judgment—License Agreements—Acts in Restraint of Trade Enjoined.—A consent judgment against four manufacturers of fluid filled cable and accessories enjoins the manufacturers from entering into any agreement to (1) allocate customers or divide territories or markets for the manufacture of their products; (2) fix prices or conditions of sale for their products; (3) exclude any person from the manufacture of fluid filled cable and accessories; (4) restrict the importation or exportation of fluid filled cable; (5) refrain from competition in the manufacture of or in obtaining rights to patents and technological information relating to fluid filled cable or accessories; (6) determine the terms or conditions upon which licenses or immunities under any patent, invention or technological information relating to their products shall be available to others; or (7) suppress commercial development or exploitation of patents, patent applications, inventions or technological information relating to fluid filled cable or accessories. The judgment also provides that (a) each defendant grant to any applicant a non-exclusive license to manufacture any of the patents listed in Schedule A, provided that a reasonable and non-discriminatory royalty may be collected, and that inspection of the books and records of the licensee, who may report only the amount of royalty due, is allowed; (b) the party to whom application is made for a license shall include in such license, a non-exclusive grant of immunity from suit under foreign patents corresponding to any of the United States patents listed in Schedule A; (c) upon application for a license, a defendant to whom such application is made shall advise the applicant of the royalty it deems reasonable for the patents to which application pertains; and (d) each license granted shall provide that the licensee may

dispute the validity or scope of the patents under which the license is granted, and this judgment shall not be construed as importing any validity or value to any of such patents. Each of the defendants is enjoined from licensing or offering to license any patent or patents relating to fluid filled cable or accessories on condition that the licensee accept a license under other patents of a defendant or of any other persons.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1270.151, 1530.10, 1530.50, 1530.90, 1590.

For the plaintiff: Herbert A. Bergson, Assistant Attorney General, John F. X. McGohey, United States Attorney, Sigmund Timberg, J. Francis Hayden, John D. Swartz, Robert A. Nitschke, Special Assistants to the Attorney General.

For the defendants: Greenman, Shea, Lane & Sandomire, by Frederick Greenman for General Cable Corporation; Cahill, Gordon, Zachry & Reindel by Jerrold G. Van Cise for General Electric Company; Francis Meagle for the Okonite-Callender Cable Company; Debevoise, Plimpton & McLean, by Edward C. McLean, for Phelps Dodge Copper Products Corporation.

Final Judgment

[*Previous Action*]

The plaintiff, United States of America, having filed its complaint herein on January 30, 1947; the defendants, General Cable Corporation, General Electric Company, The Okonite-Callender Cable Company, Incorporated, and Phelps Dodge Copper Products Corporation, having appeared and filed their answers to the complaint denying the substantive allegations thereof; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this final judgment herein, without trial or adjudication of any issue of fact or law herein and without an admission by any party in respect of any such issue in this or any other litigation;

Now, therefore, before any testimony has been taken herein and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Basis for Action*]

The Court has jurisdiction of the subject matter herein and of all the parties hereto; and the complaint states a cause of action against each of the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, and commonly known as the Sherman Antitrust Act.

II

[*Definition of Terms*]

For the purpose of this judgment:

(a) The term "fluid filled cable" shall mean all cable and cable systems for transmitting electric current for power purposes comprising one or more conductors within an enclosure or enclosures also containing a fluid (liquid or gas or both) subjected, directly or indirectly, throughout the length of the cable to controlled pressure.

(b) The term "accessories" as used herein shall mean all parts and all devices (including but not limited to normal joints, fluid-stop joints, fluid-containing reservoirs which are ordinarily of variable capacity, shipping devices, terminals and other necessary fittings), in so far and to the extent that they are incorporated or sold for incorporation in any such cable, cable system, or any part thereof, or are essential to and used or sold for use in the manufacture, shipment, installation, operation, repair and maintenance of such cable, cable system or any part thereof.

(c) The term "patents" shall mean letters patent and application for letters patent, and reissues, renewals, and continuations thereof.

III

[*Extent of Application of Provisions*]

The provisions of this judgment applicable to any defendant shall apply to each of its subsidiaries, successors, and assigns and to each of its officers, directors, agents, nominees, employees, or any other person acting under, through or for such defendant.

IV

[*List of Acts Prohibited*]

Each of the defendants is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program with any defend-

ant or Societa' Italiana Pirelli or Compagnie Internationale Pirelli or Protona, A. G., or with any other manufacturer of fluid filled cable, or with any of their subsidiaries, successors, assigns, officers, agents or employees, or with any person acting under, through, or for any of them, to:—

(a) allocate customers or allocate or divide territories or markets for the manufacture, use, sale or distribution of fluid filled cable or accessories;

(b) fix, determine, maintain, or adhere to, prices or terms or conditions of sale for fluid filed cable or accessories;

(c) exclude any person from or restrict any third person in the manufacture, use, sale or distribution of fluid filled cable or accessories;

(d) restrict or prevent the importation into or exportation from the United States, its territories or dependencies of fluid filled cable or accessories;

(e) refrain from competition in the manufacture, use, sale or distribution of, or in obtaining rights to patents and technological information relating to, fluid filled cable or accessories;

(f) determine or prescribe the terms or conditions upon which licenses or immunities under any patent, invention, or technological information relating to fluid filled cable or accessories shall be available to others;

(g) suppress commercial development or exploitation of patents, patent applications, inventions or technological information relating to fluid filled cable or accessories.

V

[*Terminated Agreements*]

The agreement listed in paragraph 19 of the complaint herein is herewith declared to be terminated, and all agreements listed in appendices A and B and paragraph 22 of the complaint herein are hereby cancelled, provided that whatever non-exclusive rights may exist in the defendants under the General Electric-Pirelli Agreement of 1933 to make, use and vend (arising out of that Agreement or any sublicense thereunder) may be retained by the defendants and shall continue, subject to the other paragraphs of this judgment. Each defendant is enjoined and restrained from adopting, adhering to, furthering or continuing any course of conduct for the purpose or with the effect of maintaining, reinstating or reviving any of said agreements.

VI

[*Granting of Licenses*]

(a) Each defendant is hereby ordered and directed to grant to any applicant, including any other defendant, upon written request therefor, a non-exclusive license to manufacture, use and sell under any one or more of the patents listed in Schedule A attached hereto and made a part hereof, or any United States patent or patents issued or applied for during a period of five years from the date of entry of this judgment relating to fluid filled cables or accessories, as to which such defendant has power to license, without any condition or restriction whatsoever except that (1) a reasonable and non-discriminatory royalty may be charged and collected and (2) where such royalty is charged, provision may be made for inspection of the books and records of the licensee by an independent auditor who may report to the defendant licensor only the amount of royalty due and payable and no other information.

(b) Upon the request of any applicant for a license under the provisions of subsection (a) of this paragraph VI, the party to whom such application is made shall include in such license, to the extent that it has power to do so, a non-exclusive grant of immunity from suit under foreign patents corresponding to any of the United States patents listed in Schedule A attached hereto, or otherwise required to be licensed under subsection (a) of this paragraph, for any products manufactured, used or sold pursuant to said license.

(c) Upon any application for a license in accordance with the provisions of subsection (a) of this paragraph VI a defendant to whom such application is made shall advise the applicant of the royalty it deems reasonable for the patents to which the application pertains. If within sixty (60) days from the date such application is received by such defendant, such defendant and the applicant are unable to agree upon what constitutes a reasonable royalty the applicant for a license may apply forthwith to his Court for a determination of a reasonable royalty, and such defendant shall, upon receipt of notice of filing such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be upon such defendant to establish the reasonableness of the royalty

requested by it, and that such royalty is non-discriminatory. Pending the completion of any such court proceeding, the applicant shall have the right to make, use and vend under the patents to which its application pertains, without then payment of royalty or other compensation, but subject to the following provisions: Such defendant may, with notice to the Attorney General, apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, a license shall then issue providing for the periodic payment of royalties at such interim rate from the date of the making of such application by the applicant; and whether or not such interim rate is fixed, any final order may provide for such readjustments including retroactive or diminished royalties as the Court may order after final determination of a reasonable and non-discriminatory royalty.

(d) Each license granted pursuant to this paragraph VI shall provide that the licensee may at any time, without revoking or surrendering its license, dispute the validity, scope or enforceability of any of the patents under which the license is granted, and this judgment shall not be construed as importing any validity or value to any of such patents.

(e) If at any time or times hereafter any of the defendants shall grant to any other defendant a license under any patent included within the provisions of this paragraph VI, then at each such time and in each such event the defendant so licensing another defendant is hereby ordered and directed to grant to each applicant therefor a similar license.

VII

[*Licensing of Patents for Fluid Filled Cable*]

Each of the defendants herein is hereby enjoined from licensing or offering to license any patent or patents relating to fluid filled cable or accessories on condition that the licensee accept a license under other patents of said defendant or of any other person.

VIII

[*Availability of Webb-Pomerene Act*]

Nothing in this judgment shall prevent any defendant from availing itself of the benefits of the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act.

IX

[*Steps Taken To Secure Compliance With Judgment*]

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General and on reasonable notice to any of the defendants made to the principal office of such defendant, be permitted subject to any legally recognized privilege, (1) access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this judgment and (2) subject to the reasonable convenience of such defendant and without restraint or interference from the defendants, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. Upon written request of the Attorney General or an Assistant Attorney General said defendant shall submit such reports in writing with respect to the matters contained in this judgment as may from time to time be reasonably necessary to the enforcement of this judgment. Information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this judgment in which the United States is a party or as otherwise required by law.

X

[*Jurisdiction of Cause Retained by Court*]

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Schedule A

I. Pirelli patents as to which all defendants have certain rights.

No.	Date	Inventor	Title
1,869,308	July 26, 1932	Emanueli	Process for Impregnating Insulating Materials
1,875,732	Sept. 6, 1932	Holttum	Sealing Device for Use with Electric Cables & Other Apparatus
1,883,648	Oct. 18, 1932	Emanueli	Multicore Oil Filled High Tension Electric Cable
1,895,982	Jan. 31, 1933	Emanueli	Device for Reducing the Current in the Lead Sheaths of Cables
1,895,983	Jan. 31, 1933	Emanueli	Apparatus for Degasifying Liquids
1,900,600	Mar. 7, 1933	Emanueli	High Tension Electric Cable
1,906,600	May 2, 1933	Hofner	Method of Jointing Oil Filled Cables with Hollow Conductors
1,906,636	May 2, 1933	Schlecker	Process of Locating Leaks
1,933,008	Oct. 31, 1933	Emanueli	Manufacture of Electric Cables for High Tension
1,933,112	Oct. 31, 1933	Held	Multicore High Tension Electric Cables
1,944,637	Jan. 23, 1934	Emanueli	Apparatus for Locating Oil Leaks in Cables
1,947,929	Feb. 20, 1934	Emanueli	Restrictor
1,956,723	May 1, 1934	Kunst	Joint for Oil Filled Cables
1,957,995	May 8, 1934	Emanueli	High Tension Cable
1,962,059	June 5, 1934	Emanueli	High Tension Electric Cable
1,964,907	July 3, 1934	Emanueli	Electric Cable
1,973,068	Sept. 11, 1934	Held	Oil Filled Cable
1,973,111	Sept. 11, 1934	Schlecker	High Tension Electric Cable
1,979,149	Oct. 30, 1934	Emanueli	Stop Joint for Liquid Filled Cables
1,979,150	Oct. 30, 1934	Emanueli	Feeding Joint
1,981,535	Nov. 20, 1934	Zapf	Oil Filled High Voltage Cable
1,981,536	Nov. 20, 1934	Zapf	High Tension Electric Cable
1,999,701	Apr. 30, 1935	Kunst	Oil Filled Electric Cable
2,006,236	June 25, 1935	Emanueli	Feeding Reservoir for Oil Filled Cables
2,011,389	Aug. 13, 1935	Zapf	Oil Filled Cable Installation
2,030,943	Feb. 18, 1936	Schrottke	Pressure Compensator for Oil or Compound Filled Cables
2,039,587	May 5, 1936	Emanueli	Fluid Filled Electric Cable System
2,040,204	May 12, 1936	Emanueli	Means for Maintaining Fluid Pressure in Sheathed Electric Cables
2,043,033	June 2, 1936	Capdeville	Underground Electric Cable
2,049,835	Aug. 4, 1936	Emanueli	Method of Joining Fluid Filled Electric Cables
2,064,650	Dec. 15, 1936	Emanueli	Apparatus for Degasifying Liquids
2,072,742	March 2, 1937	Emanueli	Stop Joint for Oil Filled Cables
2,081,880	May 25, 1937	Emanueli	High Tension Electric Cable
2,082,649	June 1, 1937	Nageli	Method of and Means for Exerting an Artificial Pressure on the Insulation of Electric Cables
2,115,574	Apr. 26, 1938	Gasser	Method of Eliminating Gas Pockets in Liquid Filled Cables
2,120,889	June 14, 1938	Emanueli	Stop Joint for Fluid Filled Cables
2,122,281	June 28, 1938	Emanueli	High Tension Electrical Apparatus
2,132,259	Oct. 4, 1938	Emanueli	Electric Cable
2,133,129	Oct. 11, 1938	Brigg & Gibson	Pressure Actuated Signaling Device
2,133,382	Oct. 18, 1938	Emanueli	High Tension Electric Cable
2,133,398	Oct. 18, 1938	Puritz	Electric Cable and Method of Repairing the Same
2,133,399	Oct. 18, 1938	Puritz	Electric Cable and Method of Repairing the Same
2,244,392	June 3, 1941	Emanueli	Device for Supervising the Pressure in Fluid Filled Cables
2,261,265	Nov. 4, 1941	Maass	Flexible Container
2,268,704	Jan. 6, 1942	Emanueli	Electric Cable

II. Other patents as to which General Cable Corporation has rights.

1,836,570	Dec. 15, 1931	Boyle	High Voltage Cable
1,837,375	Dec. 22, 1931	Saurman & Webb	Terminal Structure
1,868,962	July 26, 1932	Atkinson	High Voltage Bushing
1,878,094	Sept. 20, 1932	Atkinson	Oil Cooled Terminal
1,878,169	Sept. 20, 1932	Myers	Terminal
1,884,311	Oct. 25, 1932	Simmons	Laminate Insulation
1,920,903	Aug. 1, 1933	Haanen & Meurer	High Tension Cable
1,929,509	Oct. 10, 1933	Miller	Apparatus for Building Cable Joints
1,943,086	Jan. 9, 1934	McKnight	Electrical Cable and Method of Manufacture
1,943,087	Jan. 9, 1934	Potter and McKnight	Electrical Cable and Method of Manufacture
1,948,964	Feb. 27, 1934	Gay	Cooling System for Electrical Cables

No.	Date	Inventor	Title
1,958,984	May 15, 1934	Beaver	Means for Coating and Impregnating Sheet Material
1,965,540	July 3, 1934	Atkinson	Cable Installation
1,971,626	Aug. 28, 1934	Simmons	Cable Installation
2,010,530	Aug. 6, 1935	Atkinson	Electrical Installation
2,016,004	Oct. 1, 1935	Gay	Electrical Cable Installation
2,016,247	Oct. 1, 1935	Simmons	Electrical Installation
2,019,297	Oct. 29, 1935	Faucett	Electrical Cable
2,025,670	Dec. 24, 1935	Pettee	Reservoir
2,042,421	May 26, 1936	Atkinson & Hagen	Electrical Installation
2,050,990	Aug. 11, 1936	Atkinson	Cable
2,050,991	Aug. 11, 1936	Atkinson	Cable and Method of Making
2,060,745	Nov. 10, 1936	Pettee	Insulating Joint for Cables
2,067,169	Jan. 12, 1937	Beaver & Davey	Electric Cable
2,068,624	Jan. 19, 1937	Atkinson	High Voltage Bushing
2,071,102	Feb. 16, 1937	Atkinson & Simmons	Oil Filled Cable
2,075,019	Mar. 30, 1937	Buck, Roper & Thoms	Stop Joint for Electric Cable
2,093,114	Sept. 14, 1937	Sonnenfeld	Electric Cable and Method of Installation
2,098,922	Nov. 9, 1937	McKnight	Apparatus for Making Cable
2,118,546	May 24, 1938	Beaver & Davey	Joints for Electric Cable
2,125,869	Aug. 9, 1938	Atkinson	Electrical Conductor
2,147,402	Feb. 14, 1939	Faucett	Electrical Cable
2,163,783	June 27, 1939	Fisher	Cable Installation
2,197,544	April 16, 1940	Atkinson	Electric Cable
2,208,832	July 23, 1940	Beaver & Davey	Electric Cable
2,237,402	April 8, 1941	Beaver et al.	Electric Cable and Joint
2,240,745	May 6, 1941	Atkinson	Electric Cable
2,250,239	July 22, 1941	Sonnenfeld	Electrical Power Cable
2,254,958	Sept. 2, 1941	Beaver et al.	Fluid Tight Joint
2,310,201	Feb. 9, 1943	Cox	Cable Terminal

PENDING APPLICATIONS

SN763,001	July 23, 1947	Atkinson & McGrath	Cable with Flow Limiting Covering
SN763,002	July 23, 1947	Atkinson & Garner	Weathertight Reel
SN765,708	Aug. 2, 1947	Bronovicki	Pulling Eye and End Cap

III. Other patents as to which General Electric Company has rights.

1,819,881	Aug. 18, 1931	Eby	Semistop Joint for Fluid Filled Cable
1,819,882	Aug. 18, 1931	Eby	Insulated Cable Joint
1,822,737	Sept. 8, 1931	Karapetoff	Ployphase Intersheath Cable
1,822,738	Sept. 8, 1931	Karapetoff	Ployphase Intersheath Cable
1,823,731	Sept. 15, 1931	Eby	Variable Capacity Reservoir
1,830,533	Nov. 3, 1931	Eby	Terminal for Fluid Filled Cables
1,833,798	Nov. 24, 1931	Shanklin	Oil Filled Lead Covering Electric Cables
1,834,864	Dec. 1, 1931	Phillips	Joint for High Tension Electric Cables
1,835,922	Dec. 8, 1931	Zeiss et al.	Method and Means for Drying Out and Impregnating Joints for Cables
1,853,882	Apr. 12, 1932	Roper	Differential Method of Indicating Trouble on Oil Filled Cable
1,853,883	Apr. 12, 1932	Roper	Differential Indicating Means
1,872,818	Aug. 23, 1932	Roper	Impregnated Paper Insulated, Lead Covered Cable
1,888,075	Nov. 15, 1932	Eby	Terminal for Oil Filled Cables and Method of Evacuating Same
1,892,551	Dec. 27, 1932	Hayman et al.	End Cap or Head for Electric Cables
1,893,376	Jan. 3, 1933	Piercy	High Tension Power Transmitting Electric Cable
1,895,396	Jan. 24, 1933	Pfannkuch	Joint for High Tension Cables
1,896,841	Feb. 7, 1933	Eby	Fluid Stop Joint for Sheathed High Tension Cables
1,899,591	Feb. 28, 1933	Segar	Laminated Material
1,902,487	Mar. 21, 1933	Calvert	Oil Filled High Tension Cable
1,904,423	Apr. 18, 1933	Eby	Indicator for Reservoirs for Liquor Filled Cables
1,905,691	Apr. 25, 1933	Eby	Joints for High Tension Underground Cables
1,917,129	July 4, 1933	Kirch	Temperature Indicator
1,919,935	July 25, 1933	Eby	Fluid Filled High Tension Terminal
1,931,373	Oct. 17, 1933	Clark	Dielectric Material for Electrical Devices
1,931,455	Oct. 17, 1933	Clark	Dielectric Material for Electrical Devices
1,933,312	Oct. 31, 1933	Clark	Electric Cable System
1,933,313	Oct. 31, 1933	Clark	Cable System

No.	Date	Inventor	Title
1,933,347	Oct. 31, 1933	Shanklin	Underground Oil Filled Cable
1,933,348	Oct. 31, 1933	Shanklin	Semibalanced Pressure System for Fluid Filled Cables
1,935,595	Nov. 14, 1933	Clark	Liquid Composition and Electrical Apparatus Containing Same
1,936,470	Nov. 21, 1933	Merrill	Insulating Spacer
1,944,730	Jan. 23, 1934	Clark	Composition for Dielectric Use
1,950,182	Mar. 6, 1934	Kirch	Multiple Conductor Cable
1,952,097	Mar. 27, 1934	Shanklin	Stop Joint for Electric Cables
1,964,684	June 26, 1934	Clark	Electrical Apparatus
1,970,393	Aug. 14, 1934	Piercy	Method of and Means for Connecting Reservoirs to Fluid Filled Cables
1,977,325	Oct. 16, 1934	Pfannkuch	High Voltage Cable
1,978,233	Oct. 23, 1934	Shanklin	Pressure Reservoir for Cables
1,979,148	Oct. 30, 1934	Eby	Joint for Electric Cables
1,988,279	Jan. 15, 1935	Kirch	Terminal and Joint for Electric Cables
1,991,230	Feb. 12, 1935	Shanklin	Electric Cable System and Method of Installing the Same
1,995,884	Mar. 26, 1935	Eby	Sheath Insulator
1,999,004	Apr. 23, 1935	Clark	Dielectric Composition
2,000,747	May 7, 1935	Eby	Fluid Stop Joint
2,000,748	May 7, 1935	Engster	Terminal for Electric Cables
2,004,769	June 11, 1935	Shanklin	Means for and Method of Detecting and Ascertaining the Region of Oil Leaks in Cable Systems
2,009,820	July 30, 1935	Shanklin	Apparatus for Impregnating Cables
2,013,537	Sept. 3, 1935	Eby	Terminal for Electric Conductors
2,015,542	Sept. 24, 1935	Zeiss	Means for Temporarily Closing the Channels in Hollow Conductors of Fluid Filled Cables
2,019,338	Oct. 29, 1935	Clark	Dielectric Material
2,019,339	Oct. 29, 1935	Clark	Snuffer Composition
2,019,342	Oct. 29, 1935	Eby	Joint
2,048,516	July 21, 1936	Piercy	Reel for Fluid Filled Cables
2,050,873	Aug. 11, 1936	Zickrick	Method of and Means for Making Cable Sheaths
2,050,888	Aug. 11, 1936	Kirch	Oil Filled High Voltage Cable
2,052,422	Aug. 25, 1936	Rottsieper	So-called Semistop Joint for Fluid Filled Cable
2,053,163	Sept. 1, 1936	Phillips	Joint for Fluid Filled Cables and Method of Making the Same
2,056,017	Sept. 29, 1936	Piercy	High Tension Oil Filled Cable
2,089,052	Aug. 3, 1937	Calvert	High Tension Cable System
2,092,559	Sept. 7, 1937	Runaldue	Signal Means for Fluid Filled Cables
2,092,560	Sept. 7, 1937	Runaldue	Alarm System for Fluid Filled Cables
2,093,305	Sept. 14, 1937	Buck et al.	Cable Joint
2,105,406	Jan. 11, 1938	Clark	Liquid Insulating Composition
2,112,739	Mar. 29, 1938	Eby	Stop Joint for Fluid Filled Cables
2,112,740	Mar. 29, 1938	Humphrey	High Tension Gas Filled Cable
2,125,121	July 26, 1938	Marks	Terminal for Electric Cables
2,133,405	Oct. 18, 1938	Sheals	Oil Filled Cable and Means for Jointing the Same
2,141,894	Dec. 27, 1938	Alexanderson	Cable for Transmitting Electric Power
2,141,912	Dec. 27, 1938	Hobart	Power Transmission System
2,145,182	Jan. 24, 1939	Kirch	High Pressure Fluid Insulated Electric Cable
2,159,742	May 23, 1939	Kirch	Gas Pressure Electric Cable
2,167,510	July 25, 1939	Hobart	High Tension Gas Insulated Cable
2,173,717	Sept. 19, 1939	Hobart	Electrical System of Power Transmission
2,176,749	Oct. 17, 1939	Shanklin	Joint for Gas Filled Cable
2,188,178	Jan. 23, 1940	Eby	Connector for Sector Conductor Cables
2,196,026	Apr. 2, 1940	Piercy	Fluid Filled Cable
2,197,639	Apr. 16, 1940	Hobart	High Tension Cable System
2,210,804	Aug. 6, 1940	Eby	Connector for Cables
2,215,290	Sept. 17, 1940	Hobart	High Pressure Gas Filled Cable
2,216,010	Sept. 24, 1940	Hobart	High Tension Electric Cable
2,217,104	Oct. 8, 1940	Crandall	Temporary Sealing Means for Gas Filled Cables
2,220,728	Nov. 5, 1940	Piercy	Means for Controlling Liquid Pressure in Riser Cables
2,221,670	Nov. 12, 1940	Cooper	Gas Insulated Electric Device
2,222,718	Nov. 26, 1940	Phillips	Joint for High Tension Cables
2,237,803	Apr. 8, 1941	Zysk	Control Means for Gas Filled Cables
2,245,247	June 10, 1941	Aitchison	Variable Capacity Reservoir
2,248,588	July 8, 1941	Shanklin et al.	Gas Filled Cable Installation
2,253,171	Aug. 19, 1941	Engster	Gas Cable Installation
2 253,984	Aug. 26, 1941	Shanklin	Gas Filled Cable and Method of Making the Same

No.	Date	Inventor	Title
2,253,985	Aug. 26, 1941	Shanklin	Stop Joint for Gas Filled Cables and Method of Installing the Same
2,253,986	Aug. 26, 1941	Shanklin	Gas Filled Cable
2,253,917	Aug. 26, 1941	Shanklin	Terminal for Gas Filled Cables
2,259,129	Oct. 14, 1941	Engster	Gas Filled Cable
2,275,866	Mar. 10, 1942	Runaldue	Pressure Actuated Relay
2,277,460	Mar. 24, 1942	Shanklin	Gas Filled Cable Installation
2,290,706	July 21, 1942	Phillips	Cable Joint and Method of Making the Same
2,292,114	Aug. 4, 1942	Fritsche	Stop Joint for Multiconductor Fluid Filled Cable
2,295,290	Sept. 8, 1942	Piercy	Electric Power Cable
2,358,621	Sept. 19, 1944	Buller et al.	Wiring Scheme for Oil Filled Relay Systems
2,401,595	June 4, 1946	Wetherill	Gas Filled Cable Systems
2,401,996	June 11, 1946	Wetherill	Cable Terminal

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588,742	Apr. 17, 1945	Piercy & Kent	Method & Apparatus for Manufacturing Gas Filled Cable
607,833	July 30, 1945	Flynn	Gas Filled Electric Cable

IV. Other patents as to which The Okonite-Callender Cable Company, Incorporated has rights.

1,874,235	Aug. 30, 1932	I. Branthwaite	Electric Conductor
1,879,867	Sept. 27, 1932	C. E. Bennett	Lead Pressing
1,885,045	Oct. 25, 1932	C. E. Bennett	Lead Press
1,886,786	Nov. 8, 1932	I. Branthwaite	Electric Cable
1,926,666	Sept. 12, 1933	C. E. Bennett	Continuous Metal Press
1,931,592	Oct. 24, 1933	D. R. Stevens	Electric Cable
1,941,614	Jan. 2, 1934	F. Meyer and G. E. Moffitt	Pothead or Terminal for Electric Cables
1,947,454	Feb. 20, 1934	C. E. Bennett	Cable Joint
1,947,455	Feb. 20, 1934	C. E. Bennett	Cable Construction
1,947,481	Feb. 20, 1934	F. Meyer	Cable Joint
1,959,338	May 22, 1934	C. E. Bennett	Terminal Structure for Electric Cables
1,959,339	May 22, 1934	C. E. Bennett	Electric Power Cable
1,959,354	May 22, 1934	G. Everest	Electric Cable
1,968,019	July 31, 1934	C. E. Bennett	Electric Cable
1,969,720	Aug. 14, 1934	C. E. Bennett	Electric Power Cable
1,969,721	Aug. 14, 1934	C. E. Bennett	Cable System
1,969,722	Aug. 14, 1934	C. E. Bennett	Cable System for the Underground Transmission of High Tension Electrical Energy
1,969,764	Aug. 14, 1934	R. E. Soutter	Electric Apparatus
1,975,075	Oct. 2, 1934	C. E. Bennett	Electric Cable System
1,980,370	Nov. 13, 1934	C. E. Bennett	Cable Terminal
1,986,789	Jan. 8, 1935	C. E. Bennett	Electric Power Cable System for the Underground Transmission of Electrical Energy
1,986,842	Jan. 8, 1935	F. C. Meyer et al.	Cable Terminal
1,986,843	Jan. 8, 1935	F. C. Meyer and G. E. Moffitt	Terminal or Pothead for Electric Cables
1,986,844	Jan. 8, 1935	F. C. Meyer and G. E. Moffitt	Electric Cable Terminal
1,991,368	Feb. 19, 1935	C. E. Bennett	Electric Power Cable
1,999,354	Apr. 30, 1935	I. Branthwaite	Cable Sheath
2,015,063	Sept. 24, 1935	C. E. Bennett	Electric Cable (Oilostatic)
2,026,587	Jan. 7, 1936	F. C. Meyer and G. E. Moffitt	Joint for Electric Cables (Oilostatic)
2,029,332	Feb. 4, 1936	F. C. Meyer and G. E. Moffitt	Pothead
2,043,227	June 9, 1936	C. E. Bennett	Leak Indicating Apparatus for Oil Filled Electric Power Cables
2,046,341	July 7, 1936	D. V. McParlin	Method of and Apparatus for Removing Sheaths from Cables and the Like
2,046,364	July 7, 1936	C. E. Bennett	Apparatus for Shipping and Installing Electric Power Cables
2,049,465	Aug. 4, 1936	F. C. Meyer and G. E. Moffitt	Joint for Electric Cables
2,062,289	Dec. 1, 1936	C. E. Bennett	Electric Cable System
2,066,320	Jan. 5, 1937	C. E. Bennett	Electric Cable System
2,066,321	Jan. 5, 1937	C. E. Bennett	Electric Cable System
2,066,322	Jan. 5, 1937	C. E. Bennett	Electric Cable System
2,066,323	Jan. 5, 1937	C. E. Bennett	Electric Cable System
2,070,974	Feb. 16, 1937	F. C. Meyer	Electric Cable System and Joint Therefor

No.	Date	Inventor	Title
2,080,829	May 18, 1937	F. C. Meyer and G. E. Moffitt	Joint for Electric Cables
2,081,263	May 25, 1937	C. E. Bennett	Electric Cable System
2,099,291	Nov. 16, 1937	C. E. Bennett	Electric Cable System
2,138,614	Nov. 29, 1938	B. B. Reinitz	Sheathing Electric Cables
2,150,201	Mar. 14, 1939	C. E. Bennett	Electric Cable System
2,158,517	May 16, 1939	D. V. McParlin	Apparatus for Alloying Metals
2,161,413	June 6, 1939	F. H. Gooding	Electric Cable System
2,168,858	Aug. 8, 1939	C. E. Bennett	Electric Cable System
2,174,961	Oct. 3, 1939	C. E. Bennett	Electric Cable System
2,180,425	Nov. 21, 1939	F. C. Meyer	Electric Cable System
2,185,376	Jan. 2, 1940	D. V. McParlin	Melting Pot
2,186,444	Jan. 9, 1940	C. E. Bennett	Electric Cable System
2,186,445	Jan. 9, 1940	C. E. Bennett	Electric Cable System
2,213,983	Sept. 10, 1940	F. H. Gooding	Apparatus for Electrically Measuring the Wall Thickness of Metal Tubing
2,222,932	Nov. 26, 1940	C. E. Bennett	Electric Cable
2,227,316	Dec. 31, 1940	F. C. Meyer	Electric Power Cable
2,233,765	Mar. 4, 1941	C. E. Bennett	Electric Cable Systems
2,257,727	Oct. 7, 1941	C. E. Bennett and F. C. Meyer	Method of Forming Dams
2,286,594	June 16, 1942	C. E. Bennett	Electric Cable System
2,300,666	Nov. 3, 1943	F. H. Gooding	Electric Power Cable
2,315,039	Mar. 20, 1943	H. L. Beede	Electric Cable
2,318,367	May 4, 1943	J. E. Brigg	Insulated Electric Conductor
2,320,506	June 1, 1943	C. E. Bennett and F. C. Meyer	Method of Forming Dams
2,354,191	July 5, 1944	C. E. Bennett	Pothead or Terminal for Electric Cable System
2,368,097	Jan. 30, 1945	C. E. Bennett	Electric Cable System
2,375,067	May 1, 1945	C. E. Bennett	Electric Cable Sheath
2,375,068	May 1, 1945	C. E. Bennett	Method of Forming Reinforced Sheathed Cables
2,375,069	May 1, 1945	C. E. Bennett et al.	Apparatus for Drying Air
2,382,120	Aug. 14, 1945	F. J. White	Electric Cable System
2,388,899	Nov. 13, 1945	C. E. Bennett	Electrical Apparatus
2,390,823	Dec. 11, 1945	C. E. Bennett	Apparatus for Impregnating Electric Power Cables
2,399,849	May 7, 1946	C. E. Bennett	Method of Lining Pipe with Plastic Material
2,412,556	Dec. 17, 1946	C. E. Bennett	Electric Power Distribution System
2,414,352	Jan. 14, 1947	C. E. Bennett and P. V. White	Joint for Electric Cables
2,419,054	Apr. 15, 1947	C. E. Bennett	Electric Cable
2,433,505	Dec. 30, 1947	C. E. Bennett and G. Everest	Means for Locating Electric Faults in Electric Cable System
2,433,729	Dec. 30, 1947	C. E. Bennett	Electric Cable

PENDING APPLICATIONS

1,446	Jan. 9, 1948	C. E. Bennett	Electric Cable System
1,447	Jan. 9, 1948	C. E. Bennett and P. V. White	Electric Power Cable
1,448	Jan. 9, 1948	C. E. Bennett and P. V. White	Apparatus for Installing Electric Power Cables
2,430	Jan. 15, 1948	C. E. Bennett	Electric Power Cable Terminal
463,186	Oct. 24, 1942	C. E. Bennett	Electric Cable System
535,832	May 16, 1944	C. E. Bennett and P. V. White	Pressure Controls for Electric Cables
548,688	Aug. 9, 1944	C. E. Bennett and P. V. White	Terminal Bushings
549,764	Aug. 16, 1944	C. E. Bennett	Tubular Metal Enclosure
586,590	Apr. 4, 1945	C. E. Bennett and P. Logan	Protective Apparatus
613,257	Aug. 29, 1945	C. E. Bennett	Electric Cable Systems
631,688	Nov. 29, 1945	C. E. Bennett and P. V. White	Joint Structures for Cables
635,344	Dec. 15, 1945	C. E. Bennett	Terminal for Electric Power Cables
671,177	May 21, 1946	C. E. Bennett	Electric Power Cable
672,968	May 27, 1946	C. E. Bennett	Joints for Electric Cable Systems
673,205	May 29, 1946	P. V. White	Apparatus for Aligning Pipe
674,356	June 4, 1946	C. E. Bennett and P. V. White	Reels
679,605	June 26, 1946	C. E. Bennett	Electric Cable
685,573	July 23, 1946	C. E. Bennett	Terminal Structure

No.	Date	Inventor	Title
685,574	July 23, 1946	C. E. Bennett	Joints for Pipe Lines
698,576	Sept 21, 1946	C. E. Bennett and P. V. White	Reels
737,926	Mar. 28, 1947	C. E. Bennett	Terminating Bushings
740,358	Apr. 9, 1947	C. E. Bennett and P. V. White	Electric Cables and Method and Apparatus for Installing Same
741,931	Apr. 16, 1947	C. E. Bennett	High Tension Cable System

V. Other Patents as to which Phelps Dodge Copper Products Corporation Has Rights.

1,892,663	Jan. 3, 1933	Del Mar	Method of and Apparatus for Improving Electrical Properties of Cables
1,944,003	Jan. 16, 1934	Del Mar	Construction for Exterior Channel Oil Filled Cable
1,944,004	Jan. 16, 1934	Del Mar	Construction for Exterior Channel Oil Filled Cable
1,944,005	Jan. 16, 1934	Del Mar	Means for Separating Oil and Gas in Pressure Reservoirs
1,950,608	Mar. 13, 1934	Hanson	Condenser Type Joint or Terminal
1,959,526	May 22, 1934	Del Mar	Pre-twisted Sector Cable
1,980,388	Nov. 13, 1934	Del Mar	Construction for Exterior Channel Oil Filled Cable
2,031,014	Feb. 18, 1936	Staples	Means for Eliminating Laminations in Lead Sheath Manufacture
2,038,894	Apr. 28, 1936	Del Mar	High Pressure Oil Filled Cable
2,057,454	Oct. 13, 1936	Staples	Method for Making Lead Sheathed Cables
2,145,092	Jan. 24, 1939	Mitchell	High Tension Electric Cable
2,190,017	Feb. 13, 1940	Del Mar	Electric Cable
2,190,018	Feb. 13, 1940	Del Mar	Impregnated Paper Insulation for Electric Cables
2,275,187	Mar. 3, 1942	Clark and Palmer	Electric Cable
2,406,676	Aug. 27, 1946	Gambitta	Cable Joint
2,415,184	Feb. 4, 1947	Merrell	Electric Device with Electron Barrier
2,425,851	Aug. 19, 1947	Wyatt	Gas Filled Cable
2,432,568	Dec. 16, 1947	Gambitta	Gas Filled Cable System
2,432,603	Dec. 16, 1947	Zink	Segmental Conductor

UNDERTAKINGS OF THE ATTORNEY GENERAL WITH RESPECT TO THE PATENTS LISTED IN SCHEDULES B AND C HERETO ATTACHED

Under authority of the Trading with the Enemy Act, as amended, Executive Order No. 9193, as amended, and Vesting Orders Nos. 27, 112, 151, 201 and 4009, issued pursuant thereto, and Executive Order No. 9788, all right, title, and interest in the United States patents listed in Schedules B and C attached hereto and the rights and interests created in Societa Italiana Pirelli and Compagnie Internationale Pirelli by their agreement dated June 30, 1933 with General Electric Company, referred to in the foregoing final judgment, are vested in the Attorney General.

Under authority of the aforesaid Trading with the Enemy Act, as amended, and Executive Orders Nos. 9193 and 9788, and pursuant to law, the undersigned hereby undertakes and agrees that:

(1) The agreement dated June 30, 1933 between Societa Italiana Pirelli, Compagnie Internationale Pirelli and General Electric Company is hereby acknowledged to be terminated by virtue of the foregoing final judgment, subject to the retention by General Electric Company of the nonexclusive license and by other persons or corporations of the nonexclusive sub-licenses to make, use, and vend under the patents listed in Schedules B and C granted prior to December 31, 1943 by or in accordance with the terms of that agreement.

(2) The Office of Alien Property (and any successor thereto) will, during the entire terms of the patents listed in Schedule B attached hereto, grant to any applicant, including any defendant, upon written request therefor, an unrestricted, royalty-free, nonexclusive license under any one or more of such patents, in accordance with the general policies of the Office with respect to the licensing of such class of patents the titles to which are vested in the Attorney General.

(3) The Office of Alien Property (and any successor thereto) will, during the entire terms of the patents listed in Schedule C attached hereto, grant to any applicant, including any defendant, upon written request

therefor an unrestricted, nonexclusive license under any one or more of such patents, in accordance with the general policies of the Office with respect to the licensing of such class of patents the titles to which are vested in the Attorney General, but in any event on terms and conditions at least as favorable to applicants for such licenses as the terms and conditions prescribed in Paragraph VI of the foregoing final judgment.

SCHEDULE B

1,906,600	1,956,723	1,981,535	2,011,389	2,115,574
1,906,636	1,973,068	1,981,536	2,030,943	2,261,265
1,933,112	1,973,111	1,999,701	2,082,649	2,352,041

SCHEDULE C

1,869,308	1,944,637	1,979,150	2,064,650	2,132,259
1,883,648	1,947,929	2,006,236	2,072,742	2,133,382
1,895,982	1,957,995	2,039,587	2,081,880	2,133,398
1,895,983	1,962,059	2,040,204	2,120,889	2,133,399
1,900,600	1,964,907	2,043,033	2,122,281	2,244,392
1,933,008	1,979,149	2,049,835		

[¶ 62,301] Warren O. Englebrecht, doing business as Warrens Grocery v. Earnest Day and Mrs. Earnest Day and John Doe Day.

In the District Court within and for Muskogee County, State of Oklahoma. No. 31971. Filed July 23, 1948.

Oklahoma Unfair Sales Act

Unconstitutionality.—Section 593 of the Oklahoma Unfair Sales Act is unconstitutional and void. Section 593 of the Act, which is concerned with sales below cost, sets forth that ". . . any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act, . . ." By setting out the clause "or effect," after the clause "with the intent," this section renders the Act unconstitutional and void.

See the Oklahoma Unfair Sales Act, ¶ 8688.

For plaintiff: George Miskovsky and R. M. Mountcastle.

For defendants: Kelly Brown.

E. G. CARROLL, E. A. SUMMERS, and O. H. P. BREWER, District Judges sitting en banc.

Journal Entry

[*Nature of Action*]

This cause coming on for hearing on this the 23rd day of July, 1948, upon the defendants' demurrer to plaintiff's petition, pursuant to regular setting, plaintiff appearing by George Miskovsky and R. M. Mountcastle, his attorneys and defendants appearing by Kelly Brown, their attorney. And the Court, having heard and considered the arguments and briefs of counsel, and being fully advised, sustains said demurrer on the ground that the act (Title 15, Secs. 591 to 597, inclusive, OSA) upon which the said cause was instituted and prosecuted, is unconstitutional and void for the reason that Sec. 593 of said act contains language rendering the same unconstitutional and void, to-wit: By setting out the clause "or effect", after the clause "with the intent"; To which ruling and order said plaintiff duly excepted.

Thereupon plaintiff in open Court having elected to stand thereon, the Court ordered that said petition be and the same is hereby dismissed. To all of which plaintiff excepted. And thereupon in open court plaintiff gave notice of appeal to the Supreme Court of the State of Oklahoma and requests that this notice be entered on the trial docket of this Court as provided and required by law.

[*Plaintiff's Request for Extension of Time Granted*]

Thereupon plaintiff requested an extension of time in which to prepare and serve case made, and for good cause shown plaintiff is granted until October 23rd, 1948, within which to make and serve case-made, ten days thereafter for suggestion of amendments by either party in writing and same to be settled on five days notice in writing by either party.

[¶ 62,302] **Opinion of the Attorney General of Kentucky.**

Addressed to Willis J. Ballinger, Economic Counsel to the Committee, House Committee on Small Business, 131 Old House Office Building, Washington, D. C. by A. F. Funk, Attorney General, Walter C. Herdman, Assistant Attorney General. August 23, 1948.

Kentucky Unfair Practice Act

Sales Below Cost.—The Kentucky Fair Trade Practice Act is rather difficult to enforce, in that there must be proven an intent to injure competitors and destroy competition where prices are fixed below actual cost.

See the Kentucky Unfair Practices Act, Vol. 2, ¶ 8308.

[*Question*]

We have your letter of August 12 in which you desire information concerning state laws prohibiting the selling of merchandise below cost in intrastate commerce.

[*Proof of Intent to Injure*]

The State of Kentucky enacted a Fair Trade Practice Act in 1936 prohibiting price discrimination; however, this Act is apparently rather difficult to enforce, in that the Court has held that there must be proven an intent to injure competitors and destroy competition where prices are fixed below actual cost. The Court held this in the case of *Kentucky Utilities Company v. Carlisle Ice Company,* 279 Ky. 585, 131 S. W. (2d) 499.

[*Source of Information*]

The Act in questiton can be found in the Kentucky Revised Statutes, Chapter 365, principally Sections 365.020 to 365.070. We understand that the wording of this Act was adopted from a similar Act found in the California Statutes. It is too long to quote, and we suggest that you obtain a copy of the Kentucky Revised Statutes for information concerning this law.

[*Public Hearing*]

We regret that we will be unable to appear before your public hearing. If we can be of further service, however, please so inform.

[¶ 62,303] **Bernard M. Shotkin, trading as Dison Power & Light Company v. Westinghouse Electric & Manufacturing Company, a Pennsylvania Corporation, Mine & Smelter Supply Company, a Colorado Corporation, New England Electric Company, a Colorado Corporation, Harry U. Schockett, trading as Schockett Electric Company and M. L. Foss, Inc., a Colorado Corporation.**

In the United States Circuit Court of Appeals for the Tenth Circuit. No. 3605, May Term, 1948. Filed August 31, 1948.

Appeal from the District Court of the United States for the District of Colorado.

Sherman Antitrust Act

Case Dismissed for Lack of Prosecution.—In an action for injunctive relief and damages under the Sherman Act, the question as to whether or not the action should be dismissed on the court's own motion for failure to prosecute with reasonable diligence tests largely in the sound judicial discretion of the court, and its action with respect thereto will

not be overturned on appeal except in case of abuse of discretion. Manifestly, there was no abuse of discretion in the dismissal of this case. Although plaintiff contends that it was denied due process, and ordinarily notice and opportunity to be heard should be given, nevertheless, the dismissal without notice of this action does not contravene any sustainable concept of due process with which the Court is familiar.

See Sherman Act annotations, Vol. 1, ¶ 1640.619.

For appellant: Bernard M. Shotkin pro se.

For appellees: John Adams (Irving Hale, Jr., Donald S. Stubbs, and Lewis, Grant, Newton, Davis & Henry, for Westinghouse Electric Corporation; Winston S. Howard and Pershing, Bosworth, Dick & Dawson, for Mine & Smelter Supply Company; Harry C. Davis, and Davis, Klahr & James, for M. L. Foss, Inc., Walter M. Appel and Ira C. Rothgerber for Harry U. Schockett and Merrill A. Knight and Schaetzel & Knight for New England Electric Company, were with him on the brief).

Before PHILLIPS, BRATTON and MURRAH, Circuit Judges.

[*Nature of Action*]

BRATTON, Circuit Judge: In August, 1943, Bernard M. Shotkin, acting as trustee for his minor children, instituted this action against Westinghouse Electric & Manufacturing Company and others for injunctive relief and damages under the Sherman Anti-Trust Act, as amended, 15 U. S. C. A. § 1, et seq. From time to time, plaintiff filed numerous groundless motions and engaged in tactics indicating a studied purpose to drag the case along without trial. On March 11, 1947, the court entered an order reciting that no progress had been made in the case during the preceding year and that it should be dismissed for failure to prosecute unless cause to the contrary be shown on or before the first day of the next term to begin May 6th. Pursuant to such order, the clerk of the court called attention to the parties to Rule 8 of the court, and advised them that the case would be dismissed on May sixth unless a proper showing to the contrary be made in the meantime. Thereafter, plaintiff filed a memorandum brief which recited that it was a motion to strike the third paragraph of the answer of the defendant Westinghouse Electric and Manufacturing Company. No substantial affirmative showing was made as to why the case should not be dismissed. On May sixteenth, it was dismissed for lack of prosecution; and plaintiff appealed.

[*Case Cited*]

A district court of the United States is vested with power to dismiss an action for failure of plaintiff to prosecute it with reasonable diligence. The power is inherent and independent of any statute or rule. And where plaintiff has failed to prosecute the action with reasonable diligence, the court may dismiss it on motion of the defendant or on its own motion. *Hicks v. Bekins Moving & Storage Co.*, 115 F. (2d) 406.

[*Judicial Discretion of Court Discussed*]

A motion to dismiss for failure to prosecute diligently is addressed to the sound judicial discretion of the court, and the action thereon will not be disturbed on appeal unless such discretion was abused. *United States v. Fischer*, 93 F. (2d) 488; *Hicks v. Bekins Moving & Storage Co., supra; Silver v. Eakins*, 175 Pac. 876; *Raggio v. Southern Pacific Co.*, 185 Pac. 171; *Brown v. Haymore*, 32 Pac. (2d) 1027. In like manner, the question whether the action should be dismissed on the court's own motion for failure to prosecute with reasonable diligence rests largely in the sound judicial discretion of the court and its action with respect thereto will not be overturned on appeal except in case of abuse of such discretion. Manifestly, there was no abuse of discretion in the dismissal of this case.

[*Denial of Due Process Contended*]

The judgment of dismissal is silent in respect to the place at which it was entered and as to whether notice was given to the parties. It is stated in the brief of appellant that the judgment was entered at Topeka, Kansas, without notice and opportunity to be heard; and upon that statement in the brief, it is argued that appellant was denied due process. While ordinarily notice and opportunity to be heard should be given, the

dismissal without notice of an action for failure of plaintiff to prosecute with reasonable diligence does not contravene any sustainable concept of due process with which we are familiar.

The judgment is AFFIRMED.

[¶ 62,304] Sterling Drug, Inc. v. Morris V. Benatar, etc., et al.

In the Superior Court of the State of California, in and for the City and County of San Francisco. No. 370849. August 12, 1948.

California Fair Trade Act

Applicability of Fair Trade Law to War Surplus Commodities—Injunction to Restrain Fair Trade Violations Granted.—An injunction to restrain a California corporation from selling "war surplus" tooth powder, purchased from the War Assets Administration, and bearing the trademark of a Delaware corporation, at prices below the minimum retail prices stipulated in the Delaware corporation's fair trade contracts in California, has been granted. The rights sanctioned by the California Fair Trade Act extend to the resale of "war surplus" trademarked commodities purchased from the War Assets Administration. These rights afforded by the statute relate not so much to the sale of commodities *per se* as to protection of the good will symbolized by trademarks, brands and names. Although defendant contended that the "war surplus" tooth powder had acquired a distinct character in the public mind, namely, as depreciated in value and sold only at less than regular prices, it should be noted that defendant made no claim that the "war surplus" tooth powder was actually damaged or deteriorated in quality. Regardless of defendant's claims in advertising that the "war surplus" tooth powder was in the manufacturer's original factory cartons and that it represented a sensational value, there is no indication in the Fair Trade Act that the source of acquisition limits or changes the rights which the statute affords against what it denominates to be "unfair competition." Nor are such rights limited or changed by the differences in packaging.

See the California Fair Trade Act, Vol. 2, ¶ 8064.

For plaintiff: Landels and Weigel, by Stanley A. Weigel.

For defendants: Gerald C. Halsey and Frederick T. Leo.

Opinion of the Court

[*Question Presented*]

FOLEY, THOMAS M.: The dominant question presented for decision here is this: Do the rights sanctioned by the California Fair Trade Act extend to the resale of "war surplus" trademarked commodities purchased from the War Assets Administration? Careful consideration compels an affirmative answer to this question which appears to be one of first impression.

[*Statutory Provision Set Forth*]

In common with the similar statutes of 44 other states, the California Fair Trade Act (Business and Profession Code, 16900-16905) authorizes the vendor of commodities identified by trademarks, brands or names to stipulate, by contract with buyers, the price at which the latter shall resell. Our statute, like the others, provides for a cause of action against sales at less than the contract price, regardless of whether or not the one who sells for less is a party to the contract. The statutory provision providing such a remedy reads as follows:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." (Business and Professions Code 16904).

[*Statute Protects Value of Trademarks*]

Plaintiff's suit here is grounded in the quoted provision, which, prior to codification, was designated as Section 1½ of the Fair Trade Act. This particular provision of the statute has had a long history of judicial review. Both the Supreme Court

of this state and the Supreme Court of the United States have made it clear that the rights afforded by the statute relate not so much to sales of commodities *per se* as to protection of the good will symbolized by trademarks, brands and names. In other words, rather than sanctioning the fixing of prices on commodities as such, the statute affords protection against injury to the value of trademarks, brands or names identifying the commodities.

"The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. . . ."

"There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, at 193 and 195. (Upon the authority of the cited case, which dealt with the Illinois Fair Trade Act, the California statute was contemporaneously held constitutional in *Max Factor & Co. v. Kunsman*, 299 U. S. 198.)

[*Max Factor Case Cited*]

In the *Max Factor* case, our own state Supreme Court had, prior to affirmance by the United States Supreme Court, taken a similar view of the purpose and character of the statute.

". . . The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good-will in connection with the articles, which good-will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and cotnract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others." *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 463-464.

[*Basis for Decision*]

It is, then, in the light of the foregoing interpretations of the Fair Trade Act, handed down by the highest courts of this state and the nation, that the decision here must be made.

[*Facts*]

The facts in the case at bar are clear and, for the most part, without conflict. Plaintiff, a Delaware corporation qualified to do business in this state, is sole owner of the trademark which has long identified the product, Dr. Lyon's Tooth Powder. Acting under Fair Trade contracts entered into (by plaintiff's predecessor in interest) with hundreds of retail dealers throughout the State of California, plaintiff stipulated a minimum price of 39¢ on Dr. Lyon's Tooth Powder, 50¢ size, sometimes referred to as "large size".

Defendant Benatars, a California corporation, owns and operates two large retail drug stores in San Francisco, California. Defendant "purchased indirectly" from War Assets Administration a large quantity of Dr. Lyon's Tooth Powder, 50¢ size. (For the purposes of this opinion, it may be assumed that defendant purchased directly from War Assets Administration. Defendant's chief defense is predicated upon the goods being, in fact, "war surplus", i. e., reaching defendant after disposal by War Assets Administration.)

Defendant advertised, offered for sale and sold this "war surplus" tooth powder at 29¢ instead of at 39¢ the latter being the minimum Fair Trade price stipulated on Dr. Lyon's Tooth Powder, 50¢ size. Defendant refused to maintain that price on the "war surplus" goods, insisting that the statute did not apply to them.

The "war surplus" product was packaged somewhat differently from the current product being distributed by plaintiff. No outer cardboard container accompanied the cans containing the "war surplus" product; the color of the can of the latter was a lighter shade of blue; the cap was different in color; and the lettering on the can was different. However, the "war surplus" can carried plaintiff's trademark and the quantity of tooth powder in each case was the same. Defendant claims to have kept the "war surplus" merchandise segregated from the regular stock and to have maintained the 39¢ price in selling the latter. This is assumed to be the fact for the purposes of this opinion.

[*Chief Defense Asserted by Defendant*]

The chief defense asserted by defendant was that the "war surplus" product was not subject to the rights of plaintiff under the Fair Trade Act. Defendant urged upon the court that "War Surplus goods have acquired a distinct and separate character in the public mind, namely, as depreciated in value and sold only at less than regular prices" (Defendant's Points and Authorities, page 1, par. 1), and that "War Surplus" (merchandise) is separate and distinct from regular merchandise freshly manufactured and sold through the usual channels of distribution from manufacturer to retailer; such "War Surplus" goods have frequently been in storage in government warehouses and elsewhere for a period of several years, under varying wartime conditions and are consequently not regarded by the public as comparable to fresh new stock . . . and . . . saleable only at prices substantially reduced from the regular, usual or 'Fair Trade' prices." (Affidavit of Mr. Morris V. Benatar, pp. 10, 11.)

[*No Claim that "War Surplus" Merchandise Damaged*]

In connection with these contentions, it should be noted that defendant made no claim that the "war surplus" merchandise was actually "damaged or deteriorated in quality". In that case, the statute (Section 16902, second subdivision (2)) appears to make it clear that defendant could sell at prices of defendant's own choosing, provided that public were notified of the damage or deterioration.

[*Surplus Property Act of 1944 Quoted*]

Defendant also urged upon the court that the federal Surplus Property Act of 1944, as amended (Title 50, U. S. C. A., Appendix, Section 1611 et seq.), as well as several California statutes, "recognized the separation, and distinct character and classification of 'War Surplus' merchandise" (Defendant's Points and Authorities, page 3, par. 6). Finally, in this line of argument, defendant suggested that applictaion of rights under the Fair Trade Act to the "war surplus" tooth powder would frustrate savings to consumers intended by the federal act.

[*Contentions Unsound*]

On the issue here, none of these contentions is sound.

[*Purpose of Court*]

Courts are not concerned with the economic wisdom of legislation. Their sole responsibility is to apply the controlling statute fairly to the facts in the interest of carrying out, not defeating legislative intent. The legislature of this state has seen fit to provide a remedy to protect the good will symbolized by trademarks, brands and names against the damage resulting when commodities so identified are sold at prices less than stipulated in contracts sanctioned by the statute. The source of acquisition of products carrying the symbol of good will does not control the power to injure the value of the symbol. And injury to a trademark may be done regardless of the form of package upon which it appears.

[*Surplus Property Act of 1944 Inapplicable*]

Any suggestion that the federal Surplus Property Act of 1944, *supra,* supports the position of the defendant is not well taken, as can be determined by examination of the statute itself. The first sentence of the statute reads:

> "The Congress hereby declares that the objectives of this Act are to facilitate and regulate *the* orderly disposal of surplus property so as—" (Italics added)
>
> "§ (h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;"
>
> "§ (m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for

the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;"

"§ (n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);" Title 50, U. S. C. A., Appendix § 1611.

§ 1627(b) provides that the Surplus Property Board shall determine ". . . (that) the vairous classes of such property *should be offered consistently with the usual and customary* commercial practice with respect to such class". (Italics added)

§ 1629 provides that "nothing in this Act shall impair, amend or modify the antitrust laws or *limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act.* As used in this section, the term 'antitrust laws' includes the Act of July 2, 1890 (C. 647, 26 Stat. 209), as amended." (Italics added)

The amendment just referred to provides as follows:

". . . *Provided,* that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale in to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented by this title:" 15 U. S. C. A. § 1.

If Congress intended that goods sold under the federal Surplus Property Act should be exempt from state Fair Trade laws and from the quoted federal accommodation thereof, it is inconceivable that it would have evidenced such concern for orderly distribution, avoidance of dislocation, etc., and that it would have referred, as it did in § 1629, to the Fair Trade amendment to the antitrust laws without qualifying the reference.

[*General Disposal Letter Quoted*]

There is rather compelling evidence that the views expressed above are shared by the War Assets Administration itself. Its General Disposal Letter No. 20, dated January 14, 1947, advises those charged with disposal of war surplus property that "All regional and district offices holding inventories of branded or trade-marked drug and cosmetic items which are or may be affected by a State 'Fair Trade' Practices Act" shall give explicit notice that "The resale or use of the property herein offered for sale and/or sold by the Government, may be affected by applicable State 'Fair Trade' Practice Acts, or other similar regulatory laws."

[*1945 California Statutes Do Not Support Defendant's Contentions*]

The 1945 California statutes cited by defendant in no way support defendant's contentions. Referring to these statutes, seriatim: Chapter 1144 simply prohibits the use of names such as "Army", "Navy", "United States", etc., in connection with the sale of surplus material where such use would tend to mislead the purchasing public into believing that the seller had an official governmental connection or into believing that such articles "are of higher quality and lower price than those elsewhere obtainable" (showing that the California legislature apparently does not share the defendant's view that the public regards war surplus articles as inferior); Chapter 992 is concerned with empowering the State Director of Finance to buy war surplus property for state use; Chapter 77 memorializes the President and the Congress of the United States to designate a single federal agency to deal with states and other political subdivisions desirous of acquiring surplus property; Chapter 232 authorizes municipalities to purchase federal surplus property; and Chapter 796 merely implements Chapter 232 in authorizing municipalities to purchase federal surplus property.

[*Defendant's Desire to Capitalize upon Plaintiff's Trademark*]

The error of defendant's position results from the fact that defendant manifestly does desire to capitalize upon the good will symbolized by plaintiff's trademark in connection with sales at less than Fair Trade prices. Defendant advertised the war surplus merchandise as "guaranteed to be in manufacturer's original packages and in 100% perfect condition." Its advertising also featured the fact that the war surplus goods were "in the original factory cartons" and that they represented "sensational values" at the price set by defendant.

[*Unfair Competition*]

Regardless, however, of defendant's claims in advertising or selling the goods, there is no indication in the Fair Trade Act that the source of acquisition limits or changes the rights which the statute affords against what it denominates to be "unfair competition". Nor are such rights limited or changed by the differences in packaging above indicated. See *Guerlain, Inc. v. F. W. Woolworth Co.*, 297 N. Y. 11, 74 N. E. (2d) 217 (certiorari deined U. S. Supreme Court (12/8/47), 68 S. Ct. 220) and cases on the same point therein cited.

[*Discrimination Alleged*]

Defendant's remaining contentions merit but brief consideration. Defendant claimed that plaintiff inequitably discriminated against defendant by bringing this suit, while competitors of defendant were left free to disregard Fair Trade prices. The facts were otherwise. In all cases in which it was called to plaintiff's attention that a retailer was selling its product, "war surplus" or not, at less than the Fair Trade price, plaintiff exhibited reasonable zeal in notifying such retailer to desist. It is not incumbent upon plaintiff to sue all violators. See *Hutzler Bros. & Co. v. Remington-Putnam Book Co.*, 46 A. (2d) 101; *James Hedden's Son v. Callender*, 29 Fed. Supp. 579; and *Calvert Distillers Corp. v. Stockman*, 26 Fed. Supp. 73.

[*Meaning of Fair Trade Act's "Close-Out" Provision*]

Another contention made by defendant was to the effect that since defendant advertised the Dr. Lyon's war surplus tooth powder in question as "War Surplus Close-out", defendant could disregard the minimum prices established by contract under that clause of the Fair Trade Act which appears to exempt sales made "In closing out the owner's stock for the purpose of discontinuing delivering any such commodity". (Section 16902, second subsection (1) To sustain defendant's contention here would be to emasculate the statute. The quoted clause manifestly relates, and relates only, to a situation where a dealer, in good faith, intends to discontinue dealing in the particular product or line of products altogether and actually does so discontinue. Defendant can hardly be said to be closing out for the purpose of discontinuing delivering if, as is clear from the testimony and advertisements, defendant purchased a large special stock of Dr. Lyon's Tooth Powder and immediately thereafter purported to "close out" the new purchase alone without undertaking to close out defendant's entire stock of the product. Indeed, instead of closing out Dr. Lyon's Tooth Powder, for the purpose of giving up sale of that brand, defendant appears to desire to feature a portion of defendant's stock of the brand at prices below those established under the Fair Trade Act.

In any event, we do not have here even a claim that defendant acted in pursuance of an intent to close out for the purpose of discontinuing delivering all Dr. Lyon's Tooth Powder. The testimony of Mr. Morris V, Benatar of careful maintenance "of the Fair Trade price on the regular merchandise" is inconsistent with a complete discontinuance of dealing in the product. The quoted provision of the statute does not sanction disregard of the Fair Trade Price for the purpose of reducing stock or disposing of a portion of the stock. Were it to be construed, the door would be opened to complete frustration of the plain purpose of the statute.

[*Facts Carefully Presented*]

The court is indebted to counsel on both sides for full and careful presentation of the facts and the law relevant to the issue.

[*Directions to Plaintiff*]

Consonant with the foregoing opinion, counsel for plaintiff are directed to prepare and submit, upon due notice to counsel for defendants, proposed Findings of Fact and Conclusions of Law, as well as form of Judgment and Decree.

[¶ 62,305] **United States v. Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Builders Iron Foundry, Novadel-Agene Corporation, Industrial Appliance Corporation, Martin F. Tiernan, William J. Orchard, Henry S. Chafee, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck.**

In the United States District Court for the District of Rhode Island. Civil Action No. 705. August 6, 1948.

Sherman Antitrust Act

Introduction of Evidence—Motion for Judgment—Action Dismissed Without Prejudice.—A civil action charging a monopoly in the chlorinating equipment industry through patent and stock acquisitions, withholding of supplies from users of rival equipment, dividing fields of distribution, fixing prices, and influencing the writing of specfications and the letting of bids to exclude competitive equipment, is dismissed without prejudice for lack of prosecution. It is held that the plaintiff has not produced any facts or evidence in support of the complaint. A motion by the plaintiff for production of documents essential to the presentation of the government's case is denied on the ground that knowledge of the documents had been obtained as a result of *subpoenas duces tecum* issued by an illegally constituted grand jury.

See the Sherman Act annotations, Vol. 1, ¶ 1610.345.

For plaintiff: Grant W. Kelleher, Special Assistant to the Attorney General, Boston, Mass.

For defendants: Edwards & Angell, William H. Edwards, Gerald W. Harrington; Hinckley, Allen, Tillinghast & Wheeler, Chauncey E. Wheeler, S. Everett Wilkins, Jr.; Hogan & Hogan, Edward T. Hogan, Laurence J. Hogan; all of Providence, Rhode Island.

[*Nature of Action*]

HARTIGAN, J.: This is a civil action brought by the United States of America against the above named defendants under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade in [*sic*] commerce against unlawful restraints and monopolies," as amended (15 U. S. C. § 4), commonly known as the Sherman Act, in order to prevent further alleged violations by them, jointly and severally of Sections 1 and 2 of said Act (15 U. S. C. §§ 1 and 2).

[Portions of the opinion consisting of arguments of counsel and examination of witnesses are omitted as not pertinent to the scope of these reports.]

The above is substantially the record of the trial upon which counsel for the Government said: "I urge Your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint." (Tr. 32)

I find that the plaintiff has not produced any facts or evidence in support of the complaint.

After the Government completed the presentation of its evidence the defendants did not move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The reality here practically amounts to non-prosecution since the Government states that other evidence than the suppressed documentary evidence "might be obtained" to establish violations of the Sherman Act.

In *Carnegie Nat. Bank v. City of Wolf Point*, 110 F. 2d 569, 572, the Court said:

> "We have referred to the fact that Rule 41 of the Federal Rules of Civil Procedure does not specifically provide that a court may dismiss for want of prosecution, but that it does not limit the power of a court to dismiss to those instances enumerated because it suggests that there might be dismissals not provided therein. In any event, it is well settled, 'that a court of equity has general authority, independently of statute or rule, to dismiss a cause for failure or want of diligence in prosecution, in the exercise of a sound judicial discretion.' Longsdorf, Cyc. Fed. Proc., vol. 4, p. 40, § 1024; *Buck v. Felder*, D. C. Tenn., 208 F. 474, 477; *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 8 Cir., 94 F. 312, 313. We are satisfied, therefore, that a dismissal for failure or want of diligence is within the power of a court of equity."

See also *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406.

In the instant case the Government seeks equitable relief.

In *Rudolph v. Sensener,* 39 App. D. C., 385, 388, the Court said:

"The plaintiff in every action at law where there is no admission of the facts alleged has the burden of proving the necessary allegations of his declaration. If he declines or fails to offer evidence, the court may in its discretion dismiss his action without prejudice, or enter a judgment against him. * * *"

The situation in the instant case is somewhat analogous to that in the *Sensener* case, *supra.*

The Government's "request" for judgment and relief prayed for in the complaint is denied and judgment may be entered dismissing the action without prejudice.

It is so ordered.

[¶ 62,306] Canute Co. v. Federal Trade Commission.

In the United States Circuit Court of Appeals for the Seventh Circuit. Term, 1948. No. 9390. August 12, 1948.

Federal Trade Commission Act

Case Remanded to Commission.—A Federal Trade Commission case, based upon an order prohibiting misrepresentation of a hair dye preparation designated "Canute Water," has been remanded to the Commission for the sole purpose of enabling the Commission to set aside its findings as to the facts, conclusion and order to cease and desist, and to dismiss finally the complaint. The cease and desist order had required the manufacturer to stop representing that its preparation is water or anything other than a hair dye preparation and to discontinue using the term "pure" to describe it. The order had provided further that the term "Canute Water" could be used as a brand or trade name only if qualified by a statement to the effect that the preparation is a "Silver-nitrate" hair dye.

Remanding of case in Federal Trade Commission cease and desist order, Dkt. 5234.

See Federal Trade Commission Act annotations, Vol. 2, ¶ 6620.808.

For petitioner: Walter Moses.

For respondent: William P. Kelly.

WILLIAM M. SPARKS, C. J., J. EARL MAJOR, C. J.

Order of Court

[*Case Remanded to Commission*]

Upon motion of the Federal Trade Commission, respondent, joined in by Canute Company, a corporation, petitioner, (1) it is ordered that the respondent's motion to be permitted to withdraw from the consideration of this Court (a) motion to remand this case to the Federal Trade Commission for the purpose of enabling the Commission to enter modified findings as to the facts and conclusion, and a modified order to cease and desist, and (b) petitioner's answer thereto with supporting brief, is hereby granted, and (2) it is further ordered that this case is remanded to the Federal Trade Commission for the sole purpose of enabling the Commission to set aside its findings as to the facts, conclusion and order to cease and desist entered March 31, 1947, and to dismiss finally the complaint herein.

[¶ 62,307] Katz v. Gevirtz.

In the New York Supreme Court, Special Term, Part I. 120 N. Y. L. J. 568. September 24, 1948.

Feld-Crawford Act

Motion to Dismiss—Motions to Strike—Sufficiency of Complaint.—A non-signatory retail reseller is just as amenable to the provisions of the Feld-Crawford Act as the one who signs the price contract. Nor is it necessary that the person who sues to restrain a retailer from price cutting be a signer of any price-fixing contract or that he be a manufacturer or producer. The Act permits "any person damaged thereby" to bring action for a violation.

See the Feld-Crawford Act annotations, Vol. 2, ¶ 8604.30.

[*Nature of Action*]

BELDOCK, J.: In this action brought under the so-called "Feld-Crawford Act" (General Business Law, secs. 369-a and 369-b) for an injunction and damages, defendant has moved under Rule 106 of the Rules of Civil Practice to dismiss the complaint on the ground of insufficiency. Defendant also moves in the alternative, under Rules 102 and 103 of the Rules of Civil Practice, to strike certain paragraphs of the complaint as sham, frivolous and irrelevant and to make other paragraphs more definite and certain.

The pleading challenged for insufficiency must be construed broadly and liberally and every fair inference resolved in its favor, however imperfectly or informally the facts may have been drawn (*Condon v. Associated Hospital Service, Inc.,* 287 N. Y. 411; *Wainwright & Page v. Burr & McAuley,* 272 N. Y. 130).

I hold the complaint to be sufficient in law. The essential elements of a cause of action of this kind are (1) the fixing of prices by the owner or producer of the commodity within the provisions of the Feld-Crawford Act; (2) that the commodities involved are in fair and open competition with commodities of the same general class produced by others, and (3) that defendant having notice of the fixing of prices, as aforesaid, willfully and knowingly advertised or offered the commodities for sale at less than the price stipulated. The complaint herein substantially sets forth these essential allegations.

The objection raised, that defendant is not alleged to have been a party who subscribed to the price contract, is untenable. A nonsignatory retail reseller is just as amenable to the act as the one who signs the price contract (*Port Chester Wine & Liquor Shop v. Miller Brothers,* 281 N. Y. 101; *Calvert Distillers Corp'n v. Nussbaum Liquor Store, Inc.,* 166 Misc. 342). Nor is it necessary that the person who sues to restrain defendant from price cutting be a signer of any price-fixing contract or be a manufacturer or producer. The language of section 369b precludes any such interpretation, for that statute permits "any person damaged thereby" to bring action for a violation (*Weisstein v. Corbyn Liquor Store, Inc.,* 174 Misc. 1075). Plaintiffs claim to be competitors who were damaged by reason of the acts complained of and the right to sue and be awarded injunctive relief under this statute is available to them. Accordingly, the motion to dismiss the complaint under Rule 106 is denied.

Similarly, motions addressed to the pleading under Rules 102 and 103 are not deemed merited.

The references in the paragraphs of the complaint under attack to "fair trade agreements" and "fair trade contracts" are merely descriptive of the type of contracts entered into under the General Business Law, elsewhere referred to in the complaint. Such references are not so indefinite or uncertain that the precise meaning is not apparent. Furthermore, the uncertainty, if any, may be clarified by a bill of particulars (*Higgins v. O'Donnell,* 256 App. Div. 981).

I do not find that the allegations of the complaint are sham, frivolous, irrelevant or redundant, as is charged. While much may be said about the form of the pleading, it substantially sets forth facts necessary to plaintiffs' cause of action, and as this phase of the motion is addressed to the sound discretion of the court (*Solomon v. La Guardia,* 267 App. Div. 435), the allegations will not be stricken unless harm or prejudice will result by the retention thereof (*Goodrow v. N. Y. American, Inc.,* 233 App. Div. 37). In this instance, the presence of the matters sought to be stricken involves no prejudice and will not tend to embarrass or delay the fair trial of the action (Rule of Civil Practice 103). Defendant can readily obtain information as to the price lists and contracts by means of a bill of particulars.

Defendant's motion is in all respects denied, with leave to answer within twenty days after service of a copy of the order to be entered hereon, with notice of entry thereof.

[¶ 62,308] United States v. American Optical Company, an association, et al.

In the United States District Court for the Southern District of New York. Civil Action No. 10-391. September 17, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Consent Judgment—Elimination of Restrictive Practices—Restoration of Competitive Conditions.—A consent judgment entered in an action charging 13 manufacturers of eyeglass frames and mountings, a national trade association of optical wholesalers, six optical wholesalers, two patent holding companies and 13 individuals with engaging in a conspiracy and combination to fix prices and otherwise restrain trade in opthalmic goods enjoins price fixing, cancels certain patent licenses, requires that patents and trademarks relating to the frames and mountings involved be made available to other manufacturers on reasonable terms, and prohibits expansion by two defendants in the field of wholesale distribution by the acquisition of independent concerns, and the boycotting of wholesale firms and other unfair competitive practices.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10 and the Clayton Act annotations, Vol. 1, ¶ 2023.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; Sigmund Timberg, J. Francis Hayden, Special Assistants to the Attorney General; Marcus B. Hollabaugh, George L. Derr, Robert L. Tollefson, Special Attorneys.

For defendants: Root, Ballantine, Harlan, Bushby & Palmer; Simpson, Thacher & Bartlett; Darby & Darby; Spence, Hotchkiss, Parker & Duryee; Sonnenschein, Berkson, Lautmann, Levinson & Morse; Blair, Curtis & Hayward; Niles & Johnson; Morris N. Bobis, Curtis & Belknap; Max Rockmore; Letts & Quinn; Pennie, Edmonds, Morton & Barrows; Goodman & Mabel; Harris, Beach, Folger, Keating & Wilcox; White, Wright, Raub & Forrey.

FINAL JUDGMENT

The complainant, United States of America, having filed its complaint herein on September 16, 1940; all of the defendants having appeared and severally filed their answers to such complaint denying the substantive allegations thereof and denying any violation of the law as alleged in the complaint; this action having come on for trial before the Honorable John M. Woolsey, late Judge of this Court, and the trial having been adjourned on October 21, 1942 pursuant to the request of the Secretary of War and the Secretary of the Navy; an order having been entered on September 17, 1948, upon the motion of certain of the defendants, declaring a mistrial in this case because of the death of Judge Woolsey during the period of adjournment and directing a new trial of all the issues; no testimony or evidence having been taken upon such new trial; and all parties hereto, by their respective attorneys, having severally consented to the entry of this final judgment without any adjudication of any issue of fact or law herein and without constituting evidence or admission in respect of any such issue:

NOW, THEREFORE, before any testimony or evidence has been taken upon such new trial and without any adjudication of law or fact herein, upon the consent of all parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

[*Jurisdiction*]

I

That this Court has jurisdiction of the subject matter of this action and of all parties hereto, and that the complaint states a cause of action against the defendants under Sections 1, 2 and 3 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and Section 3 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," and acts amendatory thereof and supplemental thereto.

[*Terms Defined*]

II

When used in this final judgment, the following terms shall have the following meanings:

A. "American Optical" means, individually and collectively, the defendant Amer-

ican Optical Company, an association, and the defendant American Optical Company, a corporation.

B. "Bausch & Lomb" means the defendant Bausch & Lomb Optical Company, a corporation.

C. "Bausch & Lomb Affiliates" means, individually and collectively, the defendants Riggs Optical Company-Consolidated; Riggs Optical Company, Inc.; McIntire, Magee and Brown Company; Colonial Optical Company, Inc.; and the Southeastern Optical Company, Inc., which, for the purpose of this judgment, are treated as subsidiaries of Bausch & Lomb.

D. "O. W. N. A." means the defendant Optical Wholesalers National Association, Inc.

E. "Ful-Vue Sales Company" means the partnership of that name composed of the defendants George P. Kimmel, Robert E. Hillier, and Julius H. Tuvin, and the individual partners thereof.

F. "Patents" means United States Letters patent and patent applications, including all renewals, extensions, continuations, divisions, or reissues of such patents or patent applications.

G. "Ophthalmic goods" means ophthalmic lenses, lens blanks, spectacle frames, mountings, eyeglasses, spectacles, and component parts or combinations of any of these articles, and as so defined does not include sun glasses or industrial safety equipment not containing lenses ground to prescription.

H. "Person" means an individual, corporation, partnership, association, joint stock company, business trust, or any other business organization.

I. "Manufacturers' prices" means the prices at which manufacturers sell ophthalmic goods to wholesalers.

III

Wherever reference is made in this judgment to any defendant, said reference shall also include each of such defendant's subsidiaries, successors, and assigns and each of its directors, trustees, nominees, partners, members, officers, agents, representatives or employees, and any person acting or with authority to act, under, through, or for them or any of them.

[*Agreements Cancelled*]

IV

That the following patent licenses or agreements and all amendments, modifications, or supplements of the same, and all schedules issued thereunder or relating thereto, are hereby cancelled and decreed to be null and void from the date of this judgment, and each defendant is hereby enjoined and restrained from the further performance, observance, or enforcement of any of the terms or provisions thereof (except with regard to royalties, if any, accrued to the date of this judgment, as to which this judgment is without prejudice to rights or defenses that may be asserted or claimed by any party to any proceeding), and from adopting, adhering to, or furthering any course of conduct for the purpose or with the effect of maintaining, reviving, or reinstating said licenses or agreements:

A. All licenses and agreements between Ful-Vue Sales Company and American Optical under or relating to any of the patents listed in Appendix "A", which is attached hereto and made a part hereof, including but not limited to the License Agreement dated May 1, 1929, the License Agreement dated January 10, 1930, the Amendment to License Agreement dated September 2, 1931, the Supplemental Agreement dated March 20, 1931 and the Agreement dated September 11, 1934.

B. All licenses and agreements between the Uhlemann Optical Company of Illinois and American Optical under or relating to any of the patents listed in Appendix "A", including but not limited to the License and Agreement dated June 4, 1938, the Agreement dated October 28, 1938, the Letter Agreement dated January 19, 1939, and the Agreement dated September 4, 1941.

C. All licenses or sublicenses issued by American Optical under or relating to any of the patents listed in Appendix "A", except that this provision shall not affect the paid-in license dated January 20, 1938, issued by American Optical to Bausch & Lomb in connection with the exchange of licenses in settlement of Interference Proceeding No. 73476 declared by the Commissioner of Patents on October 30, 1936.

D. All licenses issued by Bausch & Lomb under or relating to any of the patents listed in Appendix "A".

[*Notice*]

V

A. That defendant American Optical, as to the licenses and sublicenses referred to in Section IV C, and defendant Bausch & Lomb, as to the licenses referred to in Sec-

tion IV D, are hereby ordered and directed, within fifteen days from the date of this judgment, to give notice to each of the licensees and sublicensees that said licenses and sublicenses, and all schedules issued thereunder or relating thereto, have been cancelled and are no longer in effect. Said notice shall be in a form approved by the Department of Justice and shall be accompanied by a true copy of this judgment.

B. That the respective owners of the patents listed in Appendix "A" are hereby ordered and directed within fifteen days from the date of this judgment to give notice to each person whose license under such patents of said owner has been cancelled by Section IV of this judgment, advising such persons of their rights to utilize patents and trade marks and to obtain patent licenses in accordance with the provisions of Sections VI and IX hereof. Said notice shall be in a form approved by the Department of Justice.

[*Patents to Be Made Available*]

VI

A. That each of the defendants American Optical, Bausch & Lomb, Ful-Vue Sales Company and Uhlemann Optical Company of Illinois, is hereby ordered and directed to grant to all applicants therefor non-exclusive, non-assignable licenses to make, use and vend under

(1) any or all of the patents listed in Appendix "A" which are owned or controlled by it (as indicated in said Appendix "A"), and

(2) any or all patents heretofore issued or applied for, or issued or applied for within ten years from the date of this judgment, claiming inventions constituting improvements to any invention which was claimed in any of the patents listed in Appendix "A" or which might have been claimed therein as a new invention on the basis of the inventor's disclosure, insofar as such patents are now or hereafter owned or controlled by such defendant directly or indirectly or under which it has or obtains a right to grant licenses or sublicenses.

Each of said defendants is hereby enjoined and restrained from making any disposition of any of the patents listed in Appendix "A" which deprives it of the power or authority to grant such licenses, and from accepting any exclusive license under any such improvement patents owned or controlled by any other person unless the license gives it the right to grant licenses or sublicenses under such patents in accordance with the requirements of this Section VI.

B. That if at any time hereafter any of the defendants, other than those named in Section VI A hereof, shall grant to any person a license to make, use or vend under any patent heretofore issued or applied for, or issued or applied for within ten years from the date of this judgment, claiming inventions constituting improvements to any invention which was claimed in any of the patents listed in Appendix "A" or which might have been claimed therein as a new invention on the basis of the inventor's disclosure, such license shall be non-exclusive and shall conform to the requirements of Section VI C hereof, and the defendant which grants such license is hereby ordered and directed to grant to all applicants therefor, similar non-exclusive, non-assignable licenses to make, use and vend under any or all such patents so licensed.

C. That each of the defendants is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this Section except that (a) a reasonable royalty may be charged which shall be uniform except with respect to the license excepted from the operation of Section IV C hereof; (b) reasonable provision may be made for periodic inspection of the books and records of the licensees by an independent auditor who shall report to the licensor only the amount of the royalty due and payable; (c) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; and (d) the license must provide that the licensee may cancel the license at any time by giving thirty days notice in writing to the licensor.

D. Upon aplication for a license under the provisions of this Section, the defendant to whom application is made shall state the royalty which it deems reasonable for the patents to which the application pertains. If the parties are unable to agree upon a reasonable royalty, the defendant may apply to this Court for the determination of a reasonable royalty, giving notice thereof to the applicant and the Attorney General, and he shall make such application forthwith

upon request of the applicant. In any such proceeding, the burden of proof shall be upon the defendant to whom application is made to establish by a fair preponderance of evidence, a reasonable royalty, and the Attorney General shall have the right to be heard thereon. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the patents to which his application pertains and the only obligation arising from such application shall be the obligation to pay the reasonable royalty ultimately determined by the parties or by the Court with respect to his exercise of rights under the patents during the period from the date of his application to the date of such determination of the reasonable royalty.

E. That if any person whose license or sublicense has been cancelled by Section IV of this judgment shall, within a period of sixty days from the date of this judgment, make application for a new license under the provisions of this Section, the rights and obligations of such person with respect to all patents to which the application pertains shall be determined in the same manner and with the same effect as if the application had been made on the date of this judgment.

[*Acts Enjoined*]

VII

That each of the defendants American Optical, Bausch & Lomb, Ful-Vue Sales Company and Uhlemann Optical Company of Illinois is hereby enjoined and restrained from instituting or threatening to institute, or maintaining any suit, counterclaim or proceeding, judicial or administrative, for infringement or to realize or collect damages or compensation for infringement under or on account of any patent listed in Appendix "A", where the cause of action arose prior to the date of this judgment.

VIII

That, as to ophthalmic frames or mountings embodying the invention of any patent listed in Appendix "A" or any improvement thereto as to which licenses are required to be issued under Section VI by the defendants American Optical, Bausch & Lomb, Ful-Vue Sales Company or Uhlemann Optical Company of Illinois, and manufactured by an American licensee under such patent, said defendants are hereby enjoined and restrained from attempting to enforce rights under any foreign patent embodying substantially the same invention with the purpose or effect of preventing or impeding the exportation from the United States to any foreign country of said frames or mountings.

IX

That each of the defendants is hereby enjoined and restrained from interfering in any manner with the use by any other person, with reference to a frame or mounting or part thereof, of any designation, whether registered as a trade mark or not, which has heretofore been generally used to designate frames or mountings or parts thereof manufactured under any of the patents listed in Appendix "A", except (1) to prevent the use of such designation with reference to an article without disclosure of the source of manufacture or (2) to prevent the use of such designation, in such a way as to cause deception, with reference to an article which is not substantially similar to articles to which the designation has been heretofore generally applied. Without limiting the generality of the foregoing, the following trade marks or designations are included among those heretofore generally used to designate certain of said patented articles: Ful-Vue, Numont, Arcway, Rimway, Toprim and Zyl-arc. This judgment does not in any way adjudicate, determine or affect the validity or invalidity of any such designation as a trade mark. The provisions of this section shall not apply to any trade mark or designation which has been used exclusively by any one of said defendants to designate articles manufactured or distributed by it.

X

That each defendant is hereby enjoined and restrained, for a period of five years from the date of this judgment, from granting or enforcing any license or sublicense, or entering into or enforcing any agreement under any patents (other than those which are dealt with in Section VI hereof) in the field of ophthalmic goods, which are now or hereafter owned or controlled by it, directly or indirectly, or under which it has or obtains a right to grant sublicenses, wherein there is contained any provision or condition fixing, designating, limiting, or restricting in any manner (a) the prices, conditions, or terms of sale under which any

article may be made, used or sold, (b) the purpose or use for which any article may be made, used or sold, (c) the quantities of any article which may be made, used or sold, (d) the territories or areas in which any article may be made, used or sold or (e) the persons by whom any article may be used or to whom any article may be sold. At any time within five years after the injunctive provisions of this section have ceased to be applicable, if any defendant shall include any such provision or condition in any such license, sublicense, or agreement, the defendant shall give notice thereof to the Attorney General. Non-action by the United States after receipt of any notice shall in no event be considered as approval or acquiescence.

XI

That each defendant is hereby enjoined and restrained from granting or enforcing any license or sublicense or entering into or enforcing any agreement, under any patents in the field of ophthalmic goods which are now or hereafter owned or controlled by it, directly or indirectly, or under which it has or obtains a right to grant sublicenses, by the terms or conditions of which (a) any licensee or party is required to enter into Fair Trade resale price maintenance contracts or otherwise fix or attempt to fix or maintain resale prices, or (b) any purchaser of a patented article is restricted in the use or disposition thereof.

[*Price Contracts Declared Void*]

XII

That all Fair Trade resale price maintenance contracts or schedules now in effect between any of the defendants and customers of such defendants, which relate to the resale prices of ophthalmic frames or mountings, or parts thereof, are hereby decreed to be null and void, and each defendant shall forthwith cancel each of said contracts or schedules to which it is a party and give notice within thirty days hereof to each of its customers that said contracts or schedules have been cancelled and are no longer in effect; that each of the defendants is hereby enjoined and restrained from enforcing or attempting to enforce any of said contracts or schedules; and that each of the defendants is hereby enjoined and restrained for a period of two years from the date of this judgment from entering into any Fair Trade resale price maintenance contracts or schedules relating to ophthalmic frames or mountings or parts thereof and from systematically suggesting to any other person wholesale or prescription prices for ophthalmic frames or mountings, or parts thereof.

[*Acts Enjoined*]

XIII

That the defendant OWNA is hereby enjoined and restrained from:

A. Collecting or soliciting information from or concerning, or investigating, any person with respect to the functions, operations or business of such person by any means other than direct inquiry to such person and voluntary submittal of information by such person, unless such person is a member of or has made a formal application for membership in the OWNA.

B. Collecting, soliciting, utilizing, distributing or disclosing any data or information concerning the businesses of wholesale or retail distribution of ophthalmic goods:

(1) For any purpose other than that of compiling and distributing general trade information or reports; or

(2) in such a manner as to disclose any data or information concerning any particular person; or

(3) where the purpose or effect of such activity is to establish any functional classification of any person or persons or to exclude any person from engaging in either of such businesses.

C. Preparing or disclosing any classification or list purporting or tending to show the classification of the functions or business of any particular person or persons.

XIV

That each of the defendants American Optical, Bausch & Lomb and Bausch & Lomb affiliates is hereby enjoined and restrained from being or becoming members of any organization or association whose activities have the purpose or effect of establishing any functional classification of any person or persons, fixing prices or otherwise restraining competition in the manufacture, sale or distribution of ophthalmic goods.

XV

That each of the defendants is hereby enjoined and restrained from refusing to sell

ophthalmic goods at manufacturers' prices to any person because such person is not listed on the Ful-Vue Distributors List, or any similar list, or is not a member of the OWNA or any other association, or is not listed or classified as a wholesale distributor by the OWNA or by any other person.

XVI

That each of the defendants is hereby enjoined and restrained from:

A. For the purpose or with the effect of eliminating a competitor or destroying, restraining or preventing competition, selling or offering for sale ophthalmic goods and processing services upon such goods at unreasonably low prices.

B. Selling or offering for sale ophthalmic goods to retailers under any columnar or other quantity discount price list which permits a larger aggregate gross profit on the sale of a lesser quantity of goods than it permits on the sale of a larger quantity of goods of like grade and quality, provided, however, that notwithstanding the provisions of this paragraph, sales in quantities other than those for which specific prices are quoted may be made at the prices applicable to the next lower listed quantity. For the purpose of this provision, the term "gross profit" shall mean the difference between the manufacturer's price and the price at which the goods are sold or offered to retailers.

C. Selling or offering for sale like quantities of ophthalmic goods of identical physical characteristics which are regularly sold by the defendant as being goods of the same grade and quality, or of ophthalmic goods of identical physical characteristics which are sold under the same brand or name, at different prices in the same trade or competitive area; provided that differentials in price may be made between customers in different functional classifications prevailing in the industry.

Nothing contained in this section shall prevent any of the defendants from adopting a price made in good faith to meet an equally low price of a competitor.

XVII

That each of the defendants American Optical, Bausch & Lomb, and the Bausch & Lomb affiliates is hereby enjoined and restrained, individually or by combination or agreement among themselves or with any other person, from interfering with or attempting to influence or affect the business policies, practices or expansion of any other person who is a manufacturer or wholesaler of ophthalmic goods, through the use of any threat to injure or destroy the business of such person.

XVIII

That each defendant is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering any contract, agreement, understanding, combination or conspiracy with any other person as to prices, discounts or other terms or conditions to be charged, given, or imposed in the sale or distribution of any ophthalmic goods to third persons, other than such contracts, agreements or understandings as are not then prohibited by other provisions of this judgment and are then lawful under patent license agreements or fair trade resale price maintenance contracts.

XIX

That each of the defendants American Optical, Bausch & Lomb and the Bausch & Lomb affiliates is hereby enjoined and restrained for a period of ten years from the date of this judgment from acquiring, directly or indirectly, any ownership interest by purchase or acquisition of assets or of securities or otherwise, or from leasing, or from acquiring control over, any establishment, business or concern engaged in whole or in part in the wholesale distribution of ophthalmic goods, except, however, that nothing herein shall prevent Bausch & Lomb or the Bauch & Lomb affiliates from (1) acquiring additional stock or other ownership interest in or the assets of the Bausch & Lomb affiliates, and (2) acquiring ownership or control of outlets in the territory defined in Appendix "B", which is attached hereto and made a part hereof, for the wholesale distribution of ophthalmic goods, provided that it or they have, after reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to the satisfaction of the Court that any such acquisition does not substantially lessen competition in the wholesale distribution of ophthalmic goods in the area served by the outlet sought to be acquired, or tend to create a monopoly in the wholesale distribution of ophthalmic goods in the above-defined territory. In no event shall acquisition be permitted under subdivi-

sion (2) of this Section in any city or locality in which Bausch & Lomb or a Bausch & Lomb affiliate owns or controls an outlet for the wholesale distribution of ophthalmic goods.

XX

That each of the defendants American Optical, Bausch & Lomb and the Bausch & Lomb affiliates is hereby enjoined and restrained from representing or holding out to the public that any concern, outlet or factory branch owned or controlled directly or indirectly by any of said defendants, which is engaged in the ophthalmic wholesale business or performs any of the functions of an ophthalmic wholesaler, is independently owned, controlled, or operated.

XXI

That each of the defendants American Optical, Bausch & Lomb and the Bausch & Lomb affiliates is hereby enjoined and restrained from making, entering into or enforcing, or attempting or threatening to enforce, any covenant in any contract for or incident to the acquisition or purchase of the ownership or control of any establishment, business or concern engaged in the manufacture or wholesale distribution of ophthalmic goods which prohibits, limits or restricts, in any manner, the right of the vendor or any person to engage in the manufacture or wholesale distribution of ophthalmic goods or to compete with such defendants.

XXII

That as between the defendants American Optical and Bausch & Lomb, and as between the defendants American Optical and the Bausch & Lomb affiliates, said defendants are hereby enjoined and restrained from:

A. Exchanging with each other, or disclosing one to the other, with respect to the manufacture or distribution of ophthalmic goods, any information relating to unit costs; future prices; current prices or current sales (other than such as is lawfully available on equal terms to other members of the industry); names of customers; or the opening or closing of wholesale outlets.

B. Jointly obtaining, acquiring, owning or holding, directly or indirectly, any patent relating to ophthalmic goods, or any interest in such patent.

C. Exchanging or granting one to another on an exclusive basis any license under any United States patent in the field of ophthalmic goods or any technical information in that field, or making or performing any agreement or understanding for a general exchange between any of said defendants of rights under such United States patents or of such technical information.

XXIII

That each of the defendants Bausch & Lomb, Bay State Optical Company, New Jersey Optical Company, American Optical and Shuron Optical Company is enjoined and restrained from:

(1) Leasing, selling or licensing machines used to assemble ophthalmic goods, on the condition or with the agreement or understanding that the lessee, purchaser, or licensee will not use such machine to assemble ophthalmic goods made or sold by any competitor of such defendant;

(2) Enforcing any provision in any existing lease, contract or license relating to a machine used to assemble ophthalmic goods, which provides that the lessee, purchaser or licensee will not use such machine to assemble ophthalmic goods made or sold by any competitor of such defendant; and

(3) Selling ophthalmic goods on the condition or with the agreement or understanding that such goods will be assembled only by use of machines leased, sold or licensed by such defendant.

[*Inspection for Compliance Purposes*]

XXIV

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall upon written request of the Attorney General or an Assistant Attorney General and on reasonable notice to any defendant corporation, association or partnership made to its principal office be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such mat-

ters; provided, however, that no information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

[*Report to be Filed*]

XXV

Within three months from the date of this judgment, the defendants shall file with the Attorney General a report of the action taken to carry out the provisions of this judgment requiring said defendants to send notices, including a copy of each type of notice so sent and a list of the persons to whom such notices were sent, and shall file with the Attorney General a copy of the form of patent license used in complying with the provisions requiring compulsory licensing of patents, including a statement of the rate of royalty being collected with respect to each patent so licensed.

For a period of ten years from the date of this judgment, each defendant shall, upon written request of the Attorney General or an Assistant Attorney General, submit reports in writing with respect to (a) the form and contents of, or parties to, any patent license agreements to which it is a party under United States patents in the field of ophthalmic goods; (b) the nature and extent of its United States patent holdings in the field of ophthalmic goods; (c) the United States trade marks or trade names being used by it in the field of ophthalmic goods, and any litigation or complaints initiated by it with respect thereto; (d) the activities of any trade association concerned with ophthalmic goods, and the participation of the defendants therein; (e) the cancellation of any patent license, issued pursuant to the compulsory licensing provisions of this judgment, and the reasons or grounds for such cancellation; and (f) the acquisition or opening of concerns, branches or outlets for the manufacture or wholesale distribution of ophthalmic goods in the United States.

No information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

[*Jurisdiction Retained*]

XXVI

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof, or the enforcement of compliance therewith and for the punishment of violations thereof.

[*Activities Not Affected*]

XXVII

Except with respect to Section VIII, nothing contained in this judgment shall have any effect with respect to operations or activities of any defendant which relate exclusively to acts and operations outside the United States and its territories and are not violative of the Anti-Trust laws of the United States.

[*Issues Not Adjudicated*]

XXVIII

Nothing contained herein shall be deemed to adjudicate, determine or otherwise affect the issues involved in *United States v. Bausch & Lomb Optical Company, et al.*, Civil Action No. 46C1332, *United States v. American Optical Co., et al.*, Civil Action No. 46C1333, or *United States v. Uhlemann Optical Company of Illinois, et al.*, Civil Action No. 48C608, now pending in the United States District Court for the Northern District of Illinois, Eastern Division.

APPENDIX "A"

United States Patent No.	*Name of Inventor*	*Name of Owner*	*Issue Date*
1,685,192; Reissue 17,994	Ernest E. Emons	Ful-Vue Sales Company	Sept. 25, 1928; Reissued Mar. 10, 1931
1,739,049; Reissue 17,996	John A. Smith	Ful-Vue Sales Company	Dec. 10, 1929; Reissued Mar. 10, 1931
1,964,664	Ernest E. Emons	Ful-Vue Sales Company	June 26, 1934
1,976,661	Ernest E. Emons	Ful-Vue Sales Company	Oct. 9, 1934
2,041,638	Ernest E. Emons	Ful-Vue Sales Company	May 19, 1936
2,197,682 Reissue 21,909	William Brown	Ful-Vue Sales Company	Apr. 16, 1940; Reissued Sept. 30, 1941
DP-85,089	Ernest E. Emons	Ful-Vue Sales Company	Sept. 15, 1931
DP-91,518	Ernest E. Emons	Ful-Vue Sales Company	Feb. 20, 1934
DP-93,765	Ernest E. Emons	Ful-Vue Sales Company	Nov. 6, 1934
DP-94,541	Ernest E. Emons	Ful-Vue Sales Company	Feb. 12, 1935
1,935,433	T. E. Bosworth	American Optical	Nov. 14, 1933
1,953,922	T. E. Bosworth	American Optical	Apr. 10, 1934
DP-84,024	T. E. Bosworth	American Optical	Apr. 28, 1931
DP-84,678	T. E. Bosworth	American Optical	July 21, 1931
1,747,904	George E. Nerney	American Optical	Feb. 18, 1930
1,984,541	George E. Nerney	American Optical	Dec. 18, 1934
2,050,525 Reissue 21,255	Louis L. Gagnon	American Optical	Aug. 11, 1936; Reissued Oct. 3, 1939
2,236,304	T. J. Snavely	American Optical	Mar. 25, 1941
DP-107,697	George E. Nerney	American Optical	Dec. 28, 1937
DP-110,739	Edward M. Splaine	American Optical	Aug. 2, 1938
DP-112,386	Edward M. Splaine	American Optical	Nov. 29, 1938
DP-115,769	Thomas J. Snavely	American Optical	July 18, 1939
DP-115,772	Edward M. Splaine	American Optical	July 18, 1939
DP-117,769	Charles O. Cozzens	American Optical	Nov. 21, 1939
1,878,366	Carl L. Bausch	Bausch & Lomb	Sept. 20, 1932
1,878,370	Samuel E. Bouchard	Bausch & Lomb	Sept. 20, 1932
1,878,371	Samuel E. Bouchard	Bausch & Lomb	Sept. 20, 1932
1,978,890	Samuel E. Bouchard	Bausch & Lomb	Oct. 30, 1934
1,985,499	George L. Hommel	Bausch & Lomb	Dec. 25, 1934
2,033,608	Samuel E. Bouchard	Bausch & Lomb	Mar. 10, 1936
2,063,170	Cletus F. Kramer	Bausch & Lomb	Dec. 8, 1936
2,108,875	William R. Uhlemann	Uhlemann Optical Company of Illinois	Feb. 22, 1938
2,164,557	William R. Uhlemann	Uhlemann Optical Company of Illinois	July 4, 1939
2,188,380	William R. Uhlemann	Uhlemann Optical Company of Illinois	Jan. 30, 1940
DP-117,766	William R. Uhlemann	Uhlemann Optical Company of Illinois	Nov. 21, 1939

All renewals, extensions, continuations, divisions or reissues of any of the above patents.

APPENDIX "B"

All of the Lower Peninsula of the State of Michigan; all of the State of Ohio; all of the State of West Virginia; all of the State of Kentucky except the Counties of Ballard, Carlisle, Hickman, Fulton, Graves, Calloway, Marshall, McCracken; all of the State of Indiana except the Counties of Lake, Porter, and Laporte; the Counties of Garrett and Alleghany in the State of Maryland; the following counties of the State of Illinois: Peoria, Woodford, Livingston, Tazewell, McLean, Ford, Mason, Logan, DeWitt, Piatt, Champaign, Vermilion, Cass, Menard, Scott, Morgan, Sangamon, Macon, Douglas, Greene, Macoupin, Montgomery, Christian, Shelby, Moultrie, Coles and Edgar; and the following counties in the Commonwealth of Pennsylvania: Erie, Crawford, Warren, McKean, Mercer, Venango, Forest, Elk, Cameron, Lawrence, Clarion, Jefferson, Clearfield, Beaver, Butler, Armstrong, Indiana, Cambria, Allegheny, Westmoreland, Washington, Greene, Fayette, and Somerset.

[¶ 62,309] **Irvin Padnos v. Hiram Walker Distributing Co., a Delaware corporation, and Hiram Walker & Sons, Inc., a Michigan corporation.**

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 47 C 976. September 13, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Suit for Treble Damages—No Intent to Restrain Trade Shown—Integration Not Unlawful *Per Se*.—A complaint alleging that plaintiff retail liquor dealer was injured by reason of a combination and conspiracy entered into by defendant distillers and distributors, whose products are distributed and manufactured by four integrated companies having financial and managerial interests in common, which agreement fixed resale prices and other terms of distribution and sale, is dismissed with leave to amend. It is held that the allegation of the existence of such resale agreements, together with defendants' integration, is without circumstance to show that defendants in the alleged conspiracy had the intent and purpose to restrain or monopolize trade or commerce. No facts are alleged from which the court can construe the effect of the integration to result in an injury to the public. The present complaint is directed to the personal injury suffered by plaintiff in his dealings with defendants.

See the Sherman Act annotations, Vol. 1, ¶ 1640.121, and the Clayton Act annotations, Vol. 1, ¶ 2024.19, 2036.

For plaintiff: Maurice R. Kraines, Chicago, Illinois.

For defendants: Carl S. Lloyd, Joseph H. Pleck and Perry S. Patterson of Kirkland, Fleming, Green, Martin & Ellis, Chicago, Illinois.

Memorandum

[*Nature of Action*]

LaBuy, J.: The complaint in this case is premised on two counts: the first being based upon the treble damage section of the Clayton Act (15 U. S. C. A. Sec. 15) allowing suit by a private person for damages sustained through violation by defendant of the antitrust laws, and the second being for equitable relief from continuance of defendants' actions.

[*Allegations of Complaint*]

Plaintiff alleges he is a Chicago retail liquor dealer who until May 1947 purchased defendants' products. It is alleged that defendant, Hiram Walker Distributing Company, is the sole and exclusive wholesale and retail distributor for the defendants, Hiram Walker & Sons, Inc., for Hiram Walker and Sons, Ltd., and W. A. Taylor Co. The latter two companies are not made parties defendant. The complaint states that Hiram Walker & Sons, is a Michigan corporation operating a distillery in Illinois which produces Imperial and Walker's DeLuxe whiskey; that Hiram Walker & Sons, Ltd. is a Canadian corporation operating a distillery in Ontario producing Canadian Club whiskey; that W. A. Taylor & Co. is a New York corporation producing wines in California under the name of Valliant. These four corporations are alleged to have substantially the same officers and to operate under an agreement whereby the products Canadian Club, Imperial, Walker's DeLuxe and Valliant wines are sold through the Hiram Walker Distributing Company, a Delaware corporation, doing business in Illinois as

the sole and exclusive distributor for the other three corporations.

Paragraph 5 of the complaint charges that as to Canadian Club the four corporations "entered into a combination, conspiracy, agreements or contracts" that the Distributing Company was to have sole and exclusive sale of Canadian Club in the Chicago territory; that it was not to sell to retailers unless they agreed to buy Imperial and Valliant; that it was to maintain and increase the dollar price of Canadian Club; that it was to maintain the price of Canadian Club by contracting with retailers not to sell the Distributing Company products at less than a "suggested" price and threatening to enjoin those who sold below; that the supply of Canadian Club was to be stretched by requiring retailers to purchase Walker's DeLuxe and Canadian Club on condition that retailers purchase similar quantities of Imperial and Valliant. As to Imperial and Walker's DeLuxe the Distributing Company was to be the sole and exclusive seller in Chicago; that it was agreed the sale of Canadian Club would be conditional on the sale of Imperial thereby requiring retailers to push Imperial; that it was agreed Imperial was to be sold at a "suggested" price; that this resulted in a large supply of Imperial stock making it harder to sell competing whiskies. As to Valliant wines the allegations are substantially the same as those respecting Imperial.

Paragraph 6 of the complaint charges a restraint on foreign trade by limiting the sale of Canadian Club to persons who would buy Imperial and Valliant; requiring retailers to pay increased prices and requiring dealers to purchase Imperial and Valliant; requiring retailers not to sell below "suggested" prices which were distributed to them and threatening to enjoin sales at less. Plaintiff could not procure said products at wholesale except from the Distributing Company; the Distributing Company raised the dollar price of Canadian Club sold to plaintiff twice; that plaintiff was compelled to purchase Imperial or Valliant equal to two or more times Canadian Club; that other retailers were compelled to buy only one case and therefore plaintiff was discriminated against; that plaintiff was compelled to dispose of Imperial and Valliant at substantial loss.

The equitable relief count iterates the first seven paragraphs of Count I, alleges the injunction issued by the Circuit Court of Cook County on petition of defendants in May 1947 was without jurisdiction and this court should enjoin the prosecution of the suit in the Circuit Court; that if defendant Distributing Company has a fair trade contract that such contract is null and void as being part of the conspiracy; that secret rebates are given to retailers in the form of the more desired beverages; and that an injunction should issue restraining defendants from continuing the practices injuring the plaintiff.

[*Necessary Elements*]

The elements necessary to found an action under Section 15 of the Clayton Act are (1) a conspiracy (2) in restraint of or to monopolize interstate or foreign trade, and (3) resulting in damages to the plaintiff. It is a fundamental principle in this kind of action that unless the conspiracy violates Section 1 or 2 of the Sherman Act no action will lie under Section 15 of the Clayton Act. Further, the effect upon interstate commerce must be direct and not remote and must be the result of an intent to restrain interstate commerce.

The combinations and contracts in restraint of trade which were intended to be prohibited by the Sherman Act are combinations which are directed to the control of the market by suppression of competition in the marketing of goods and services, the effect of which is adverse to the consumer and the public. The practices prohibited by the Act are those that have an evil effect upon the public generally as distinguished from purely personal or private injury.

[*No Intent Alleged*]

From reading the first count of the complaint the court is of the opinion from the facts alleged that no intent and purpose to restrain or monopolize trade or commerce is shown or can be inferred. The factors which allegedly color defendants' activities stem from (1) the fact that their products are manufactured and distributed by four integrated companies having allegedly financial and managerial interests in common, and (2) the fact that an alleged agreement exists between the three producers with the one distributing company regarding distribution and terms of sale of these products.

[*Integration Not Unlawful*]

Integration is not in and of itself unlawful. The taint arises when such integration is utilized for the purpose of stiflng the free activity of others in the same field and deprives the public of the benefits of the competition. No facts are alleged from which the court can construe the effect of this integration to result in an injury to the public since it is not stated how the public has been deprived of the continued sale and distribution of defendants' products or how it has suffered any other injury.

[*Complaint Insufficient To Charge Violation of Act*]

Section 1 of the Sherman Act specifically exempts from its bar resale price agreements on products which are in free and open competition. The allegation of the existence of such resale agreements, together with defendants' integration, is without circumstance to show that defendants in the alleged conspiracy were directing their scheme against interstate and foreign commerce. It is necessary for the plaintiff to allege with a degree of certainty and definiteness the conspiracy or combination to restrict free competition in the sale and distribution of their products.

The present complaint is directed to the personal injury plaintiff suffered in his dealings with defendants. Count II is based upon the same jurisdictional requisites as Count I and consequently fails in the same essentials required by Section 15 of the Clayton Act.

The court therefore sustains defendants' motion to dismiss Count I and Count II of the complaint; denies defendants' motion for summary judgment; sustains plaintiff's motion for leave to amend and to make other parties defendant within thirty days from date hereof.

[¶ 62,310] M. Witmark & Sons v. Mrs. Jessie L. Jensen. Santley-Joy, Inc. v. Hastings Theatre Corp. Harms, Inc. v. Grand Theatre Corp. M. Witmark & Sons and Mills Music, Inc. v. Berger Amusement Company, Incorporated.

In the United States District Court for the District of Minnesota. Civil Nos. 1026, 1797, 1798, 1799. September 9, 1948.

Sherman Antitrust Act

Copyright Infringement Suit—Defense of Extension of Copyright—Violation of Antitrust Laws.—Injunctive relief will be denied in a suit for infringement of music copyrights where it is shown that the copyright owners have extended the copyright monopoly and have restrained competition, in violation of the antitrust laws. Plaintiffs, acting through an association of composers, authors and publishers, are shown to have acted in concert to fix prices and control competition in the licensing of musical compositions, and to have achieved monopolistic domination of the music integrated in sound films in the motion picture industry, in violation of the Sherman Antitrust Act. Where the granting of the relief sought would serve to continue the unlawful practices, such relief will be withheld.

See the Sherman Act annotations, Vol. 1, ¶ 1660.200, and digest of prior opinion, reported in 1946-1947 *Trade Cases* ¶ 57,589.

For plaintiffs: Louis D. Frohlich, New York, N. Y.; Thomas Vennum, Minneapolis, Minnesota.

For defendants: Louis B. Schwartz, Samuel P. Halpern, Minneapolis, Minnesota.

Amicus curiae: Bogle, Bogle & Gates, Seattle, Washington.

Memorandum Decision

[*Nature of Action*]

NORDBYE, J.: These cases came before the Court for trial without a jury. Mr. Louis D. Frohlich, of New York City, and Mr. Thomas Vennum, of Minneapolis, Minnesota, appeared in behalf of the plaintiffs; Mr. Louis B. Schwartz and Mr. Samuel P. Halpern, of Minneapolis, Minnesota, appeared in behalf of the defendants; Messrs. Bogle, Bogle & Gates, of Seattle, Washington, filed a brief *amicus curiae*.

Plaintiffs in these cases are seeking (1) damages for alleged infringement by defendants of certain musical composition copy-

rights owned by plaintiffs, and (2) an injunction restraining future threatened violation of those copyrights. Plaintiffs contend that defendants, who operate certain motion picture theatres, gave public performance of those compositions for profit when showing certain films in their theatres without first obtaining from plaintiffs a license to perform publicly the compositions for profit.

[*Defenses*]

Defendants contend that plaintiffs are entitled to no relief upon the grounds that (1) plaintiffs have illegally extended their copyrights, and (2) plaintiffs' method of doing business is in violation of the Sherman antitrust law. Unless these defenses can be sustained, it follows from the evidence that plaintiffs have established infringement of the musical copyrights referred to in the complaint and are entitled to an injunction, damages, and counsel fees.

[*Facts of Case*]

Plaintiffs are members of the American Society of Composers, Authors and Publishers, better known as Ascap, which is a voluntary association including within its membership many composers, authors, and publishers of musical compositions. Motion pictures in the United States are produced principally by eight major companies and are licensed by the producers to exhibitors to be exhibited in various motion picture theatres. Sound for pictures cannot be played unless the music included in the sound track is also played, in that the dialogue and music are on the same sound track and obviously cannot be separated. Plaintiffs and the other members of Ascap have adopted by their arrangements, agreements, and practices a uniform plan whereby copyrighted music owned by them is licensed through an agent to motion picture producers. The music is licensed to them at a license fee agreed upon, permitting the producers to synchronize the copyrighted music on the sound track of the motion picture film to be produced. The music by such synchronization will be integrated with the film, and all the members of Ascap know and are informed that the film on which the music is recorded will be copyrighted by the motion picture producer and thereafter licensed for exhibition in motion picture theatres for profit throughout the United States and elsewhere. As stated, the rights granted to the motion picture producers are merely synchronization rights. The license agreements covering synchronization seem to vary in form, but all of them specifically indicate that the rights granted are recording rights alone and do not extend to performance rights of the copyrighted music. In some the following reservations are made:

> "The right to perform said musical composition as covered by this agreement is conditioned upon the performance of said musical composition in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which said musical composition is performed."

In other license contracts, the word "perform," as noted in the first line, is changed to the word "record." There may be other changes in the wording in the various forms of contracts used.

Furthermore, it may be noted that, in the agreements between the copyright owner and the producers granting synchronization rights to the producers, the latter specifically assent that there is a reservation to the copyright owner of the right to license the performance rights to the exhibitors of the films, and, in carrying out the arrangement between the copyright owner and the producer, the latter in its contract with the theatre owner limits the exhibition of the film, where Ascap rights are involved, to theatres having licenses from Ascap.

The licensing of the performance rights of the copyrighted music thus recorded on the sound film is handled exclusively by Ascap for these plaintiffs and other members of that Society. There are some fifteen thousand theatres in the United States which obtain music performance rights from Ascap. The performance rights of any musical composition controlled by Ascap may be licensed singly, but it appears that Ascap's copyrighted music is always licensed as a group under a blanket license from Ascap. And while the copyright owners, including the plantiffs herein, since the consent decree entered into in 1941 between Ascap and the federal government, may deal individually with anyone seeking a license for the performance of their compositions publicly for profit, it seems that, in the licensing of the performance rights of the music integrated in a sound film, as a matter of practice theatre owners have but little oppor-

tunity to obtain licenses from the many individual copyright owners belonging to Ascap who may have copyrighted music in the particular film purchased by the theatre owner. Defendants term the right of granting individual licenses by the individual Ascap copyright owner as "illusory" in that the motion picture theatre owner is generally required to buy his pictures for his theatre before he knows what copyrighted music may be contained therein. It is contended that often he does not know the titles of the pictures for which he has contracted and which he has agreed to exhibit in his theatre. The "cue sheets," which contain the entire music score of the particular film and which are made available with each film production, reflect whether the music is copyrighted or in the public domain, but usually they are not made available to the exhibitor until he has bound himself to purchase the film. Obviously, therefore, it is urged that he is in no position to bargain for a license with the copyright owners of the music. That is, he must have the license or licenses or he cannot exhibit the film in his theatre. Defendants contend that, in the relatively short time available to the motion picture operator after the cue sheets are available, it would be quite impossible for any motion picture exhibitor to contact all the different copyright owners of music for licenses, and that the very predicament that he would be in if he would assume to wait until the cue sheets are prepared and made available before he bargained for a license for copyright music requires him to obtain a yearly blanket license for all Ascap music if he is to carry on his theatre business successfully. That the necessities of the situation seem to make this practice uniform is sustained by the record herein, and there is no deviation in the manner in which theatre owners obtain a license for the performance rights of copyrighted music. They all clear through Ascap, and for years Ascap has built up its business in this regard accordingly and with full knowledge of all of these circumstances. In fact, one of the witnesses, informed as to the methods of doing business in this regard, testified, and his testimony is not contradicted, that he had never heard of any theatre owner's approaching anyone but Ascap for performance rights where the music was copyrighted by an Ascap member. Then, in addition, there are certain practical aspects which undoubtedly have brought about the uniform practices of Ascap in this regard. If a member of Ascap intends to issue a performance license to a motion picture theatre owner, he is required to give notice to the Society of his intention to do so, and the issuance of such license by him must have the approval of all parties interested in the copyright—the composer, the author, and the publisher. All license fees obtained by Ascap members for performance of motion picture films for profit, are paid to Ascap and these fees are distributed to the members by Ascap according to a formula devised by that Society. These factors undoubtedly have had a bearing upon, and apparently were devised to bring about, the plan of Ascap's being in exclusive control of the granting of performance rights of music copyrighted by Ascap members, but whatever may have occasioned the plan, it is evident that Ascap has obtained over the years a monopoly of the music thus integrated in sound motion picture films. It is uncontradicted that on an average at least 80 per cent of the music integrated in sound films is copyrighted and owned by members of Ascap and the licensing exclusively controlled by Ascap.

[*Monopolistic Control*]

This plan and method of doing business by plaintiffs and the other members of Ascap undoubtedly was prompted by a desire to protect their rights as copyright owners, facilitate the collection of license fees so that they might be distributed in accordance with the formula agreed upon, enable them to handle more expeditiously the licensing of films to theatre owners, and enable the Society to police the violations of their copyrights. But, notwithstanding these seeming beneficent purposes, plaintiffs and their associates through Ascap have obtained by these methods and practices which they have carried on over the years monopolistic control over the copyrighted films in which their music is integrated. This seems evident because, unless the theatre owner obtains a license at a fee which plaintiffs and their associates through Ascap demand, no theatre owner can exhibit a sound film which he rents from a producer and which contains Ascap music. In other words, plaintiffs and their associates have, through Ascap, the combined and potential power to deny to any theatre owner the right to carry on his business, because, without the right to exhibit films containing Ascap music, no theatre owner would be able to stay in business. It

is therefore defendants' contention that all of these facts and circumstances undeniably establish that plaintiffs have extended their copyrights by their method of doing business and that such practices give to them through Ascap an economic advantage and economic control beyond that granted to each of them by the copyright laws. Defendants rely principally upon the teachings of the following cases: *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502; *Carbice Co. v. American Patents Development Co.,* 283 U. S. 27, 51 S. Ct. 334; *Leitch Mfg. Co. v. Barber Co.,* 302 U. S. 458, 58 S. Ct. 288; *B. B. Chemical Co. v. Ellis,* 314 U. S. 495, 62 S. Ct. 406; *Morton Salt Co. v. Suppiger,* 314 U. S. 488, 62 S. Ct. 403; *Mercoid Corporation v. Mid-Continent Co.,* 320 U. S. 661, 64 S. Ct. 268; *Mercoid Corporation v. Honeywell Regulator Co.,* 320 U. S. 620, 64 S. Ct. 278; *Ethyl Gas Corporation v. United States,* 309 U. S. 436, 50 S. Ct. 618; *United States v. Aluminum Co. of America,* 148 F. Supp. 416.

[*Prior Decision*]

Questions similar to those presented herein were before this Court on defendants' motion for a summary judgment. That motion was denied on July 10, 1947. However, further consideration of the facts now disclosed in the record and a reappraisal of some of the decisions of the Supreme Court has caused the Court to depart from the principal conclusions reached in passing upon defendants' motions.

[*Rights Under Copyright Act*]

At the outset, it may be assumed that a copyright owner of music may have the right to license the recording of his composition on a film and also the exclusive right to license the performance of the synchronized composition publicly for profit. It would seem that these rights are separate and independent rights under the Copyright Act, which provides (17 U. S. C. A. § 1):

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * *

"(e) To perform the work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: * * *."

The United States Court of Appeals for this circuit has held in *Remick v. Interstate Hotel Co.,* (1946) 157 F. 2d 744, at 745, cert. den., that the right to perform a composition publicly for profit and the right to record it are separate and independent rights. See, also, *Jerome v. Twentieth Century Fox-Film Corp.,* 67 F. Supp. 736; *Buck v. Jewell-La-Salle Realty Co.,* 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971, 76 A. L. R. 1266; *Jewell-La-Salle Realty Co. v. Buck,* 263 U. S. 202, 204, 51 S. Ct. 407, 75 L. Ed. 978; *Buck v. Swanson,* 33 F. Supp. 377, 387, and cases cited; *Fox Film Corporation v. Doyal,* 286 U. S. 123, 127, 52 S. Ct. 546, 76 L. Ed. 1010.

[*Extension of Copyrights*]

And because of the claimed right to split the licensing of the recording rights and performance rights, plaintiffs urge that the asserted extension of their copyrights is merely the copyright monopoly which has inured to them because of the advancement in the motion picture industry, which has inaugurated sound films and devised the technique of integrating the sound script with the background of music and songs. It is pointed out that any individual copyright owner of music necessarily obtains a potential control over motion picture films if a producer decides to use his music in a sound film; that is, no motion picture exhibitor can exhibit any film containing copyrighted music unless he pays tribute by way of a license fee to every copyright owner of music which may be contained in the film. Thus, it is argued that the potential power of the copyright owner over the copyrighted film, and perchance any uncopyrighted songs contained in the film, is the result of the monopoly granted by the copyright law and is thrust upon the copyright owner by reason of the mechanical arts and technique employed in the production of the sound motion pictures. But if it be assumed that the act of an individual copyright owner in granting an individual recording license of his copyrighted music to the motion picture producer, and the granting of performance rights to the motion picture exhibitor, does not unlawfully extend his copyright monopoly, that situation is not that which the present record presents. Here,

the plaintiffs and their associates have wittingly or unwittingly adopted a method and plan of licensing the recording for public performance of their copyrighted music in the motion picture field which has bestowed upon them a monopoly of some 80 per cent of all the music recorded in motion picture films. By placing the control of performance rights for motion pictures in a Society maintained by them, they have obtained a potential economic advantage which far exceeds that enjoyed by one copyright owner. The power, although it may be argued it has been benevolently exercised in the past, nevertheless fully exists. Through Ascap, these plaintiffs and their associates by a refusal to license, or by the imposition of an exorbitant performance license fee, can sound the death knell of every motion picture theatre in America. That it would not be good business economics for them to do so does not mitigate the economic advantage which these plaintiffs have obtained in addition to that which is granted to them by their lawful copyright monopoly. Free competition among the members of Ascap to license individually their music is effectively curbed, if not completely obliterated, by the scheme of operation which the members of Ascap have adopted. The monopoly which they enjoy is tied in with the copyrighted film monopoly because, as a part of the plan, the producers require the exhibitors to obtain a license from Ascap where Ascap's music is involved before they are authorized to exhibit the film which is licensed to them. The pooling of all license fees obtained from the licensing of some 80 per cent of all sound music in motion pictures and the sharing of the revenues thus obtained permit each copyright owner to enjoy the benefits obtained by other copyright owners. So it will be seen that plaintiffs have also tied their copyrights with other copyrighted music and thus have shared in the rewards which are obtained from other copyrighted material.

The language used by Judge Hand in speaking for the three-judge court in *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, at 348, seems apposite. There, the court was considering the monopoly of motion picture producers in carrying on their practice of "block booking" in the sale of films to motion picture exhibitors. Judge Hand stated:

"It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration."

Instead, therefore, of having a single monopoly of a particular piece of copyrighted music and the benefits which that might afford, every copyright owner of music in Ascap obtains the added economic power and benefit which the combined Ascap control gives to them and their associates. Obviously, no one copyright owner would have the monopolistic power over the motion picture industry which Ascap now enjoys.

It does not appear that plaintiffs or Ascap have actually imposed exorbitant fees in the past, or that they have ever refused to license any theatre owner who is willing to pay the required fee. And while it does appear that Warner Brothers, Metro-Goldwyn-Mayer, Paramount, and Twentieth Century Fox, four of the major motion picture producers, have subsidiaries which are members of Ascap, and that these producers have employees and others who compose music for films for them and that such music is copyrighted by the producers or their affiliates and eventually licensed by Ascap in the same way as music composed and copyrighted by other composers belonging to Ascap, and that these producers thereby share in the license fee pool maintained by Ascap, it does not seem necessary to determine on this record whether there is any actual conspiracy between the major producers, or a majority of them, to combine with Ascap in its plan of splitting the license rights in order to create a greater revenue for Ascap and for the producers. It may be that the producers are of the opinion that it is simpler to have the exhibitors pay the performance license fee rather than for them to pay Ascap a license fee for both recording and performance, and then pass on the extra cost of the license fee to the exhibitors. Admittedly, however, there may be an economic advantage to both the producer and Ascap under the present system.

However free plaintiffs and their associates in Ascap may have been from any design or intent to extend their copyright

monopoly, or however beneficial it may be for them to carry on their business in this manner, or however inconvenient it may be for them to function otherwise, such facts and circumstances will not permit them to enlarge their lawful monopoly. As stated by the Supreme Court in *B. B. Chemical Co. v. Ellis,* 314 U. S. 495, 498,

> "* * * The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant."

And as stated in *Mercoid Corporation v. Mid-Continent Co.,* 320 U. S. 661, 666,

> "* * * The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use."

[*Concert of Action*]

It is the collective acts and agreements of plaintiffs and their associate members which have diverted their copyrights from their "statutory purpose and become a ready instrument for economic control in domains where the antitrust acts or other laws not the patent statutes define the public policy." *Mercoid Corporation v. Mid-Continent Co., supra,* at p. 666. Refuge cannot be sought in the copyright monopoly which was not granted to enable plaintiffs to set up another monopoly, nor to enable the copyright owners to tie a lawful monopoly with an unlawful monopoly and thus reap the benefits of both.

The defendants contend that plaintiffs not only are extending their copyright monopoly in contravention of the copyright law, but also are violating the antitrust laws and that, for both of these reasons, they should be precluded from any recovery or injunctive relief herein because the relief they are seeking is in effect in furtherance and in aid of their law violations. In a recent decision of Judge Leibell, of the Southern District of New York, in *Alden-Rochelle, Inc., et al. v. American Society of Composers, Authors and Publishers, et al.,* dated July 19, 1948, Ascap was held, upon the facts presented in that case, to be in violation of the antitrust laws. While some of the facts recounted in that decision may not very clearly appear in the record herein, it would seem that a fair appraisal of this record would require the same conclusions as indicated by Judge Leibell. He determined that "Almost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the antitrust laws." In passing, it may be noted that the consent decree of 1941 permitting individual copyright owners to issue individual licenses for performance rights does not preclude a finding that Ascap is in violation of the antitrust laws in other respects.

[*Restraint of Competition*]

As heretofore indicated, motion picture operators are required by the methods of doing business established by the producers, as well as by the members of Ascap, to enter into a blanket license with Ascap for the performance rights of the copyrighted music integrated in sound films, and, as stated, Ascap under this arrangement controls some 80 per cent of the music integrated in sound films. It seems undeniable that there is no competition among Ascap members. Competition is effectually restrained because all licenses are granted by Ascap under its control and domination. All earnings derived from licenses are pooled and divided among the members. As illustrative of the monopoly and control of Ascap, it appears that in August, 1947, it attempted by a notice to all theatre owners, to raise substantially and arbitrarily the license fees for performance rights of Ascap music in all motion picture theatres in the United States. This proposed raise was to be based upon the seating capacity and the admission charge of the particular theatre. Thereafter, the representatives of Ascap and representatives of a certain portion of the motion picture exhibitor associations had long negotiations looking to an adjustment in the existing rates for the right to perform publicly for profit music in Ascap's repertoire by the motion picture exhibitors throughout the United States. And while it is contended that the present rates arrived at in February, 1948, were acquiesced in by some twelve thousand motion picture exhibitors as being fair and reasonable and that they were willing to execute contracts with Ascap thereunder, the price fixing power was nevertheless vested in Ascap. The reasonableness or unreasonableness of the rates does not militate against the absolute control of

Ascap to fix prices. The vice of the arrangement is apparent because, as the Supreme Court stated in *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 223,

> "* * * the machinery employed by a combination for price-fixing is immaterial.
>
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*"

[*Monopolistic Domination*]

It cannot be denied, therefore, that plaintiffs and their associates, acting in concert through Ascap, fix prices and completely control competition and thereby restrained trade in violation of Section 1 of the Sherman Anti-Trust Act which declares illegal "every contract, combination, in the form of a trust or otherwise, or a conspiracy in restraint of trade or commerce among the several States." Moreover, it seems inescapable on this record that plaintiffs, through Ascap, have achieved monopolistic domination of the music integrated in the sound films in the motion picture industry and have effectively monopolized that part of trade and commerce in violation of Section 2 of the Sherman Antitrust Act. As stated by Judge Leibell in his decision:

> "The fact that Ascap is a membership association gives it no immunity. 'Arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.' *Associated Press v. United States,* 326 U. S. 1 at p. 19. Nor is Ascap shielded by its purpose to prevent the infringement of the copyright of its members. The purpose of the Fashion Guild to prevent 'Style Piracy', i.e. the copying of 'original creations', did not take it outside the scope of the antitrust laws. *Fashion Guild v. Trade Comm'n,* 312 U. S. 457."

Granted that there may be practical difficulties confronting Ascap members if they are to realize a full reward of their individual copyright monopoly, their practice of using a monopoly to obtain another monopoly cannot be condoned in view of the prohibition of the antitrust laws. The language of Mr. Justice Reed in *United States v. Line Material Co.,* 333 U. S. 287, 315, seems highly pertinent:

> "* * * The mere fact that a patentee uses his patent as whole or part consideration in a contract by which he and another or other patentees in the same patent field arrange for the practice of any patent involved in such a way that royalties or other earnings or benefits from the patent or patents are shared among the patentees, parties to the agreement, subjects that contract to the prohibitions of the Sherman Act whenever the selling price, for things produced under a patent involved, is fixed by the contract or a license authorized by the contract."

Undoubtedly, the simplest plan for the copyright owners belonging to Ascap would be for them to issue both synchronization rights and performance rights to the producers. This would provide for a free competitive market in the motion picture industry for all copyright owners of music suitable for use in sound films. That the cost of the performance license would be passed on to the theatre owner is entirely probable, but plaintiffs would not be using their copyright privileges contrary to public interest.

[*Relief Withheld*]

In view of the foregoing, if the relief sought by the plaintiffs were granted, the Court would be, as stated in *Mercoid Corporation v. Mid-Continent Co.,* 320 U. S. 661, at 670, "placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the antitrust laws." The same principle is announced in *Morton Salt Co. v. Suppiger Co.,* 314 U. S. 488, at 492, where the court stated, "It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid when the plaintiff is using the right asserted contrary to public interest."

This Court is now sitting as a court of equity. Equitable relief is prayed for to restrain the defendants from future threatened violation of plaintiffs' copyrights, as well as for damages for past infringement. Public interest transcends plaintiffs' rights under their copyrights, and where the granting of relief sought would serve to continue the unlawful practices here condemned, it should be withheld. One who unlawfully exceeds his copyright monopoly and violates the antitrust laws is not outside the pale of the law, but where the Court's aid is requested, as noted herein, and the granting thereof would tend to serve the plaintiffs in their plan and scheme with other

members of Ascap to extend their copyrights in a monopolistic control beyond their proper scope, it should be denied. In view of the Court's finding that the copyright monopoly has been extended, it is not necessary to determine whether antitrust violations alone would deprive plaintiffs of the right of recovery. See article "Violations of Anti-Trust Laws as Defenses in Civil Actions," Minnesota Law Review, May, 1947.

It follows, therefore, from the premises that plaintiffs should be denied any recovery herein. Findings of fact and conclusions of law consistent herewith may be submitted upon five days' notice.

An exception is allowed to the plaintiffs.

[¶ 62,311] United States v. St. Louis Dairy Company, et al.

In the United States District Court for the Eastern District of Missouri, Eastern Division. Criminal No. 25,713. Filed May 14, 1948.

Sherman Antitrust Act

Motions to Dismiss Indictment—Direct and Substantial Restraint of Commerce.—Motions to dismiss an indictment charging a conspiracy the substance, purpose and effect of which is to fix and stabilize prices of fluid milk are overruled. It is not necessary that the pleading state factual allegations sufficient to show a direct and substantial impact upon interstate commerce and a restraint thereupon. The agreement for price maintenance without more is an unreasonable restraint under the Sherman Act. Other elements of restraint need not be charged or proven.

See the Sherman Act annotations, Vol. 1, ¶ 1630.210.

Same—Conspiracy in Restraint of Interstate Commerce.—Milk purchased by defendant dairies in Illinois for bottling and pasteurization in Missouri is involved in interstate commerce. The allegation that there was a "continuous" flow of milk from producers in Illinois to consumers in Missouri is sufficient to charge a restraint of interstate commerce, in violation of the Sherman Act. Bottling, pasteurizaton and commingling of milk do not arrest the flow of interstate commerce.

See the Sherman Act annotations, Vol. 1, ¶ 1630.217.

For plaintiff: Drake Watson, United States Attorney, New London, Missouri; George B. Haddock, Special Assistant to the Attorney General, Washington, D. C.; John R. Niesley, Walter D. Murphy, Joseph R. Cannon, Special Attorneys, all of Washington, D. C.

For defendants: James A. Finch, Cape Girardeau, Missouri; E. C. Hartman, William H. Allen, Jacob M. Lashly, all of St. Louis, Missouri.

Memorandum on Motions of Defendants to Dismiss Indictment

HULEN, J.: Defendants, being charged by indictment with conspiracy to fix and stabilize prices of fluid milk, in restraint of interstate commerce in violation of the Sherman Act (U. S. Code, Tit. 15, Sec. 1) move to dismiss on grounds that the indictment does not plead facts showing (1) the conspiracy charged was in restraint of interstate commerce, and (2) the restraint described directly and substantially restrains interstate commerce.

The indictment in substance charges the corporate defendants have their principal place of business in St. Louis, Missouri, are engaged in purchasing fluid milk from producers, bottling, selling and distributing such milk to retail and wholesale customers for resale in the City of St. Louis, Missouri, and communities near St. Louis in Missouri. The milk thus sold is produced in the States of Illinois and Missouri. The corporate defendants purchase milk from the producers in Illinois, consisting of over half the fluid milk sold by them. After purchase of the milk in Illinois it is transported by defendants to St. Louis, there it is intermingled in the corporate defendants' plants with milk produced in Missouri. (By local ordinance all milk sold in the City of St. Louis must be pasteurized.) The indictment recites that fluid milk by

its nature is perishable, cannot be stored, must reach consumers within a short time after production, and from day to day there is a continuous flow of fluid milk from the producers in Illinois and Missouri to consumers in St. Louis and vicinity. The corporate defendants sell and distribute 63 per cent of fluid milk consumed in the St. Louis area. Conspiracy of defendants, as alleged is to fix uniform and non-competitive retail and wholesale prices for fluid milk sold by them in the St. Louis, Missouri area during the past ten years, by virtue of a continuing agreement and concert of action among defendants that the corporate defendants would charge uniform prices for fluid milk sold by them. Things charged as the purpose of and to effect the conspiracy are the charging of uniform prices and various meetings at which it was agreed to and said defendants did fix a uniform price for fluid milk. The meetings commenced in July 1946 and ended in January 1948. The retail price of fluid milk in July 1946 was fixed at 17¢, wholesale 15¢. The last meeting, according to the indictment, fixed the retail price at 22½¢ and wholesale at 20½¢. The effect of the conspiracy, as intended by defendants, has been to increase and fix the price of milk to consumers sold by the corporate defendants in the St. Louis area and restrain interstate commerce in fluid milk.

I.

The Government asserts that "while it is true that the Sherman Act applies only to unreasonable restraints of trade * * price fixing agreements are per se unreasonable." Combinations to fix or regulate prices are banned by the Sherman Act. Such was the holding of the Supreme Court in *Fashion Guild v. Trade Commission*, 312 U. S. 457, l.c. 466:

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the types of conduct banned by the Sherman and Clayton Acts."

More direct was the pronouncement of the Court in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, l.c. 154-5:

> "A combination formed for the purpose of controlling the market price of a commodity and possessing the power to make its control effective raises such danger of evil consequences which the Sherman Act was intended to prevent, that it falls within the direct condemnation of the statute and can not be removed by collateral considerations urged in justification of the restraint. *United States v. Trenton Potteries Co.*, 273 U. S. 392.
>
> "While the Act has been interpreted as forbidding only unreasonable restraints of trade and while this concept is of value in many situations where the nature of the restraint is such that the application of the statute is doubtful, the concept does not compel the conclusion that there are no restraints which *ipso facto* come within the condemnation of the Act."

The consequences of such combinations, at which the law is leveled, is stated in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, l.c. 458:

> "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, *United States v. Trenton Potteries Co.*, 273 U. S. 392, *and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act*, which is not only a prohibition against the infliction of a particular type of public injury but a *'limitation of rights which may be pushed to evil consequences and therefore restrained.'*" (Emphasis added)

We pause to observe in the last ruling the words "potential power" for price maintenance. The agreement need not in fact accomplish that result. Note this language: "a limitation of rights which may be pushed to evil consequences". On the same subject the Court said in *Local 167 v. United States*, 291 U. S. 293, l.c. 297:

> "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

In line with the lastest authorities, cited above, which it is claimed by some give the Sherman Act a more liberal interpreta-

tion than older cases, will be found *Coronado Co. v. U. M. Workers,* 268 U. S. 295, 1.c. 310, where the Court said:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

The authorities on this proposition are reviewed in *United States v. Food and Grocery Bureau of So. Cal.,* 43 Fed. Supp. 974, 1.c. 977-8, and there will be found a summary of the law in an opinion by Judge Yankwich:

> "In assaying price-fixing agreements, the test is not so much whether the effect is felt after the movement of the goods has reached the end of the interstate journey. The inquiry seeks the effect upon prices in the market. And if this effect be shown, it matters not that the movement has come to a halt within the state. The teaching of the most recent cases, to which I have just referred, and which I also discussed in the opinion on the motions to dismiss and to strike, is too clear to absolve price-fixing agreements solely because their effect may not be felt until local sales are made, in retail trade, at the end of the journey. To interpret them in this manner is not to destroy whatever distinction may exist between interstate and local activities. It is merely to recognize that the Supreme Court, realizing the inter-relation between local and interstate commerce, has declined to recognize a break in the continuity of movement of articles originating in interstate commerce, and has asserted the controlling power of the anti-trust law over the entire process. And so, when the court said specifically that control of prices 'in the state of destination where the interstate movement ends' (*Local 167 v. United States,* 1934, 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. Ed. 804) may come under the interdict of the anti-trust laws, we cannot assume that it was not aware of the full implication of the words.
>
> "The optative mood in the language of the court does not mean that in price-fixing other elements of restraint must be shown. If the language had that meaning, the teaching of the later case—that price-fixing alone is a violation—gives the contrary answer."

The indictment in this case states the defendants engaged in the conspiracy "to fix uniform and non-competitive retail and wholesale prices for fluid milk sold"; "[corporate] defendants * * sell and distribute approximately 63 per cent of the fluid milk consumed in the St. Louis area"; "the * * conspiracy has consisted of a continuing agreement and concert of action * * the * * terms of which have been that * * corporate defendants would charge uniform and non-competitive retail and wholesale prices for fluid milk"; "the corporate defendants have regularly * * charged uniform and non-competitive retail and wholesale prices in their sale of fluid milk"; "the conspiracy * * has had the effect, as intended by the defendants, of increasing, stabilizing, and otherwise controlling and fixing prices to consumers and other purchasers of fluid milk sold by the corporate defendants". We conclude the indictment states a violation of the Sherman Act, stressing those parts quoted together with the other allegations of the charge, provided it also pleads interstate commerce.

The indictment having charged a conspiracy, the substance, purpose and effect of which is the stabilizing and fixing of prices, we are unable to agree with the defendants that the pleading must go further and state "factual allegations * * sufficient to show a direct and substantial impact upon interstate commerce such as to operate as a restraint thereupon". The control of prices "where the interstate movement ends may operate directly to restrain * * interstate commerce". (*Local 167 v. United States, supra.*) The agreement for price maintenance "without more" is an unreasonable restraint under the Sherman Act. (See *Ethyl Gasoline Corp. v. United States, supra.*) Other elements of restraint need not be charged or proven. Price-fixing alone is a violation. (See *United States v. Food and Grocery Bureau, et al., supra.*)

II.

On the question of interstate commerce raised by defendants' motions we direct attention to the charge that as to the milk originating in Illinois constituting over one-half of the milk sales of the corporate defendants, that while this milk is

produced in Illinois the corporate defendants purchase the milk from the producers in Illinois and therafter retain exclusive custody and control of the product until it reaches either the retail consumer or wholesaler in Missouri. Defendants, to free themselves from the interstate character stamped on the transaction by the parts of the charge noted, strenuously argue that the corporate defendants "warehouse" the milk in St. Louis, that it is mingled with milk produced in Missouri, and that its form is changed by Pasteurization. How long milk must be held by the corporate defendants in their St. Louis plants to subject it to classification as being warehoused, we are not informed. The argument is not germane because we are passing on the allegations of the Government's pleading and it states, "there is a continuous flow of fluid milk from producers in the State of Illinois" and Missouri to defendants' customers, that "milk by its nature is perishable" and "must reach the consumer within a short time after production". By authority of discovered adjudications and having regard for the evident policy expressed in the Sherman Act, as declared in the ruling of our highest Courts, we are of the opinion the indictment charges a conspiracy in restraint of interstate commerce.

There are cases holding, when the commodities come to rest within the state, if their origin is in another state, that interstate commerce ends. *Schechter Corp. v. United States* (295 U. S. 495) is relied on by defendants in that respect. It involved not a case under the Sherman Act, but validity of the N. R. A. legislation. This rule has had liberal application to sustain state laws concerning transportation and tax matters. But the same construction has not been given to cases arising under the Sherman Act. In *Live Poultry Dealers' Protective Ass'n v. United States,* 4 F. 2d 840, 1.c. 842, Judge Hand, in passing on a case involving the same issue defendants here raise, held:

> "However, the power of a state to tax goods (so it be without discrimination), which have been brought from other states, is by no means the measure of the powers of Congress over interstate commerce. The point is neatly illustrated in the cases, among others, which concern the regulation of prices for natural gas. Thus in *Missouri v. Kansas Gas Co.,* 265 U. S. 298, 44 S. Ct. 544, 68 L. Ed. 1027, where the gas was delivered to wholesalers, the state might not act at all, while, when it is delivered direct to the consumers, it may, until Congress interfere. *Pennsylvania Gas Co. v. Public Service Com.,* 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434. Perhaps, in the light of those cases, sales like those at bar are within the exclusive power of Congress in any event. But we need not go so far; by the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830) Congress has exercised its fullest power over interstate commerce, and certainly such sales as these are within it."

The case just referred to was a proceeding under the Sherman Act. It involved a price-fixing agreement on live poultry after it arrived in New York. Speaking directly to the subject of interstate commerce the Court said:

> "The defendants raise two chief objections: First, that the commerce is not interstate; and, second, that the agreement is not an unreasonable restraint of trade. As to the first, it should be noticed that the poultry reaches Washinton Market after a pause at Hoboken only sufficient to put it into crates. It is, moreover, in proof that the sales take place on the same day as the poultry arrives in New York. We ignore such sales as take place in Hoboken, since they add no new feature to the case. So far as touches the point of interstate commerce, such a situation is precisely within *Swift & Co. v. U. S.,* 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518, and *Stafford v. Wallace,* 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, both of which concerned the shipment of live stock."

A case more directly in point is *United States v. Sheffield Farms Co.,* 43 F. Supp. 1. The case was before the Court by attack on the Government's pleading by defendants. The defendants in the *Sheffield Farms* case, as here,

> "contend that the conspiracy alleged operated solely with respect to the prices charged for milk at wholesale in the City of New York after the milk had come to rest in city plants and after any milk which originated outside the state was intermingled with local milk, pasteurized and packaged. However, the milk could not have been sold in New York City if it had not been pasteurized because of a local ordinance, and the packaging is but a necessary incident to its distribution."

The Court held:

> "The temporary stoppage of commerce on its way to the ultimate consumer does not remove the flow from the jurisdiction of the Federal Government. *United States v. General Motors,* 7 Cir., 121 F. 2d 376, certiorari denied October 13, 1941, 62 S. Ct. 105, 86 L. Ed. —; *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 544, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; *Local 167 v. United States,* 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804; *N. L. R. B. V. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. Therefore the stoppage of the milk, coming across state lines, for the purpose of pasteurization and packaging or bottling, did not change its interstate character. *Local 167 v. United States, supra.*"

In *Lake Valley Farm Products v. Milk Wagon Drivers' Union,* 108 F. 2d 436, a like ruling was made. Similarity of facts to the present case is evident.

> "The Farm Products Company purchases its daily requirements of fluid milk from the plaintiff Cooperative, which receives its product from farmers in Wisconsin, who deliver their milk to the plant of the Cooperative where it is loaded on motor trucks and transported over the public highways to the Farm Products Company in Chicago, which pasteurizes and bottles the milk, after which it is sold by the Farm Products Company to various persons referred to as 'vendors,' who severally own and operate their own automobile truck equipment. They in turn, after purchasing the milk and cream from the pasteurizing plant, distribute it to various stores which in turn sell it to the general public on a cash and carry plan."

Similarity in basis for claims of defendants is also apparent. The Court declared:

> "Under the facts found, it is clear that there is an actual flow of milk in interstate commerce from the farm-receiving station in Wisconsin, through the plaintiff dairy into the retail cut-rate stores in Chicago."

The case involved a labor dispute and was reversed by the Supreme Court (311 U. S. 91) because the lower court was without jurisdiction under the Norris-LaGuardia Act.

To argue that mere stoppage for bottling (and Pasteurization) and commingling in St. Louis destroyed the interstate character of the movement is to overlook the position occupied by the corporate defendants with regard to the product originating in Illinois. From the time of making purchase in Illinois, until it passed out of their hands, either by retail or wholesale disposal, the defendants controlled the product. Under the charge they purchased the milk with knowledge of the conspiracy and how the milk would be handled by them to effect the conspiracy. Thereafter the milk never left the possession and control of the corporate defendants, moving across the State line into and out of their St. Louis plant and into the consumer's hands in case of retail sale, at all times impressed with the object of the same conspiracy, by the same parties from origin in Illinois to final destination in Missouri. These facts, in our opinion, bring this case, as pled, more conclusively within the ban of the Sherman Act than some of the cases relied on by the Government. Take the case of *United States v. Food and Grocery Bureau of So. Cal.,* 43 F. Supp. 966, 1.c. 968, where the conspiracy was to fix prices of "products, such as milk, baking powder, cereals, sugar and the like, originating in interstate commerce." Ownership in this case must have changed hands more than once after the products came into the State of California. It is fair to conclude the products became a part of the conspiracy in some cases after they arrived in the State as the con spiracy was "started as an effort on the part of persons engaged in the food and grocery business". The conspiracy was to fix the retail price—after original boxes had been broken. The Court held the conspiracy was to restrain interstate commerce and was under the interdict of the Sherman Act. In affirming the lower court the Court of Appeals ruled (139 F. 2d 973, 1.c. 978):

> "The Supreme Court in *Local No. 167 v. United States,* 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. Ed. 804, states that the control of prices 'in the state of destination where the interstate movement ends may, operate directly to restrain and monopolize interstate commerce'."

We find in *Greater New York Live Poultry C. of C. v. United States,* 47 F. 2d 156, 1.c. 158, a comment on intent of shippers. as bearing on the question as to when shipments leave interstate commerce. There the Court said:

"It was clearly contemplated by the shippers that the poultry should pass through the receivers to the marketmen, for the shippers paid the charges for unloading, cooping and cartage to West Washington Market, and the price paid the shippers depended on market price made by resale to the marketmen. While the receivers cannot on this record be held to be mere agents of the shippers, as in *Live Poultry Dealers' Protective Ass'n v. United States,* 4 F. (2d) 480 (C. C. A. 2), their intervention as purchasers does not necessarily cause interstate shipment of the poultry to end on delivery to them."

And in the present case, when the corporate defendants purchased the milk in Illinois, under the facts pled in the indictment, they contemplated and intended every step the milk would take until delivery, with ultimate intent it should be governed in its sale in Missouri by the terms of the conspiracy. Under these circumstances we find no basis for terminating the interstate character of the shipment, at any point on the journey from producer to consumer, under a charge it was a "continuous journey", together with the other allegations of the indictment.

Under this rationale we think the ruling in *Binderup v. Pathe Exchange,* 263 U. S. 291, 1.c. 309, sustains our position. We quote:

"The film contracts were between residents of different States and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end *and was not intended to end* the movement of the commodity. *It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'"* (Emphasis added)

If we are correct in our conclusion that the fluid milk at the time it was purchased in Illinois by the corporate defendants was impressed with the unlawful agreement and conspiracy, and thereafter travelled under such defendants' control and ownership to retail consumer and wholesaler in Missouri in furtherance of the conspiracy, then the *Frankfort Distilleries* case (324 U. S. 293; 1944) is applicable. This was a case under the Sherman Act, which reached the Supreme Court on a question of sufficiency of the Government's pleadings. The charge of price fixing as the object of the conspiracy was disposed of in the following language:

"The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se."

A concurring opinion by Mr. Justice Frankfurter not only indicates the trend in construction given to the Sherman Act by that Court, to which we have referred, but announced a conclusion on an issue like that now before this Court which we believe is applicable:

"The decision of the court below is not without support in what has been said in the past in holding that, apart from the Twenty-first Amendment, this was a restraint local in its nature and therefore outside the scope of the Sherman Law. But price-fixing is such an immediate restraint upon trade that I do not think that the reach of the consequences of such an obvious restraint should be determined by drawing too nice lines as a matter of pleading. The case is before us, in effect, on demurrer to the indictment and judged abstractly, as a matter of pleading, I cannot say that the indictment was demurrable."

We are not unaware of the apparent conflict in our conclusion with that of the District Court for the Southern District of Ohio in *United States v. French Bauer,* 48 F. Supp. 260. We have the greatest

respect for opinions of District Courts but nevertheless we are not bound to follow them if we are not in agreement. From the meager facts recited in the opinion we are unable to determine the full basis of the ruling on one point in particular which we consider important in the present case. That is, control of the product from purchase in one State until delivery in another. The *French Bauer* opinion apparently disagrees with the rule, as we understand it, that price-fixing is per se a violation of the Sherman Act.

As to the *Schechter* case, relied on by defendants, we do not think it controlling in support of their position, and the Appellate Court (*Food and Grocery Bureau of So. Cal. v. United States, supra*) and the Supreme Court (*United States v. Wrightwood Dairy Co., supra*) have apparently held likewise. It was not a case under the Sherman Act. It involved hours and wages of employees—not price paid for merchandise. That this distinction is vital to defendants' position is indicated by the ruling of the same Court in *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, l.c. 123) where the Court said:

> "In the *Schechter* case the Court was concerned only with the alleged infringements of the 'Code of Fair Competition' for the live poultry industry of the New York City metropolitan area, which had been adopted under the provisions of § 3 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 196. The violations of the code charged were that wholesale distributors who had purchased poultry in New York, most of which came from without the state, and who were engaged in slaughtering and reselling to retailers, had failed to maintain for their employees wages and hours prescribed by the code, and had failed to abandon 'selective selling' to their customers in New York which the code had prohibited.
>
> "The Court's opinion pointed out that the defendants *were not charged with injury to interstate commerce or interference with persons engaged in that commerce*, and that the acts charged had no different relation to or effect upon interstate commerce than like acts in any other local business which handles commodities brought into the state. *Schechter Corp. v. United States, supra*, 545-6. It characterized their effect upon interstate commerce as 'indirect', and distinguished them from those acts and tranactions intrastate which, because they '*directly affect*' interstate commerce, are within the Congressional regulatory power. In explanation of this distinction and as examples of direct effects which are within the commerce power it referred to the 'fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce,' citing the *Shreveport* case, *supra*, and referred to intrastate restraints upon competition injuriously affecting interstate commerce condemned by the Sherman Act, citing *Local 167 v. United States, supra*, and other cases." (Emphasis added.)

We think the very language of the *Schechter* opinion demonstrates how that case differs from this case. The Court said in the *Schechter* opinion (at p. 542):

> "But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. * * *
>
> "(p. 543) The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a '*current*' or '*flow*' of interstate commerce and was thus subject to congressional regulation."

As we have stated, in this case under the pleading of the Government, after defendants formed the conspiracy they journeyed regularly into Illinois and purchased milk to use in effecting the conspiracy. The indictment states there was a "continuous" flow of milk from producers in Illinois to consumers in Missouri. It may well be said the conspirators used the ultimate means of sales in Missouri, which in and of themselves were intrastate activities, to attain the end of fixing prices on milk they had obtained in Illinois. Cases falling under this head were excepted from the ruling in the *Schechter* case (l.c. 544):

> "And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities."

Finally we direct attention to the case of *Mandeville Island Farms, Inc., et al. v. American Crystal Sugar Company*, — U. S. — (May 10, 1948). This is a case under the Sherman Act. The issue on the pleading was stated thus:

"Broadly petitioners regard the entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth, as a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it that, for purposes of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp.

"Respondent, on the contrary, broadly severs the phase or phases of growing and selling beets from the later ones of refining them and of marketing the sugar. The initial growing process together with sale of the beets, and it would seem also the intermediate stage of refining, are taken to be "purely local," since all occurred entirely within California; therefore were wholly intrastate events; and consequently were beyond the Sherman Act's reach."

While the pleading went further than the indictment in the present case and charged other effects on interstate commerce than price fixing alone, we cite the case principally as bearing on defendants' claim that the bottling, commingling and Pasteurization changed the form of the product and arrested interstate commerce. If manufacture, in and of itself, of beets into sugar cannot stop the interstate flow of goods, from which sugar is processed, then it would seem to follow that bottling, Pasteurization and commingling of milk would not. The holding of the Court on this point is:

"The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard v. Filburn,* 317 U. S. 111, or the scope of the Sherman Act's coverage. The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute."

Order

Motions of defendants, and each of them, to dismiss the indictment are overruled.

[¶ 62,312] Harry Ferguson and Harry Ferguson, Inc. v. Ford Motor Company, et al.

In the United States District Court for the Southern District of New York. Civil No. 44-482. September 23, 1948.

Sherman Antitrust Act

Motion to Impound Documents—Applicability of Remedy—Admissibility of Documents Discretionary.—A motion by plaintiffs to impound documents alleged to have been improperly obtained by defendants in a suit charging patent infringement, antitrust violations, and unfair competitive practices is denied. It is held that any harm done by disclosure of information contained in the documents cannot be undone by impounding them, that summary relief against the competitive use of information in the possession of the defendant must be litigated upon a motion for an interlocutory injunction, not upon a motion to impound, and that use of the documents for purposes of examination and cross-examination or evidence rests within the discretion of the court in each individual instance.

See the Sherman Act annotations, Vol. 1, ¶ 1640, and prior opinion reported at ¶ 62,252.

RIFKIND, D. J.: Plaintiffs have moved for an order directing: (a) that the defendants and their counsel file with this court, in a sealed envelope, all copies in their possession, or under their control, of specified confidential documents which they have improperly obtained from one William J. Sands, a witness being examined before trial; and (b) that said documents be and remain sealed and be opened only on further order of this court; and (c) that pending further order of this court defendants, their counsel, employees, agents and representatives make no further use of information acquired from said documents.

A brief statement of the facts is necessary in order to place this motion in its proper context. On January 8, 1948, plaintiffs filed a complaint wherein they alleged that the defendant had infringed their patents, had violated the antitrust laws and had engaged in unfair competitive practices, all to the damage of the plaintiff. In due course issue was joined and the pre-trial examinations began.

In June of 1948, the plaintiffs discovered, or at least so it is alleged, that the defendant had induced one Sands, an employee of the plaintiffs, to assist the defendants in the preparation of their defense and, in that connection, to surrender to the defendants a large number of confidential documents, property of the plaintiffs and in the possession of the witness as a result of his confidential relationship to his employer. These documents were produced during the examination of Sands and were marked for identification. It is with respect to seventy of the documents, so produced, that the present motion is addressed.

The theory of the plaintiffs' motion is as follows: Had the defendants, by recourse to the discovery rules, made application for the production by the plaintiffs of the documents, plaintiffs would have been in a position to ask for the protective devices contemplated by Rule 30(b) with respect to confidential matters and secret processes. Plaintiffs contend that they should not be in any worse position because defendants had improperly secured access to these documents. Therefore, they urge the court to regard these documents as if constructively still in the possession of the plaintiffs and to make provision for the protection of such secrets as they contain. It is important, however, to note that upon the argument plaintiffs' attorney expressly disavowed any desire or intention to suppress the documents insofar as they affected the litigation and stated that he desired merely to protect plaintiffs against the competition to which they would be unjustly subjected by reason of business, rather than litigation, use of the material thus made available to defendants by the faithless employee.

It must be recognized that the plaintiffs' view is founded, necessarily, upon a fiction. Whether acquired by the defendants rightfully or wrongfully, the reality is that they have had possession of and access to these papers for many, many months. Insofar as the disclosure in itself is harmful to plaintiffs, the harm has already been inflicted. Insofar as the disclosure has business consequences, the remedy which may be available to the plaintiffs consists of a claim for damages or the restraint of further use. It can no longer rest in the realm of non-disclosure. Since the protective devices of 30(b) to which plaintiffs have reference concern the degree of disclosure it is to a large extent, although not wholly, inapplicable to the proceeding.

If we examine now the purpose of the plaintiffs in making this motion as avowed by their attorney, it becomes clear that what they are seeking is summary relief against the competitive use of information in the possession of the defendant. It may be that they are entitled to such summary relief but, if it is available, the application therefor would have to be presented and litigated upon a motion for an interlocutory injunction. Absent facts which would justify interlocutory relief, the remedy would be by action: either by independent action or by supplemental complaint in the pending action. Either procedure would afford the parties and the court a direct opportunity for passing upon the merits of the claim. They should not be passed upon in the oblique manner in which they are presented upon a motion to impound.

The defendants argue that whatever may be the avowed purpose of the plaintiffs in making this motion, its inevitable consequence would be that they would be deprived of the opportunity to use the papers in the examination and cross-examination of the witness Sands and of the plaintiffs. They contend that these papers contain evidence; that whether they were lawfully or unlawfully obtained is immaterial to the issue of the admissibility of such evidence. *VIII Wigmore, 3rd ed.* § 2183

Although I have not inspected the papers, the affidavits indicate that it may well be that they contain "secrets" in three different senses of that word. One, they may contain admissions in the form of statements confidentially made by plaintiffs to witness Sands, such as, for instance, an admission that plaintiff Ferguson was in fact not the inventor of an invention covered by a patent in issue, or that the

damages which plaintiffs attribute in the complaint to the violation of the anti-trust laws was, in fact, attributed by the plaintiffs, before suit was commenced, to some other cause. These are matters confidential in the eyes of business men. They are not confidential in the eyes of the law in the sense of being inadmissible in evidence. Two, there may be items which are in the legal sense privileged, such as communications between the plaintiffs and their attorneys. And, three, there may be items which the law denominates trade secrets, such as a secret process for the manufacture of an article marketed by plaintiffs.

How to deal with material of the third category always presents a problem. The nature of that problem was analyzed in *Dupont Powder Co. v. Masland,* 1917, 244 U. S. 100, in an opinion by Mr. Justice Holmes. The brevity of that opinion renders superfluous any attempt to paraphrase it; but this much of it needs to be noted, that the judge's discretion is very wide in the determination whether, to whom, and under what precautions the revelation should be made.

In the light of these considerations it seems to me that (1) nothing this court can now do would undo the disclosure already made; (2) business abuse of the disclosure, if any has occurred or should occur, is beyond the scope of the relief available on the pending motion; (3) use of the papers for purposes of examination, cross-examination, refreshment of memory or introduction into evidence can best be regulated by consideration of the factors bearing upon such use in each individual instance, separately, in the precise context in which such use is proposed.

The motion is, therefore, denied.

[¶ 62,313] United States of America v. Standard Education Society, a corporation, Standard Encyclopedia Corporation, H. M. Stanford, individually and as President and Director of Standard Education Society and as President, Director and Incorporator of Standard Encyclopedia Corporation, W. H. Ward, individually and as Secretary and Director and Incorporator of Standard Encyclopedia Corporation, and A. J. Greener, individually and as Incorporator of Standard Encyclopedia Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 4521. September 28, 1948.

Federal Trade Commission Act

Res Judicata Defense.—A civil penalty proceeding for violation during 1940 and 1941 of a modified cease and desist order, prohibiting misrepresentation in the sale of encyclopedias or reference books and so-called extension service, is not *res judicata* in view of a decree denying application for enforcement of the cease and desist order since there was no showing of any violation prior to March 21, 1938. The defense of *res judicata* is applicable only where the underlying issue in two suits is the same, and the adjudication of the issue in the first suit is determinative of the same issues in the second suit.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.336, 6125.611, 6601.70, 6610.42, 6610.61, 6620.190, 6660.85.

Question of Immunity Under Section 9 of Act Justified.—In a civil penalty proceeding for violation of a modified cease and desist order prohibiting misrepresentation in the sale of encyclopedias or reference books and so-called extension service, defendants, who testified extensively before the Commission in obedience to a subpoena issued by the Commission while acting as special master, and testimony was not limited to corporate records, have the right to raise the question of immunity under Section 9 of the Federal Trade Commission Act. The subpoena involved in this proceeding made no designation that the Commission was sitting as special master. It is in all respects the subpoena of the Commission.

See Federal Trade Commission Act annotations, Vol. 2, ¶ 6129.28.

Civil penalty proceeding dismissed in FTC Dkt. 1574.

Attorney for plaintiff: Otto Kerner, Jr.

Attorneys for defendant: Henry Ward Beer and Anderson & Roche.

Memorandum

[*Nature of Proceeding*]

LABUY, J.: The complaint herein is a civil penalty proceeding for past violations in 1940 and 1941 of a modified cease and desist order of the Federal Trade Commission entered March 28, 1940 and is brought pursuant to Section 45(1) of the Wheeler-Lea Act (15 U. S. C. A.).

[*Prior Court Proceedings*]

The chain of events concerning the defendants began on December 24, 1931 when, after hearings before the Federal Trade Commission regarding violations with respect to representations to customers, the Federal Trade Commission issued a cease and desist order. On January 20, 1936 the Federal Trade Commission petitioned the Circuit Court of Appeals for the Second Circuit for an enforcement of said order. On December 21, 1936 paragraphs 1, 3 and 8 of said order were reversed and on November 8, 1937 the Supreme Court of the United States reversed the Circuit Court of Appeals and sent the matter back for proceedings in accord with its opinion. On March 21, 1938 the Wheeler-Lea Act was passed giving the United States the concurrent remedy of a suit for civil penalties for violations of Federal Trade Commission orders. On May 20, 1938 the Circuit Court of Appeals entered a decree "resettling" the cease and desist order of December 24, 1931 and designated the Commission a special master to hear and determine whether violations of the 1931 order were existent. On March 28, 1940 the Federal Trade Commission issued the present modified order to cease and desist in reliance upon the provisions of Section 5(i) of the Federal Trade Commission Act, as amended by the Wheeler-Lea-Act. This modified order is in all respects identical to the original order of December 24, 1931. On September 18, 1941 the Federal Trade Commission petitioned the Circuit Court of Appeals to be released from reporting as to whether defendants had complied with the 1931 order since the Wheeler-Lea Act now provided that the Attorney General could bring a civil suit for penalty. This petition was denied on October 20, 1941 on the ground that the matter was in the hands of the Federal Trade Commission.

On July 24, 1942 the present penalty complaint was filed. On December 10, 1942 the Commission was required by the Circuit Court of Appeals to proceed with the taking of proof on or before February 1, 1943 under penalty of revocation of the order of May 20, 1938 appointing it as special master. On October 20, 1943 Judge Sullivan overruled the defendant's motion to dismiss the present civil penalty suit brought July 24, 1942 and continued the proceeding until such time as the Commission makes its report to the Circuit Court of Appeals. As special master the Commission submitted its report to the Circuit Court of Appeals on July 27, 1944. This report disclosed, with the exception of Stanford, that violations of paragraphs 1, 2, 3 and 6 of the May 20, 1938 decree had occurred, but that the defendants had committed no violations prior to March 21, 1938.

On January 29, 1945 the Commission petitioned the Circuit Court of Appeals to deny its 1936 application for enforcement of its cease and desist order and on February 13, 1945 an order was entered discharging the Commission as special master and denying the application for enforcement since there was no showing of any violation prior to March 21, 1938.

[*Defendants' Grounds for Dismissal Listed*]

The defendants' motion to dismiss the remaining counts, Counts 1 to 28, 40, of this complaint is based on three principal grounds: (1) the present suit is *res judicata* in view of the decree of the Circuit Court of Appeals on February 13, 1945; (2) the modified cease and desist order entered March 28, 1940 is null and void; and (3) the individual defendants are immune from being subjected to this penalty suit by virtue of Section 49 of the Federal Trade Commission Act.

[*Nullity Contention Disregarded*]

With respect to defendants' contention on the nullity of the modified cease and desist order of March 28, 1940 this court is not concerned since the question has been determined by the ruling of Judge Sullivan on October 20, 1943 wherein it was held that said order was authorized by Section 5(i) as amended by Section 3 of the Wheeler-Lea Act.

[*Res Judicata Discussed*]

The master's report covers defendants activities during the years 1939, 1940 and 1941. No action was requested of the Circuit Court of Appeals regarding approval or disapproval of this report or for a consideration on its merits. In support of its contention of *res judicata* defendants call attention to the opinion of Judge Sullivan wherein it is stated:

"The question to be decided by the Circuit Court of Appeals is whether or not the defendants here have complied with the provisions of the cease and desist order; the question before the court in the instant case is whether or not defendants have violated the same cease and desist order of the Commission. Hearings are now being carried on by the Commission in conformity with the order of the Circuit Court of Appeals. Nothing will have been gained by also forcing defendants into the position of furnishing the same lengthy and expensive evidence in the penalty case."

The defense of *res judicata* is applicable where

"the underlying issue in two suits is the same, the adjudication of the issues in the first suit is determinative of the same issues in the second suit. The rule is "That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified." *Lee v. F. T. C.*, (C. C. A. 8, 1940) 113 F. (2d) 583.

[*Res Judicata Inapplicable*]

From the present state of the pleadings and with particular reference to the order of the Circuit Court of Appeals denying application for enforcement of the Federal Trade Commission order, there is nothing to indicate determination of the issue presented by the present complaint. The order of the Circuit Court of Appeals held no violations occurred prior to March 21, 1938; the violations complained of in the present complaint present violations for the years 1940 and 1941.

[*Question of Immunity Discussed*]

The defense of immunity appears in Section 49 of the Trade Commission Act (15 U. S. C. A.) reading:

"* * * No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: * * *"

[*Question of Immunity Justified*]

Suits for penalties and forfeitures incurred by the commission of offenses against the law are quasi-criminal in nature and are within the realm of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution and of that portion of the Fifth Amendment which declares that no person, shall be compelled in any criminal case to be a witness against himself. *Boyd v. U. S.*, 116 U. S. 616 (634). The Government contends that since the Federal Trade Commission was acting as a special master this immunity proviso cannot apply and further if it did apply no testimony or evidence was adduced relating to defendants outside of the corporate records. But this section grants immunity from prosecution where testimony is given or evidence produced before the commission in obedience to a subpoena issued by it. The subpoenas, which are exhibits herein, make no designation that the Federal Trade Commission is sitting as special master. It is in all respects the subpoena of the commission and the court believes the defendants have the right to raise the question of immunity in this action. It is true the section does not apply to corporate officers so far as they are required to produce and testify concerning books and records of the corporation whether made by them as an officer or by another authorized to do so. The tran-

script of the record in the Federal Trade Commission acting as special master has also been submitted by defendants for the purpose of their motion. From the transcript it appears that the defendants seeking immunity testified extensively and that such testimony was not limited to corporate records.

[*Presentation of Order*]

Counsel should present an order not inconsistent herewith within twenty (20) days from date hereof.

[¶ 62,314] United States v. Maryland & Virginia Milk Producers Association.

In the United States Supreme Court. No. 89. October 11, 1948.

Sherman Antitrust Act

Conspiracy to Restrain Trade—Sufficiency of Allegations—Motions to Transfer.—An indictment charging a conspiracy to fix prices and restrain trade in milk was dismissed by the District Court for failure to set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act. A per curiam order grants motions to transfer and remands the case to the United States Court of Appeals for the District of Columbia.

See the Sherman Act annotations, Vol. 1, ¶ 1630.225, and prior opinion reported at ¶ 62,264.

[*Order*]

Per curiam: The motions to transfer are granted and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit pursuant to Title 18, United States Code, 3731. *United States v. Swift & Co.*, 318 U. S. 442; *United States v. Wayne Pump Co.*, 317 U. S. 200.

[¶ 62,315] Louis Paradise, d. b. a. Paradise Distributing Company v. Charles J. Goldman, d. b. a. C. J. Goldman Liquor Shop.

In the Wisconsin Circuit Court for Milwaukee County. No. 213188. Filed May 21, 1948.

Wisconsin Fair Trade Act

Enforcement of Minimum Resale Prices—Foreign Manufacturer—Not Licensed to Do Business in Wisconsin.—An out-of-state manufacturer of liquor, who is not licensed to do business in Wisconsin, may not enjoin the sale of his product at a price less than that established pursuant to fair trade contracts. The rights of plaintiff distributor are no greater than those of the manufacturer of the commodity. Defendant retailer is entitled to judgment dismissing the complaint.

See the Wisconsin Fair Trade Act, Vol. 2, ¶ 8944, and Commentary on Resale Price Maintenance, ¶ 7361.

For plaintiff: Gold and & McCann, Milwaukee, Wisconsin.

For defendant: Fred Wright, Milwaukee, Wisconsin.

DECISION

[*Nature of Action*]

BRAUN, A. E., Circuit Judge: This is an action, under the provisions of Sec. 133.25 of the statutes (Fair Trade Act) to enjoin the defendant from selling certain brands of liquor below prices stipulated by the plaintiff as a distributor. Plaintiff is a distributor of liquor products made by Gooderham & Worts, Ltd., a foreign corporation and hereinafter referred to as G. & W.

Prior to January 22nd, 1941, G. & W. was licensed to do business in Wisconsin but on that date it surrendered its license and since that time it has not been licensed to do business in this state.

[*Fair Trade Contracts*]

G. & W. is a producer of liquors which are marketed under various brands and labels. Under the provisions of Sec. 133.25 G. & W. made a number of contracts in the spring of 1947 to provide for the fair trading of its products. Under the terms of the contracts G. & W. stipulated the prices at which certain brands of whiskey and gin might be sold at retail. No competent evi-

dence was presented showing that the defendant had knowledge of such price lists. In September 1947 G. & W. issued another list of prices at which its products might be sold at retail and also as to this list the evidence failed to show that notice or knowledge of such price list can be imputed to the defendant.

In December, 1947, G. & W. issued still another list of minimum prices that might be charged for its products by retailers. Prior to that time G. & W. sent notices by mail to licensed liquor dealers in Wisconsin notifying them of its minimum prices. The defendant, Goldman, denied that he ever received any of the notices sent by G. & W.

The evidence shows that on December 27th, 1947, a Mr. William H. Plouff, the state manager for G. & W. and his assistant, Carroll Prinz deposited in the post office at Milwaukee post-cards containing the minimum retail price list of G. & W. Products and addressed such cards to the defendant at his place of business. The cards then used were like Exhibit 5 which is a special post card authorized by the post-office department. Plouff testified that he addressed a card similar to Exhibit 5 and deposited it in the post-office but gave no testimony that he affixed the usual postage stamp on such card. Prinz admitted that he had no recollection of postage stamps having been placed on the cards addressed to the defendant by himself or Plouff. Exhibit 5 is a specimen of cards having printed on the space usually reserved for stamps a notation that the postage was paid under a permit. It is a matter of common knowledge and the court takes judicial notice of the fact that postal regulations authorize the use of post cards in this form provided they are used in large quantities and the postage is paid in advance. It is obvious that a single card or two like Exhibit 5 will not be delivered under postal regulations unless a proper postage stamp is first affixed thereto. The evidence therefore is insufficient to establish a basis for the presumption that the mail in question was actually delivered to the defendant. This is especially so in the light of the testimony given by the defendant and his assistant that they never received the cards which Plouff and Prinz claim they sent to the defendant. So in respect to this last price list it must be held that the defendant did not have notice of the G. & W. minimum fair trade price list.

[*Defense Raised*]

One of the defenses pleaded by the defendant to the claim that G. & W. had published a fair trade price list regulating the sale of its products at retail is that G. & W. is a foreign corporation; that it has not been licensed to do business in Wisconsin and that under Sec. 226.02 (9) neither G. & W. nor its assigns may enforce any contract made in Wisconsin or in respect to its property in this state.

Plaintiff's counsel denies the validity of this defense but has failed to cite any authorities holding that statutes like Sec. 226.02 (9) are unconstitutional.

Subsec. 133.25 (5) of the Fair Trade Act binds dealers who have information as to price lists stipulated by a producer under the act even though they do not sign contracts with the producers. Even though a retailer refuses to sign a contract for the purchase and sale of a commodity which is being fair traded, if he has notice of such fact and of the minimum prices that have been stipulated by the producer then if, with such notice and konwledge, he buys such commodity for the purpose of resale it must be held that the provisions of the minimum price list are incorporated in the contract of purchase and he is bound to comply with it. In other words he makes himself a party to the fair trade contract even though he does not sign it. From this it follows that if the commodity is being fair traded by a foreign corporation which is not licensed to do business in this state then a retailer may avail himself of the defense provided by Sec. 226.02 (9). It is therefore my conclusion that the defendant was not compelled to observe the minimum price list stipulated by G. & W. if he had notice of such minimum price list and if he did not have notice of such list he also cannot be held to have violated the Fair Trade Act.

The evidence also shows that in 1948 G. & W. arranged for three wholesale liquor dealers in Milwaukee to distribute and sell its products to retail dealers, namely: Capital Beverage Company, McKesson Liquor Company and the plaintiff, doing business under the name of Paradise Distributing Company.

It is also established that in October, 1947, the defendant bought 95 cases of John Collins gin and 50 cases of William Penn whiskey from the McKesson Liquor Company and that in December, 1947, he purchased 100 cases of William Penn whiskey from the Capitol Beverage Company. It further appears that between January 13th, 1948, and March 3rd, 1948, the defendant purchased large quantities of Mill Farm Bourbon whiskey, William Penn blended whiskey and John Collins gin from the Capitol Beverage Company and that the last deliveries under such purchases were made March 30th, 1948. All of these liquors are products of G. & W. and are included in the minimum price lists stipulated by such producer.

On March 4th, 1948, plaintiff sent to the defendant by registered mail a fair trade price list of the same products which G. & W. had attempted to fair trade and with prices identical to those mentioned in Exhibit 5 which was issued by G. & W.

Defendant admits that subsequent to receiving the price list which was issued by plaintiff he advertised in the Milwaukee newspapers that he offered to sell and did sell the brands of whiskey and gin at prices below the minimum prices stipulated by the plaintiff. These advertisments and sales precipitated the present litigation.

[*Constitutionality*]

Defendant claims the Wisconsin Fair Trade Act is unconstitutional because by subsection (8) of the act cooperative societies and associations not organized for profit are exempted from the provisions of the act and cites *Weco Products Co. v. Reed Drug Co.,* 225 Wis., 474, as his authority. While it is true that the court in that case held subsec. (8) of the act unconstitutional, it nevertheless held that the act was severable and held the balance of the act valid. However, regardless of the validity of subsec. (8) the legislature by ch. 275, sec. 42 of the laws of 1943 repealed said subsection and now there can be no doubt about the validity of the act in its present form.

[*Distributor Has No Greater Rights Than Manufacturer*]

Another defense to the complaint which defendant relies on is that, because G. & W. as an unlicensed foreign corporation has no standing in court to protect the sales of its brands of liquor in this state, therefore plaintiff as a distributor of G. & W. products, has no rights respecting the protection of the brands of liquor produced by G. & W.

Sec. 133.25 exempts from charges of conspiracy or contracts in restraint of trade or commerce commodities produced by owners who by the use of trade-marks, brands and labels have built up a good will for themselves if such commodities are in fair and open competition with commodities of the same general class produced by others.

All of the cases in which the validity of Fair Trade Acts have been considered recognized the fact that when a producer markets a commodity under a trade-mark, brand or label he thereby builds up a good will for such commodity; that such good will is a property right and it is this property right which is sought to be protected. These cases distinguish between the protection of the good-will of producers and the right to sell the product itself independent of the trade-mark, brand or label. It is uniformly held that the good-will which a producer establishes by the use of a trade-mark, brand or label is entitled to be protected against price cutting in the sale of such protected commodity, although the product itself is not protected if not sold under such trade-mark, brand or label. The cases supporting this theory may be found in the briefs filed by counsel for both parties and it does not seem necessary to enumerate them here.

Subsec. 133.25 (3) of the Fair Trade Act protects contracts fixing minimum prices that may be charged for commodities which are sold under a trade-mark or brand against the charge of a conspiracy in restraint of trade if such contracts are made by the owners of such trade-marks or brands. Subsec. (5) of the statute gives a cause of action to any person who may be damaged by the sale of such trade-marked or branded commodity against anyone who wilfully and knowingly advertises for sale or sells below the stipulated price. It is my interpretation of the Fair Trade Act that the contracts providing for the sale of commodities under a trade-mark or brand at a stipulated price must be made or produced by the owner of the trade-mark or brand and if a retailer who is a party to such contract or who has knowledge of such contract and minimum price list may be enjoined from selling such commodities at cut prices in an action by a distributor or wholesaler who is damaged thereby.

Under this interpretation the rights of the plaintiff can be no greater than the owner or producer of the trade-marked or branded commodity and as G. & W. has no standing in court in this action so plaintiff as a distributor cannot enforce any price list stipulated by G. & W. It is also my interpretation of the Fair Trade Act that the right to make contracts fixing minimum prices belongs to the owner of the trade-mark or brand that is used in the sale of a commodity. If an owner of a trade-mark or brand used in the production of a commodity wishes to delegate to a distributor the right to stipulate a minimum price list he probably may do so but under no circumstances can the distributor acquire a greater right than that of the producer. From this it follows that the minimum price list issued by the plaintiff cannot be enforced in court because plaintiff's assignor has no authority to stipulate minimum price lists in Wisconsin so long as it is not licensed to do business here.

Defendant also contends that he is only bound to maintain prices lawfully stipulated in the sale of commodities purchased *after* the date of contracts made by G. & W. or by plaintiff as distributor *and* after receiving notice of the minimum price list. In other words defendant claims that in respect to the liquor purchased by him prior to March 4th, 1948, he is free to sell it at any price he pleases. The following cases support this contention: *Lentheric, Inc., v. Weissbard et al.,* 122 N. J. Eq. 573, 195 A. 818; *Chamley Drug Shop v. Guerlain,* 113 Fed. (2d) 247; *James Heddon's Sons v. Callendar,* 29 Fed. Supp. 579.

[*Complaint Dismissed*]

Defendant also has raised a number of other points on which he relies to defeat plaintiff's prayer for an injunction. In view of the conclusions arrived at above it does not seem necessary to discuss these other contentions of the defendant. It follows from what has been said that the defendant is entitled to judgment dismissing plaintiff's complaint with $100.00 costs and disbursements.

Let findings of fact and conclusions of law be prepared accordingly.

[¶ 62,316] M. R. Dickson, et al. v. North East Texas Motor Freight Lines, Inc.

In the Texas Court of Civil Appeals for the Fifth Supreme Judicial District. No. 13,831. February 27, 1948. On rehearing, April 16, 1948.

Texas Antitrust Laws

Labor Dispute—Conspiracy in Restraint of Trade—Permanent Injunction.—A judgment of permanent injunction restraining a teamsters' union, its business agent, certain of its members, and eighteen truck lines from establishing and maintaining a boycott against a motor carrier of freight is affirmed as to the restraints against acts in the nature of secondary boycott. Provisions of the decree prohibiting all picketing of plaintiff's premises for purpose of publicizing plaintiff as unfair are reversed. Publicizing the facts of a labor dispute in a peaceful way through appropriate means is within the Constitutional guaranty of freedom of speech.

See the Texas Antitrust Laws, Vol. 2, ¶ 8835, 8836.

For appellants: L. N. D. Wells, Jr., W. F. Bane, Dallas, Texas; David Previant, Milwaukee, Wisconsin.

For appellee: Bowyer, Gray, Thomas, Crozier & Jaffe, Dallas, Texas.

[*Nature of Proceeding*]

YOUNG, A. J.: After trial to the court, Teamsters Union No. 745 A. F. of L., its officers, representatives and other named persons have here appealed from a judgment of permanent injunction. Plaintiff below is a motor carrier of freight, defendants being said union, Dickson, its business agent, nine individuals (ex-employees of plaintiff), and eighteen other truck lines. The judgment complained of followed generally the allegations of plaintiff's petition, which prayed that all defendants be restrained from establishing and maintaining a boycott against it; from picketing its place of business with placards carrying untrue statements; from interfering with plaintiff's contracts and with commerce; from maintaining a conspiracy in restraint of trade in violation of the antitrust laws

of Texas, notwithstanding provision of contracts between said union and truck line defendants relating to the crossing of picket lines and the handling of goods characterized by the union as unfair. Mandatory provision of the judgment directed truck line defendants to resume interchange of freight with plaintiff; the union and four of plaintiff's ex-employees only undertaking an appeal.

[*Employer's Business*]

Appellee is a Texas corporation, a common carrier of freight, handling merchandise by motor vehicles over the highways of Texas and Oklahoma on permits from the Interstate Commerce Commission and Texas Railroad Commission. It has engaged in such business since 1921, employing between 130 [and] 165 persons, operating 92 trucks with more than 5,000 customers. Its operations extend from Dallas to Texarkana, with many terminal and intermediate points of service in North Texas and southern Oklahoma. Appellee's daily tonnage is about 300,000 lbs; it having contracts and interchange agreements with the eighteen truck line defendants from whom it received on an average, daily, of between 175,000 and 200,000 lbs. of freight.

[*Representation of Employees*]

On September 16, 1946 M. R. Dickson, assistant business agent of appellant union, had been furnished by eleven employees of appellee (the nine individual defendants already mentioned and two others) with slips authorizing Local 745 to act as their agent in collective bargaining. However, none of the North East Texas Motor Line employees were members of a labor union; no proceedings had been instituted before the NLRB for certification to defendant union or other person or organization as bargaining agent for plaintiff's employees; and according to J. L. Robinson, Company president, and Bert Aldis, manager of its Dallas terminal, there had been no demands by company employees for better wages, hours and conditions of employment, when, on September 17, 1946, Robinson received a long distance call at Paris from Dickson, defendant union's assistant business agent at Dallas. As to the ensuing conversation, the evidence is conflicting, Dickson testifying to effect of telling Robinson that the latter's employees in pickup and delivery service had asked witness to represent them in securing better wages and working conditions; requesting a conference and the signing of a union contract; that the employees would go on strike if an agreement was not signed, which request for negotiations Robinson flatly refused. On the other hand, Mr. Robinson testified to telling Dickson that he was not averse to such a conference and that "I will be glad to have you."

[*Picketing*]

These eleven employees went off the job the next morning, the record being unclear as to whether they quit voluntarily, were discharged or simply went on strike; at any rate, the succeeding day (September 18) pickets were stationed around plaintiff's Dallas terminal (one or more of these dissatisfied employees participating), each picketer bearing a sign reading "North East Texas Motor Lines unfair to Teamsters Union A. F. of L." Testimony is likewise conflicting as to whether these labor activities were initiated by Dickson on behalf of the union; its office, however, answering all inquiries to effect that a strike was on at plaintiff's premises and the company on the "unfair" list. Immediately all truck line defendants except six[1] ceased doing business with plaintiff, either because of their drivers' refusal to cross picket lines or by reason of proviso in each of their contracts with the union to the same effect, notwithstanding the interchange contracts and arrangements plaintiff had with such other truck lines. As a result, and overnight, plaintiff suffered losses in business revenues of some 90 per cent; his Dallas office receipts on September 16 being $1,650; the next day, following above labor activity, receipts of $150.

[*Injunction*]

The final order of injunction (here appealed from) carried in substance the following recitals: (1) That on the occasion in question no bona fide labor dispute existed between plaintiff and labor defendants; (2) labor and truck line defendants were enjoined from refusing to handle plaintiff's freight and ordered to resume

[1] Of these, Merchants' Fast Motor Lines and Brown Express had no contract with the union; and whether interchange of freight ceased between the other four truck lines and plaintiff on account of strike, the record is not clear.

business relations with plaintiff in accepting and delivering freight, notwithstanding provision of contracts between union and said truck lines; (3) labor union and ex-employees were enjoined (a) from establishing a picket line at plaintiff's place of business or picketing defendant truck lines for purpose of publicizing plaintiff as unfair, and (b) similarly enjoining them from telephoning or informing truck line defendants or customers that plaintiff is "unfair" or informing them that a strike existed among employees of plaintiff; (4) labor union defendants and ex-employees were enjoined from interfering with business relations or contracts between plaintiff and truck line defendants or customers so as to terminate such contracts or business relations; these truck lines being likewise enjoined from terminating contracts and business relations with plaintiff on account of above mentioned labor troubles; (5) labor union defendants and ex-employees were enjoined from threatening and intimidating or coercing Liquid Carbonic Company or other shipping or receiving customers not to do business with plaintiff, or from informing said customers a strike existed among employees at plaintiff's Dallas terminal, or that plaintiff was unfair or on the unfair list.

[*Pertinent Legislation*]

Recent legislation (both Federal and State) with respect to labor organizations and affairs, appears to have rendered moot to some extent the issues raised on this appeal. See Labor Management Relations (Taft-Hartley) Act, 80th Congress, 1947, and the Nine Acts, Texas Legislature, 50th Session, 1947, now appearing as Art. 5154 a-f, and Art. 7428 as amended, Vernon's Annotated Civil Statutes. Likewise the similarity in subject matter in the instant suit and *Turner v. Zanes,* 206 S. W. 144 (by this Court), is such as that both appeals are based upon identical points of error. The *Turner-Zanes* case is deemed controlling, therefore, of several points herein raised; but to the extent that this record differs from the *Turner* appeal, appellants here are entitled to conclusions of fact and law, viz:

[*Labor Dispute*]

First: While every presumption will be indulged in favor of the trial court's finding, this record, we think, clearly discloses the existence of a labor dispute between appellee and eleven of his employees; if not that, then surely there was a pending dispute with defendant union as an adversary party. While there is a conflict of testimony as to whether Daniel, an employee, had complained to Mr. Robinson or his Dallas foreman on behalf of the group, the whole record is suggestive of their dissatisfaction in the matter of appellee's working conditions; as, for example: Their authorization of Dickson in the matter of collective bargaining; the latter's discussion with Robinson of a union contract; they [*sic*] walking off the job and joining a picket line, carrying banners, all of which sufficiently establishing the activity as a labor dispute within the meaning of Art. 1621b, Sec. 3, Penal Code. But if we be mistaken in our conclusion that there was no [*sic*] employer-employee dispute, then unquestionably the negotiations between appellant union and the company (attempted or pending), constituted such a dispute and an adequate basis for the ensuing strike and picketing. "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, *even though they are not in his employ.*" (Italics ours) *A. F. of L. v. Swing,* 312 U. S. 321.

[*Scope of Picketing Restraint*]

Second: The judgment further restrained all picketing of plaintiff's premises "for purpose of publicizing the plaintiff as unfair" to defendant union or as on the "unfair" list, though their conduct was otherwise peaceful. We have seen that such picketing has constitutional protection as a form of free speech (See recent U. S. Supreme Court decisions, cited in the *Turner* appeal). Also that in connection with picketing, a reference to the employer as unfair or on the unfair list is not to "falsify facts." *Cafeteria Employees, etc. v. Angelos,* 320 U. S. 293; these terms in an industrial dispute being merely expressions of opinion relative to the labor policy of a particular employer. *Teller,* Vol. 1, Sec. 152; *Steffes v. Motion Pictures, etc.,* (Minn.), 161 N. W. 524.

The trial court erred, therefore, in wholly restraining appellant's method of picketing the premises of plaintiff, likewise in forbidding free communication of such fact to the public or parties concerned; for we have already held that a condition of strike was then subsisting between the parties. "Publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a State." *Carlson v. California,* 310 U. S. 106.

[*Restraint of Carriers*]

Third: The injunction further required truck line defendants to resume commercial relations with plaintiff by accepting and handling all freight tendered in usual course of business, notwithstanding a proviso of appellant union's contract with at least sixteen of these truck lines, reading: "The employer shall not request nor instruct any employee to go through a picket line of a union, nor to handle unfair goods declared so by the unions signed to this agreement." Defendant motor lines have not appealed from this phase of the judgment, thus making the particular restraint a final order. A brief discussion of these court recitals is proper, however, defendant union being a party to the contract mentioned in said judgment.

On notice of the strike, these sixteen truck lines immediately terminated all business relations with plaintiff company; numerous of the truck line officials testifying that they considered themselves bound to do so under the contract. The result was an almost total stoppage of plaintiff's business in interchange of freight and heavy decrease in cash receipts the following day. The trial court could reasonably have found from the foregoing facts that the practical construction placed on the quoted proviso by the parties, obliged each "employer" to cease business relations with any concern which defendant local was attempting to unionize. So viewed by the court, the contract simply became the predicate for a secondary boycott by the parties thereto against any nonsubscribing employer, the boycott to become actual upon notice of the existence of a strike, as in the instant situation; such an understanding between a trade union and business organizations being obviously in violation of our laws against trusts, monopolies and conspiracies in restraint of trade. For while it may be true that the proviso in question was prima facie in aid of the union's right to collectively bargain, the immediate effect of its operation as applied to plaintiff was a virtual boycott and the creation and carrying out of restrictions against him in the free pursuit of a lawful business. Arts. 7426 to 7429, *Vernon's Annotated Statutes,* and Arts. 1632-1634 Penal Code; *Webb v. Cooks', Waiters' and Waitresses' Union,* (Tex. Civ. App.), 205 S. W. 465; *Borden Co. v. Local No. 133 of Teamsters, etc.* (Tex. Civ. App.), 152 S. W. (2d) 828. See also Art. 7437, reading: "Any contract or agreement in violation of any provision of this subdivision shall be absolutely void and not enforcible either in law or equity."

For a discussion of other points, the parties are referred to the companion case of *Turner v. Zanes, supra,* which opinion is deemed controlling thereof.

[*Ruling*]

All restraint imposed by judgment, paragraphs 1, 2, 4 and 5, in nature of secondary boycott, involving truck line defendants, is hereby affirmed. In other respects the judgment is reversed and here rendered; labor defendants being entitled to the same rights of publicity and picketing in connection with their pending labor dispute as were accorded in the *Turner-Zanes* appeal, viz: "Nothing herein shall be construed to limit the right of C. B. Kepke and the Labor Union Defendants from publicizing the controversy with plaintiffs in an accurate, peaceful and truthful manner, without threats, coercion or intimidation, actual or implied, against any of the parties herein mentioned."

Affirmed in part; otherwise reversed and rendered. All costs of appeal are taxed against appellee.

[*On Motion for Rehearing*]

YOUNG, A. J.: Appellants point out and correctly, that appellee was not deprived of all facilities for inter-line connections with other carriers; in our opinion, however, not relieving the employer-union agreement in question of its aspect of illegality under our State antitrust laws.

After full consideration the motions of both appellants and appellee for rehearing are overruled.

[¶ 62,317] Revere Camera Company v. Eastman Kodak Company and Eastman Stores Co.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 50. October 5, 1948.

Clayton Antitrust Act

Treble Damage Suit—Allegations of Public Injury—Motions to Strike.—A complaint filed by a camera manufacturer for treble damages and injunctive relief based upon alleged violations of the antitrust laws by a manufacturer of cameras and film stated that plaintiff brought the suit on its own behalf and in the public interest in that the acts complained of are injurious to the interests and welfare of the public. Defendants' motion to strike from the complaint the allegations which purport to set forth claims based on injury to others than plaintiff, on the ground that they are immaterial to any claim which plaintiff may assert on its own behalf, is allowed. A motion to strike portions of the complaint which refer to other legal proceedings involving a defendant, on the ground that none of such references to prior proceedings is within the purview of the Clayton Act, and that none of these proceedings refers or relates to any of the claims or allegations of this complaint, is allowed. Allegations regarding prior litigation are improper and immaterial in the absence of some showing either of materiality to the issues to be tried or that they constitute a prima facie case against defendant under Section 5 of the Clayton Act. A motion to dismiss the complaint insofar as it purports to set forth a claim on behalf of the public, and seeks relief therefor, on the ground that plaintiff has no capacity, standing or right to assert such a claim, is allowed. There is nothing in the Clayton Act authorizing a private person to bring suit on behalf of the public or others for violation of the antitrust laws and to obtain relief therefor. Injunctive relief against threatened conduct that will cause loss or damage will not be granted where the injury complained of is a public injury, and the plaintiff cannot show that he suffers a special injury differing from that suffered by the public at large.

See the Clayton Act annotations, Vol. 1, ¶ 2024.19, 2036.35.

For plaintiff: Zabel & Gritzbaugh, Chicago, Illinois.

For defendants: Charles O. Parker, Chicago, Ill.; Donovan, Leisure, Newton, Lumbard & Irvine, by James R. Withrow, Jr., New York, N. Y.; Nixon, Hargrave, Middleton & Devans, by Arthur L. Stern, Rochester, N. Y.

Memorandum

[*Nature of Action*]

SULLIVAN, Judge: This action is brought under Sec. 15 of Title 15, USCA, known as the Sherman Act, and Sec. 26, Title 15, known as the Clayton Act, for treble damages and injunctive relief based upon alleged violations by Eastman Kodak and Eastman Stores of Sections 1, 2 and 3, Title 15, (Sherman Law) and Sections 13 and 14, Title 15, (Clayton Act.)

The complaint was filed on January 14, 1948. Paragraph 1 thereof sets out the facts which confer jurisdiction on this court.

Paragraph 2 alleges that Revere is engaged in the manufacture and sale of amateur motion picture cameras, projectors and film splicers, and in the sale of certain accessories and equipment therefor manufactured by others.

Paragraph 3 alleges that "Revere brings this suit on its own behalf and in the public interest in that the acts complained of are injurious to the interests and welfare of the public, and the equitable relief sought, if granted, will inure to the benefit of the public generally."

Paragraph 4 alleges that Eastman Kodak is also engaged in the manufacture and sale of like items, and in addition manufactures and sells amateur motion picture film and maintains stations at which photographers may have exposed film processed or developed.

Paragraph 5 alleges that Eastman Stores is a wholly owned subsidiary of Eastman Kodak, and is engaged in transacting busi-

ness as a retail outlet for Eastman Kodak products.

Paragraphs 6 and 7 set out the interstate and foreign commerce carried on by both Revere and Eastman Kodak.

Paragraph 8 outlines the growth and importance of the photographic industry.

Paragraphs 9, 10, 11, 12 and 13 outline the history, scope and character of the business and operations of Eastman Kodak.

Paragraphs 14, 15, 16, 17 and 18 describe the photographic goods involved in this suit.

Paragraphs 19 and 20 describe the sources of supply of motion picture film.

Paragraph 21 outlines Revere's history in the business, alleging "that prior to September 1939, Revere had manufactured amateur motion picture cameras of the single 8 mm. spool type and that it was able to offer to purchasers of its cameras an adequate supply of black and white film for use therein. This film was manufactured and packaged by Agfa-Ansco Corporation, a film manufacturer, and sold by Revere under its own name."

Paragraph 22 alleges the offenses complained of as follows:

Eastman individually, and as parent of the corporate structure hereinbefore mentioned, and in concert with one or more of its said subsidiaries including Stores (Ill.) and with others has

(a) Acted, confederated, conspired and combined, with said subsidiaries and said others, to do the unlawful acts and things set forth in this complaint, and continues so to do.

(b) Contracted, combined and conspired with one or more of its said subsidiaries, including Stores (Ill.), and with others to restrain trade or commerce in motion picture film, cameras and projectors, for amateur use, and accessories and supplies therefor, in violation of the provisions of Sections 1 and 3 of the Sherman Act.

(c) Monopolized and attempted to monopolize, combined and conspired to monopolize and to attempt to monopolize, a part of the trade or commerce among the several states of the United States, and with foreign nations, in motion picture film, cameras, and projectors, for amateur use, and accessories and supplies therefor, in violation of the provisions of Section 2 of the Sherman Act.

(d) Combined, and conspired, with the intent of using the monopoly established by them in the manufacture, distribution and sale of color film to attempt to establish a monopoly, and to restrain trade and commerce, in the production, distribution and sale of motion picture cameras, and accessories, equipment and supplies therefor.

(e) Discriminated in price between different purchasers of motion picture film, cameras, and projectors, for amateur use, and accessories, equipment, and supplies therefor, of like grade and quality, in commerce, and for use, consumption or resale within the United States or a Territory thereof, or the District of Columbia, and where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in the manufacture, sale and distribution of one or more of said items, or to injure, destroy or prevent competition with Eastman, and one or more of its said subsidiaries, including Stores (Ill.), in violation of Section 2 of the Clayton Act.

(f) It has unlawfully discriminated in favor of one purchaser against another purchaser of amateur picture film, cameras, and other equipment, supplies and accessories bought for resale, by contracting to furnish or furnishing or by contributing to the furnishing of services or facilities connected with the processing, handling, sale or offering for sale of such commodities upon terms not accorded to all purchasers on proportionately equal terms.

(g) In the course of commerce, leased or made a sale or contract for sale of motion picture film, cameras, projectors, for amateur use, and accessories and supplies therefor, for use, consumption or resale within the United States, or a Territory thereof, or the District of Columbia, or fixed a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, or merchandise, of a competitor or competitors of Eastman, where the effect of such lease, sale, or contract for sale of such condition, agreement or understanding may be, or has been, to substantially lessen competition or tend to create a monopoly in commerce in such items, in violation of Section 3 of the Clayton Act."

Paragraph 23 outlines the relations of the parties and alleges "that in or about August, 1939, Eastman importuned Revere to abandon the manufacture and sale of

its single 8 mm. cameras, to cease the sale of single 8 mm. film, and to enter into a patent license agreement with Eastman to make and sell an amateur motion picture camera under certain of Eastman's patents, adopted for use with Eastman's double 8 mm. film wound on patented spools manufactured by Eastman." It is further alleged that Eastman represented to Revere that if Revere would agree to enter into such license agreement, Eastman would supply Revere with patented rewind spools to equip the cameras manufactured by it thereunder and, further, that Eastman would at all times provide purchasers of such cameras from Revere with an adequate supply of double 8 mm. film and suitable facilities for developing or processing the same throughout the United States and abroad.

Paragraph 24 alleges that Revere, relying upon said representations, on or about September 8; 1939, entered into a license agreement with Eastman by the terms of which Eastman granted to Revere a limited non-exclusive royalty-free license to make, use and sell double 8 mm. motion picture cameras under Eastman patents. It is further alleged that while such license agreement provided that "nothing herein shall create any obligation of any kind on the part of Eastman to market or continue to market any particular type or kind of film" it was intended by the parties thereto that Eastman would, and Eastman by said agreement undertook during the life of said agreement to manufacture an adequate supply of film suitable for use in cameras made by Revere thereunder and facilities for processing and developing said film so used, and to refrain from doing anything to hinder Revere in the beneficial enjoyment of such agreement.

Paragraph 25 sets out that immediately upon entering into said license agreement Revere abandoned the manufacture of single 8 mm. film, redesigned its camera and manufacturing equipment, and under its license began to manufacture and sell a new moderately priced double 8 mm. camera for use with film manufactured by Eastman. That in making this change Revere was compelled not only to redesign its product, but also to reorganize its plant at great expense.

Paragraph 26 alleges that pursuant to the terms of the agreement, Revere equipped each of its double 8 mm. cameras with one empty spool purchased from Eastman, so that Eastman thereby had continuous information as to the number of cameras manufactured and sold by Revere.

Paragraph 27 alleges that Revere's double 8 mm. spool type cameras manufactured and sold under the license agreement with Eastman attained great popularity and that Revere's sales of such cameras now exceed those of all other manufacturers combined.

Paragraph 28 sets out that in 1941 Revere designed and built a double 8 mm. magazine camera and exhibited a model thereof to Eastman, and that Eastman charged that it constituted an infringement of certain of Eastman's patents. After extended correspondence Eastman proposed that Revere accept a license under certain Eastman patents, and that Revere manufacture and sell, pursuant to such license, its magazine camera designed to accommodate magazine and film made by Eastman. In order to prevent dealers in its products from being involved in litigation, Revere brought a suit against Eastman in this court, which resulted in a decree in its favor, whereupon Revere enlarged its production of double 8 mm. camera of the magazine type.

Paragraph 29 alleges that due to Eastman's dominant position in the manufacture and sale of motion picture film purchasers of Revere's cameras are dependent upon Eastman for supplies of film.

Paragraph 30 alleges that in connection with the manufacture and sale of its cameras Revere also manufactures motion picture projectors and film splicers.

Paragraph 31 sets out the competition which exists between Revere and Eastman as well as certain of Eastman's subsidiaries.

Paragraph 32 sets out the growth of Revere's sales, based upon which Revere in 1946 enlarged its equipment and facilities for an estimated production greatly in excess of its 1946 sales, and which it would have realized but for Eastman's unlawful acts as set forth in this complaint.

Paragraph 33 alleges that notwithstanding the obligations of Eastman under its license agreement with Revere to furnish Revere camera users with an adequate supply of film, purchasers of Revere cameras, in recent months, have had increasing difficulty in obtaining film for use therein. It is alleged that many dealers

in Revere products have cancelled orders for cameras, projectors and splicers, or reduced the volume thereof because of their inability to obtain film with which to supply their customers for use in Revere cameras, and that the inability of the dealers and users of Revere cameras to obtain film for use therein is due to the unlawful acts of Eastman as stated in the complaint.

Plaintiff, in its prayer for relief, asks that defendants be found guilty of the unlawful acts charged and that damages be assessed in the sum of $1,000,000 and that said damages be trebled, and that plaintiff have judgment against defendant for $3,000,000 plus costs of suit and reasonable attorney's fee. That defendants be adjudged to have violated the antitrust laws of the United States as charged in the complaint, and that each of them, and their officers, directors and agents be enjoined permanently from continuing to so violate said anti-trust laws. That defendant Eastman be commanded to so direct and control its subsidiaries as to prevent them from engaging in all unlawful acts as set out in this complaint, and particularly from conspiring and combining among themselves or with others to restrain trade or commerce in motion picture films, cameras, projectors, splicers, and accessories and equipment therefor. That the court decree that Eastman disclose all formulae, processes and "know-how" within the knowledge of Eastman and license all patents and patent applications owned or controlled by Eastman pertaining to the manufacture of amateur motion picture color film to any applicant upon such terms as the court may deem just. And that plaintiff have such other and further relief as to the court seems just and proper.

Defendants, pursuant to Rule 12(b)(c) of the Federal Rules of Civil Procedure have moved: (1) to dismiss the complaint insofar as it purports to set forth a claim on behalf of the public, and seeks relief therefor, on the ground that plaintiff has no capacity, standing or right to assert such a claim. (2) To strike from the complaint under Rule 12(f) all allegations purporting to set forth a claim on behalf of the public and seeking relief therefor, on the ground that such portions of the complaint are immaterial to any claim which the plaintiff may properly assert. And (3) motion to strike from the complaint under Rule 12(f) the portions thereof which refer to other legal proceedings involving the Eastman Kodak Company, on the ground that none of such references to prior proceedings are within the purview of the Clayton Act, and none of these proceedings refer or relate to any of the claims or allegations of this complaint, and are immaterial and improper.

These motions are now before me for disposition.

Plaintiff at the outset contends that this litigation should not be decided on pleadings and that motions to strike are not favored by the courts, citing a number of cases in support of this contention, among them the case of *Burke v. Masta Machine Company,* 5 Fed. Rules Dec. 134, where the District Court for the Western District of Pennsylvania held:

> "A motion to strike was never intended to furnish an opportunity for the determination of disputed and substantial questions of law, and, therefore, without attempting to pass upon the question whether the allegations of the answer in this case to which the motion to strike is addressed, constitutes a defense, and, without intimating that they do, I conclude only that the allegations are of such a character that their sufficiency ought not to be determined summarily upon a motion to strike, and therefore, the plaintiff's motion as it relates to the allegations in said amended answer is denied."

I do not believe that the question here involved is the same sort of disputed question of substantive law as the Pennsylvania Court had under consideration when it decided that the same should be decided only after a hearing on the merits. The plaintiff here insists that it has a right to bring its action in the public interest, although I have been unable to find any case which supports this contention and plaintiff has cited none to me. Defendants on the other hand insist that Section 4 of the Sherman Act and Section 15 of the Clayton Act very clearly and definitely provide that the Attorney General shall bring either civil or criminal actions on behalf of the public, and Section 4 of the Clayton Act authorizes a person "who shall be injured in his business or property" to bring a suit for treble damages and provides that he may recover such damages as have been "by him sustained," and therefore that all

allegations purporting to assert claims on behalf of the public are immaterial to the question of plaintiff's damage and should be stricken.

This complaint is brought under Sections 4 and 16 of the Clayton Act which authorizes a private person to sue on his own behalf for actual or threatened injury to his business or property and provides that he may recover damages by him sustained. There is nothing in this statute authorizing a private person to bring suit on behalf of the public or others for violation of the anti-trust laws and to obtain relief therefor. Section 4 of the Sherman law and Section 15 of the Clayton Act charge the Attorney General with the duty of protecting the public interest by either civil or criminal action. The statute makes no provision for this function to be assumed by a private person. The courts seem consistently to have held that a suit may not be maintained by a private person merely because of violations of the anti-trust laws which have resulted in injury to the public. On the contrary a plaintiff must allege and prove that these violations have been the proximate cause of special injury to his business or property, as distinguished from injury resulting to the public generally. In *Beegle v. Thomson*, 138 Fed. (2) 875, cert. denied 322 U. S. 743 (1944) the court said:

> "Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti Trust Act, embraces, as one of the essentials of such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential . . . the mere existence of a violation is not sufficient ipso facto to support the action."

Section 16 of the Clayton Act authorizes injunctive relief for private persons. The language of this section also provides that a plaintiff thereunder may obtain injunctive relief only against threatened special loss or damage to him, differing from the injury which may be suffered by the public at large. As contrasted with Section 4 of the Sherman Law and 15 of the Clayton Act authorizing the Attorney General to institute proceedings in equity "to prevent and restrain" violations, this section authorizes a person to sue for injunctive relief "against threatened loss or damage by a violation of the Anti Trust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings . . ."

The rule in equity is that injunctive relief against threatened conduct that will cause loss or damage will not be granted where the injury complained of is a public injury, and the plaintiff cannot show that he suffers a special injury differing from that suffered by the public at large. Section 16 also authorizes relief only to prevent special injury to the plaintiff differing from the injury which may be suffered by the public at large and does not authorize a suit on behalf of the public. In *Westor Theatres, Inc. v. Warner Bros. Pictures*, 41 Fed. Sup. 757, the court said:

> "The complaint herein purports to allege a cause of action under the Sherman and Clayton Acts on behalf of individual plaintiffs. It seeks both legal relief by way of money damages and equitable relief by way of injunctions and orders of dissolution. The sole statutory authorizations for such a proceeding by individual plaintiffs are found in two provisions of the anti-trust laws in Sections 4 and 15 of the Clayton Act.
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> "Under both sections it is apparent that the individual cause of action contemplated is one arising by virtue of acts of the defendants, in violation of the anti-trust laws, which have been the proximate cause of injury to plaintiffs in their business or property or which threaten to cause loss or damage to the plaintiffs. Hence the only relevant issues are those involving conduct which proximately results in injuries to the plaintiffs or which threatens such injury. An individual plaintiff is not entitled to sue by reason of violations resulting in injury to other persons or to the public. Correction of the latter evils is the function of the Government alone."

Plaintiff alleges that it brings this action against Eastman on its own behalf and in the public interest, on the ground that the monopoly on amateur motion picture films, especially on double 8 mm. color films held by Eastman, and Eastman's system of allocating film through the channels of mer-

chandising, effect discriminations in trade and cause injury to Revere, as well as to other manufacturers of cameras using double 8 mm. film, and to the public.

Plaintiff's case for treble damages must be predicated upon a showing that defendant has monopolized or attempted to monopolize trade or commerce among the several states; and that it has contracted, combined and conspired to restrain trade or commerce, in violation of the anti-trust laws, resulting in harm and injury to the public, and must then plead facts showing that such violations have been the proximate cause of injury, loss and damage to plaintiff in its business or property.

Plaintiff apparently agrees with this theory, because it admits that it is elementary anti-trust law that an injury to the public interest must be shown, citing the case of *Neumann v. Bastian-Blessing Company, et al.*, 70 Fed. Supp. 447, decided in this court by Judge LaBuy, where the court said:

> "The combinations and contracts in restraint of trade which were intended to be prohibited by the Sherman Act are combinations which are directed to the control of the market by suppression of competition in the marketing of goods and services, the effect of which is adverse to the consumer and the public. The practices prohibited by the Act are those that have an evil effect upon the public generally, as distinguished from purely personal or private injury."

From this plaintiff argues that in the instant case it is not only proper but implicit that it plead the public interest, and that in bringing this private anti-trust action it appears in court in the double capacity of representing itself and as a representative of the public interest; that the very purpose of the kind of action brought here is to use the private suit as an instrument for enforcing the anti-trust laws.

The anti-trust laws were enacted to prevent injury to the public as well as injury to individuals, but nowhere is the individual authorized to bring a suit on behalf of the public for the public injury. The Attorney General alone is authorized by the statute to bring such suit, the individual being authorized to bring his own treble damage action for any injury he may have sustained as a result of a violation of the anti-trust laws. True, the cases have held that treble damage suits are intended as an ancillary and additional force to supplement law enforcement by the Department of Justice, but nowhere does the statute give to a private litigant authority to bring the action on behalf of the public. *Weinberg v. Sinclair Refining Company,* 48 Fed. Supp. 203. Plaintiff also cites the case of *Maltz v. Sax, et al.*, 134 Fed. (2) decided by the Circuit Court of Appeals for the Seventh Circuit, where Judge Evans said:

> "This grant to persons damaged (through an unlawful combination or conspiracy in restraint of commerce)—a cause of action for treble damages—was for the purpose of multiplying the agencies which would help to enforce the Act and therefore make it more effective."

I cannot believe that this gives the plaintiff here because of its own alleged injury a right to plead the public interest. I am of the opinion that the law clearly establishes that plaintiff has no authority to sue on behalf of the public and others which it claims have been injured by defendants' alleged violations of the anti-trust acts. Defendant's motion to dismiss the claims on behalf of the public and of others alleged by plaintiff to have been injured is allowed.

On defendant's motion Number 2 to strike the allegations which purport to assert claims on behalf of the public and others: These allegations are immaterial to any claim which the plaintiff may have properly asserted. Whether or not the suit is in the public interest and whether the various unlawful acts alleged are injurious to other competitors or other manufacturers is immaterial to the question of whether the plaintiff here has suffered special injury for which he may recover treble damages or obtain injunctive relief under the provisions of the Sherman and Clayton Acts. This is also true of the allegation that "public policy" requires that Eastman be compelled to disclose its formulae, processes and "know-how" in the manufacture and sale of amateur color film.

Defendants' motion to strike from the complaint the allegations set out in the motion, which purport to set forth claims based on injury to others than Revere, on the ground that they are immaterial to any claim which Revere itself may assert on its own behalf, is allowed.

On defendants' motion to strike references to various other anti-trust cases, without showing their relevancy to this proceeding:

Paragraph 13 of plaintiff's complaint alleges:

"Eastman has attained its position in the industry by consolidation and merger, acquisition of business and assets and reorganization of various corporations, including competitors, as well as by growth and expansion. In attaining its dominant position, Eastman has frequently resorted to illegal trade practices which have involved it in numerous lawsuits including several under the anti-trust laws of the United States."

The complaint then goes on to cite five cases in which Eastman appeared as a party. The courts have held that allegations regarding prior litigation are improper and immaterial in the absence of some showing either of materiality to the issues to be tried or that they constitute a prima facie case against defendant under Section 5 of the Clayton Act, which provides:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto; Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

In *Mebco Realty Holding Co. v. Warner Bros. Pictures, Inc.*, 6 Fed. Rules Service 12 f 21, Case No. 1, plaintiff attempted to make the same general use of prior anti-trust cases as in the case at bar, the complaint containing the following allegation:

"Various courts of the United States at various times have found that defendant Producers and defendant Distributors have acted in concert and conspired together to have performed acts in violation of the Sherman Act and Clayton Act aforesaid."

The court granted defendant's motion to strike this allegation, saying:

"These statements, unless material or pertinent to the issue to be tried, ought to be stricken under the provisions of Rule 12f of the Federal Rules of Civil Procedure. I have heard the arguments and have read the briefs. There is nothing asserted which convinces me that what has happened to the producers or distributors in former cases in any court can have any legal effect in the instant action. An attempt to answer that paragraph would mean that every defendant would have to set out and analyze each case of similar character in which it might have been involved. If the paragraph had set out the specific cases as applicable to each defendant it would be a good pleading if at all applicable.

"I hold that in either case it is an improper pleading and should be sticken."

Sainaiko Bros. Coal and Oil Company v. Ethyl Gasoline Corporation, 2 Fed. Rules. Dec. 205, was a suit for treble damages, and plaintiff pleaded the Government's charges in a prior suit against defendant and the result of the suit. The court held that under the statutory provision that an adjudication under anti-trust laws to the effect that defendant had violated the laws shall be prima facie evidence against defendant, plaintiff, suing for damages under the Clayton Act, could not plead a prima facie case if he did not set forth the charges in the Government's suit against the defendant and the result of that suit.

Defendants' motion No. 3 to strike from the complaint reference to other proceedings involving the Eastman Kodak Company is allowed.

Plaintiff is given thirty days in which to amend its complaint if it so desires.

If plaintiff does not elect to amend, then defendants are given thirty days in which to answer.

[¶ 62,318] United States v. General Electric Company, International General Electric Company, Incorporated, Carboloy Company, Inc., Fried, Krupp Aktiengesellschaft, Walter M. Stearns, Zay Jeffries, Walter G. Robbins.

In the United States District Court for the Southern District of New York. Cr. 110-412. October 8, 1948.

Sherman Antitrust Act

Price Fixing and Monopolization—Combination of Independent Competing Patents—Proof of Guilty Knowledge Not Required.—Domestic and foreign manufacturers charged with monopolization of the hard metal composition industry in violation of the antitrust laws are adjudged guilty where the evidence establishes that defendants entered into (1) agreements for the cross-licensing of patents providing that one licensee would grant sublicenses and fix selling prices which all would follow, (2) manufacturing licenses providing for price control over unpatented products, and (3) licenses on condition that the licensee or agent should assign or cross-license future patent rights; and engaged in resale price fixing, an illegal boycott to prevent competition in the sale of unpatented tools, territorial division of markets, vertical integration by acquisition of competitors, and direct price fixing. The failure of the Government to prove that the patent owners had guilty knowledge that they were combining independent competing patents does not preclude conviction under Section 1 of the Sherman Act. In suits under Section 1, wrongful intent need not be established by the Government.

See the Sherman Act annotations, Vol. 1, ¶ 1021.341, 1630.585.

Same—Conviction under Section 2—Proof of Specific Intent Not Required.—A finding that defendants' primary purpose was a system of price control that ranged over the entire cemented carbide industry, and a finding that defendants are guilty of actual monopolization, sustain a conviction on charges of monopolization, attempt to monopolize, and conspiracy to monopolize. It is not necessary that defendants were aware that they were pooling competing patents, so long as they knew what they were doing, and did it with the intent to create a monopoly.

See the Sherman Act annotations, Vol. 1, ¶ 1022.10, 1240.101.

Wilson Tariff Act

Combinations in Restraint of Trade—Articles Imported from Foreign Countries—Application of Statute.—The Wilson Tariff Act applies to a combination in restraint of trade between domestic and foreign manufacturers. The statute makes explicit the prohibitions of the Sherman Act in the field of foreign commerce.

See the Wilson Tariff Act, Vol. 1, ¶ 696, and the Sherman Act annotations, Vol. 1, ¶ 1021.361.

For plaintiff: John F. X. McGohey, United States Attorney; Herbert A. Berman, Bartholomew Diggins, Malcolm Hoffman, Special Assistants to the Attorney General; Robert B. Hummel, John S. James, Carlisle P. Myers, Gareth Neville, Special Attorneys.

For defendants (except Krupp): Walter Gordon Merritt, Hyler Connell, James T. Mackey, John B. Tittmann, Thomas P. Dwyer, Andrew M. Calamari.

[*Nature of Action*]

[*Digest*] This is a criminal prosecution under an indictment returned October 21, 1941, charging defendants in four counts with violations of the Sherman Anti-Trust Law, Sections 1 and 2; and in a fifth count with violation of the Wilson Tariff Act. By stipulation, a jury was waived, and the case tried to the Court.

The suit concerns trade and commerce in so called hard metal compositions and products containing such compositions. By hard metal composition is meant tungsten carbide and all other combinations of tungsten, tantalum, titanium, or a similar metal, with carbon, particles of the carbide being cemented or bound together by iron, cobalt, nickel, or a similar matrix.

The corporate defendants are Fried, Krupp Aktiengesellschaft, which is not before the Court, the General Electric Company, and two General Electric subsidiaries, the Carboloy Company Inc., and the International General Electric Company. The individual defendants are Walter Stearns, who was manager of special contracts for the General Electric Company; Zay Jeffries, technical director of the Lamp Department of that corporation and formerly chairman of the Board of Carboloy; and Walter Robbins, president of Carboloy. The four companies owned and acquired patents which were so used as substantially to

dominate the entire interstate and foreign commerce of the United States in the field of hard metal compositions. This situation continued from the inception of the industry in this country in 1928, until 1940, when some of the patents were declared invalid in an infringement suit in Michigan, *General Electric Company v. Willey's Carbide Tool Co.,* 33 Fed. Supp. 969.

The Schroter patents are fully discussed by Judge Tuttle in his opinion in *General Electric Co. v. Willey Carbide Tool Co.,* 33 F. Supp. 969, D. C. Mich. 1940, in which he held them to be invalid in view of the prior art.

These patents were originally owned by the Osram Company in Germany. Under a contract General Electric Company had with Osram, the American concern was granted the exclusive United States right to use the disclosures in its own manufacture of electric lamps. Consequently, the patents were issued in the name of General Electric as assignee. All the remaining rights in the patents were sold by Osram to the Krupp Company of Germany.

By 1928, the Schenectady works of the General Electric Company were manufacturing a substantial amount of cemented carbides for its own use for machining and wire-drawing purposes, not only at Schenectady, but elsewhere. GE patents were applied for in 1927 and 1928. Indicative of the extent of GE research is the fact that by the end of 1929, fifteen additional patent applications had been filed, and thereafter as many patents were issued.

Of these GE patents, the more important ones are Hoyt No. 1,843,768, filed April, 1927, granted February, 1932, and Gilson, No. 1,756,857, filed April, 1927, granted April, 1930. Both of these are known as hot press patents, in contrast with those of Schroter, which are cold-pressed. Each of these patents contain product, as well as process claims.

Meanwhile, Krupp itself was manufacturing a hard metal composition that was called Widia. This material was being sold in the United States, but the volume of the business, and the selling price of the material were not clearly established upon the trial. The evidence does show, however, that on January 31, 1928, Krupp gave Morris Simons of the Union Wire Die Company a three months exclusive option on the right to import Widia into this country for use in dies, and on July 7, 1928 Simons and Krupp signed a three years contract along these lines. Furthermore, Widia appears to have been sold here in 1928 for use in tool cutting by the firm of Thomas Prosser & Sons. By letter dated August 13, 1928, Krupp quoted Prosser prices which were in the neighborhood of 10¢ per gram. There are 453.59 grams in a pound.

By September, 1926, GE had begun to think seriously of the desirability of acquiring rights in these patents, in addition to such as had already been acquired through its Osram contract. The original thought was that GE would bargain for shop rights, and that Krupp would have all others, including rights to the GE improvements, and the right to license others to use the patents in the lamp industry. Apparently, Krupp offered a license to manufacture and sell, but on unsatisfactory terms, and by October, 1927, GE was considering the advisability of obtaining exclusive United States rights. A memorandum expressing the "tentative agreement" of the parties was signed on April 17, 1928, and the contract itself was finally signed on November 5, 1928.

The 1928 contract was for 15 years, with automatic extension thereafter until terminated by 6 months notice. Basically, Krupp assigned to GE all its present and future United States patent rights in the field of hard metal compositions. Three such patents and six applications were listed, including Baumhauer and the Schroter. Krupp had an outstanding contract with Gewerkschaft Wallram of Essen, which permitted the latter to export Krupp-manufactured dies into the United States, and the new contract recognized this right. Krupp itself was permitted to import into the United States under any of the GE-held patents, or under any improvement to which GE should acquire future patent rights. An arrangement was made for the exchange of technical information between the parties. GE agreed to issue a "reasonable number" of non-exclusive licenses to make, use, and sell under the patent rights and agreed specifically to license Ludlum Steel Co. and Firth-Sterling Co., two companies to which Krupp had promised rights under the patents. With these exceptions, GE's control of the patents within the United States was to be complete. GE, apparently, at Krupp's

insistence, agreed to fix prices and terms of sale, and to require all licensees not to sell at a price or on terms more favorable than GE's own sales. Krupp agreed that its material sold here would conform to the GE prices. Krupp was to receive two-thirds of a royalty fund to be created, less litigation expenses which were to be paid out of the fund. Licensees were to be charged a royalty of $5 per pound and this $5 was to go into the fund. GE was to contribute $5 for each pound it sold itself, and Krupp was to pay $5 for each pound it exported into the U. S. The remaining third of the fund was to go to GE. The contract was predated to April 17, 1925, apparently in an effort to make the Krupp-Simons contract subservient to the GE contract.

In September, 1928, GE incorporated the Carboloy Company as a subsidiary in which it had a majority interest, and thereafter assigned to it the GE rights under the Krupp contract, as well as its other interests in the hard metal composition field. This company carried on all GE's activities in the field of carboloy, as the new material was called. In 1932, GE obtained complete ownership of Carboloy.

The Carboloy Company published a very complicated manual which fixed the prices at which manufacturers and agents could sell parts and finished products. The price was fixed on all items except so-called "particular tools." These were more or less unusual tools for which the manual did not attempt to fix a formula for the price of the completed instrument. Only the cemented carbide content was price-fixed in such tools.

On an average, it may be said that the cost of the hard metal composition was about one-third to one-half the cost of the finished tool.

Thus, in addition to the Carboloy Company, there were four groups in the field: (1) the manufacturing licensees, (2) the agents, (3) the Krupp Company and its United States outlets, Morris Simons of Union Wire Die, and Thomas Prosser & Sons, and (4), a group not yet mentioned, the so-called infringers. It will be convenient to describe the events of the 1927-1940 period, to which the indictment relates, in terms of the GE-Carboloy relations with these various interests.

The Krupp Company and Its United States Outlets

Relations between Krupp and GE were uncongenial from the very start. Krupp complained about GE's price-fixing policy, and GE complained about the price-cutting being practiced by the Krupp outlets in the United States.

In January, 1930, Krupp and GE representatives met in Germany to discuss their difficulties. The Germans presented their understanding of the true import of the 1928 contract, but Mr. Stearns strongly denied any such interpretation. On the witness chair, Mr. Stearns reiterated his stand that the contract meant exactly what it said, namely that GE was to fix the prices.

However, at that 1930 meeting, Mr. Stearns seems to have felt that Krupp should have some assurances that GE would not fix prices without first consulting the German company. Accordingly, GE submitted to Krupp for signature a letter stating that, "GE intends to exploit hard metal composition in the United States in the best manner possible, and fully intends that the prices, terms and conditions established by G. E. (as to which G. E. retains full freedom of action) either directly or through Carboloy in accordance with the terms of the Main Agreement will be fair and reasonable to all parties concerned." Krupp rejected this as "merely a promise on your part to maintain a price policy in accordance with the spirit of the agreement. This promise in no wise provides for an extension of our former rights, and, besides, its value is problematical."

When Stearns was examined at the time of the trial, he said that he had promised Krupp that prices would be "fair and reasonable," but explained that this meant that they would be fixed only after due investigation.

The Krupp outlets in the U. S. were Morris Simons' Union Wire Die Company, and Thomas Prosser & Sons. Simons sold the die line, Prosser the tool line. Krupp's various contracts with Prosser were all subsequent to November 5, 1928, and so were subject to the basic Krupp-GE agreement of that date. Consequently, while Carboloy had some difficulty with Prosser's price-cutting, it was not important.

Simons, on the other hand, was a source of great difficulty to the family of licensees until 1937, when Carboloy finally took over the Simons' business. The extent of GE's concern can be measured by the fact that at the time of the purchase Simons was estimated to be doing three to four times more business in the die line than Carboloy.

One further source of bad feeling between the parties should be mentioned. Krupp maintained that the 1928 contract prohibited exports by GE and Carboloy. GE contended the contrary. The upshot was that GE agreed not to export except to South America, where the trade was very small. This accommodation also involved a refusal to fill a substantial order from Russia, which Carboloy first planned to solicit, but finally decided not to sell.

Due to these difficulties, Krupp and GE entered into new negotiations, and in April, 1936, a contract was signed amending the basic document. GE territory was broadened to include Canada, but neither GE nor its licensees could export out of this licensed area. Krupp, on the other hand, agreed not to export into the GE area, in return for which concession the royalty rate returnable to Krupp was increased. Krupp's consent would be necessary for any sublicense to be issued by Carboloy in the future. The contract was to be effective July 7, 1937, unless Krupp should cease importing, or Carboloy should enter into agreement with Simons, at an earlier date, which date would then be the effective date of the amended contract.

According to Jeffries' testimony, the Krupp Company was willing to eliminate Prosser and Simons without any compensation, but the GE Company insisted that these concerns be fairly treated. On May 1, 1936, Prosser sold all its assets and good will to Carboloy upon the following terms, to wit: a down payment of $13,000 for the purchase of the inventory, and the balance, amounting to almost $300,000, payable over seven years, the annual payment being contingent on Prosser's not competing with Carboloy. Simons, as usual, was much more difficult to deal with, and it was only after extended negotiations, and GE's request of Krupp "to strongly bring as much pressure as possible on Mr. Simons," that Simons capitulated, and sold his business, along with a covenant not to compete, for a sum close to a million dollars. The indenture was signed July 14, 1937.

After careful consideration of the exhibits and the testimony, I am forced to conclude that the elimination of Prosser and Simons from the hard metal field was not due to a sense of fair play on the part of GE, but was designed to overcome their competition and to obtain an effective price control of hard metal composition in the American market. The most convincing evidence of this purpose is afforded by a study of the extended difficulties preceding the Simons contract. If Krupp could cut Simons loose without further ado, and if the GE-Krupp contract were not dependent upon the elimination of Simons, GE would have been able to come to an agreement much more rapidly, and would not have been obliged to make an expenditure of one million dollars. Other portions of the record confirm this view of both purchases.

The basic purpose of the arrangement is revealed by a statement made by Robbins in February, 1936. In his judgment, the most important advantage of the arrangement was this:

> "an effective price control on all merchandise would immediately be possible... I feel that in the next seven or eight years an effective price control on our part with the matter of new price arrangements entirely in our hands we can by careful selection and decision increase the profits to be taken from this business in a very substantial amount over our present operations."

At this point, it is fitting to discuss the activities of the Internal Electric Company (IGE).

IGE was a wholly owned subsidiary of GE, charged with complete responsibility for GE's foreign business, except that Canada remained within the jurisdiction of GE. In this capacity, IGE administered the restrictions on exports which had been agreed to between GE, Carboloy, and Krupp. Further, IGE was responsible for negotiations with other foreign companies concerning cemented carbides. Thus IGE had a contract with Allgemeine Elektricitaets-Gesellschaft (AEG), a German corporation, which, essentially, was a pooling and territorial division of patent rights. This contract applied to cemented carbides from 1927 until October 7, 1938. The manner in which this contract operated is illustrated by a letter written by Scudder of IGE to Jeffries in January, 1935. AEG

was negotiating with Siemens, another German corporation, concerning a proposed Siemens license of its hard metal composition patent rights to Krupp, in return for an increase of royalty which Krupp would pay Siemens, and Siemens would then divide the same with AEG pursuant to a contract between them. In order to carry out this proposal, it was necessary for AEG to have IGE's approval. IGE withheld its assent.

The Manufacturing Licenses

Each of these had certain provisions in common. Each license recited that it was subject to the basic Krupp-GE contract. The licensee was granted a non-exclusive right to make, use, and sell hard metal compositions in the United States, its territories and possessions. The licensee agreed not to sell at a price or on terms of sale more favorable than Carboloy's own price and terms, so long as such articles or their processes of manufacture continued to be covered by any of the licensed patents. The licensee further agreed not to violate the spirit of this provision. The licensee's books were to be open to inspection by the licensor. The licensee also stipulated that if it should fail to abide by the contract terms it would, in the absence of any evidence to the contrary, pay damages equal to the total value of the articles involved at the price specified in the manual. The licenses were personal and of restricted assignability. The licensee admitted the validity of the patents licensed or to be licensed, except as invalidity should be determined in a suit between other parties.

It seems hardly necessary to set forth the history of each of these licenses in the fullness of detail presented by the record. In general, it may be said that Carboloy issued a license only when it felt it to be expedient, and then did so under such restrictive provisions as could be negotiated.

In 1932, Dr. Schwarzkopf, a German inventor, came to America to exploit a cemented carbide called Cutanit, for which a patent application had been filed in this country in 1930. The Cutanit material was perhaps the first titanium carbide that was offered to the trade, and its efficiency, at least for "light cuts" on steel, was decidedly greater than that of any material then made by Carboloy, or its licensees.

The licensees were much upset over the competition thus threatened, and were anxious that Carboloy obtain rights which would enable them to make use of this material. Carboloy itself was extremely worried. On October 7, 1932, Jeffries wrote Ludlum Steel that Carboloy's first objective was to obtain complete patent rights on Cutanit, and its second objective, if the first could not be obtained, was to put Cutanit under price control. By November, Jeffries was thinking of offering Schwarzkopf a limited license. "This, apparently, would clear up the whole patent situation and put everything under price control and, I believe, leave us and our licensees in a preferred position in the field."

In October of 1932, the licensees had a meeting at which it was decided that, if it were necessary to pay a considerable sum in order that all might have rights to Cutanit, the licensees would absorb a portion of the cost in the form of additional royalties for the use of Cutanit. Finally, in April of 1933, the license was signed.

The Cuttings Corporation, Schwarzkopf's concern, was licensed to make, use, and sell hard metal composition under 18 listed patents and 14 listed applications belonging to Carboloy, and under any improvements thereto to which Carboloy might subsequently acquire patent rights. However, hard metal composition was given a restrictive definition, being confined to material containing 16% or more of titanium, or other members of the same chemical family, but not including tantalum or tungsten. The royalty rate was 16.15 cents per cubic centimeter of hard metal composition. The Cuttings Corporation granted Carboloy an exclusive U. S. license under six listed applications, and any patents to issue thereunder, Cuttings retaining the right to practice these inventions. Carboloy could sublicense any of its own licensees to the Cuttings patents. Cuttings was to receive 16.15 cents per cubic centimeter for material produced under its patents. Cuttings expressly agreed not to export.

The Fansteel and Eisler licenses were both granted after Carboloy had filed infringement suits against these concerns.

The Cuttings Company apparently refused to remain within the terms of its restrictive license. In early 1938, Robbins wrote Krupp that Carboloy would sue if

the Cutanit people continued to violate their agreement, a decision in which Krupp heartily concurred. Carboloy also took notice of the fact that Cuttings was apparently suffering some financial troubles. Nevertheless, no suit was instituted. Instead, a new and broader license was negotiated. Cuttings was permitted to manufacture not in excess of 750 pounds of material per year, "not containing more than 2 per cent by weight of any one, or any combination of titanium, vanadium, zirconium, boron, and silicon" and was licensed without any quantity restriction on material containing more than 2 per cent of such ingredients.

Two devices were employed to keep the licensees working together. Formal meetings of the licensees, to which Prosser and Simons were invited, were held from time to time. In the early thirties, especially, these meetings were held monthly or bi-monthly. The evidence does not clearly establish what business was transacted on these occasions. No records were kept of the proceedings. It was admitted, however, that prices, and price changes, were discussed. The defendants maintain, nevertheless, that in no instance did they ever reach an agreement with the licensees on what the price should be, although they do not deny that one of their prime purposes in these meetings was to hear the licensees' opinions on prices.

The other device was the Cemented Carbide Supervision Bureau. The purpose of the Bureau was to police the prices at which carbides were sold, and to insure that they conformed to the manual. Carboloy itself was not infrequently caught in a violation, and it, too, had a fine assessed against it. During the first year and a half, expenses above fines collected were prorated by agreement among the licensees. Carboloy began to operate the Bureau in July, 1932. It thereafter continued, however, as a "nonpartisan" instrument for the protection of the price line in the interests of all the manufacturers.

The Infringers

As already noted, manufacturing licenses were granted to three alleged infringers—American Cuttings Alloys, Fansteel, and Eisler Electric. American Cuttings Alloys was threatened with an infringement suit, and was induced to give a three months option to Carboloy. The other two were actually sued, although the actions were never brought to trial. The defendants claim that the American Cuttings Alloys and Fansteel licenses were issued to avoid patent litigation, and that the Eisler license was issued because Laise, of the management of that company, could not effectively be restrained by means of any court order, but would create a new corporation and resume competition.

In addition to Simons and Prosser, and these three alleged infringers, the licensed family, from time to time, was harassed by competition from smaller manufacturers. In all, the record shows fourteen such competitors. The striking feature of the record is that, although the first suit was filed in 1930, the patents were not judicially considered until 1940. This came about in the case of *General Electric Co. v. Willey's Carbide Tool Co., supra.* The patents on which plaintiff then relied were the Schroter patents, Hoyt, and Gilson. Judge Tuttle held each of them to be invalid.

The delay in reaching an adjudication of the patents was due to a number of reasons: In some instances, GE deliberately refrained from instituting suit. On one occasion, a suit was dropped for the reason that the defendant discontinued business. On another occasion, the litigation came to an end when the defendant took an agency license. As to some of the others, the evidence for defendants was that one was dropped because another was pending. The Cleveland Automatic Machine Co., suit was terminated by a consent decree, holding the patents valid and infringed, but with no accounting or costs, because the Marvel Rare Metals Co., suit was pending. That suit was not pursued because the Super Tool Co., suit was pending. One of the reasons that suit was not urged was the pendency of the case against Tool Metals Co. This case was not diligently prosecuted because counsel were pressing for trial in the *Super Tool* case. This last was the suit which terminated in the Eisler Electric Co., license, Super Tool being a subsidiary of that concern.

A third group of infringers should be mentioned. These were Ford and General Motors, two large users who made or threatened to make their own material in order to get lower prices. Although Jeffries stated that suit against Ford was

contemplated at one time, the record indicates that the real purpose of the licensees was to sell material to Ford, and not to sue him. The same is true as to General Motors.

[*Sherman Act*]

With this resume of some of the factual circumstances of the case, attention should here be given to Section 1 of the Sherman Act.

It will be appropriate first to discuss the application of Section 1 of the Sherman law, and then to consider the three counts of the indictment that are laid under Section 2. Count 4 of the indictment charges a conspiracy in violation of Section 1. It is horn-book law that decision in a case such as this may turn on an evaluation of "the whole picture, not individual figures in it." *U. S. v. Pullman Co.,* 50 F. Supp. 123, 135 (D. C. Pa., 1943); *U. S. v. Reading Co.,* 226 U. S. 324, 357, 1912; *American Tobacco Co. v. U. S.,* 147 F. 2d. 93, 106 (C. C. A. 6, 1944). This rule of evaluation as a whole may apply to patent anti-trust cases as well. *Standard Sanitary Mfg. Co. v. U. S.,* 226 U. S. 20, 41, 48, 1912; *National Harrow v. Hench,* 83 F. 36, 38 (C. C. A. 3rd 1897); *Standard Oil Co. (Indiana) v. U. S.,* 283 U. S. 163, 1931; *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, 401, 1948. A patentee may not use his patent to transcend what is necessary to protect the use of his grant. Patent rights when "pushed to evil consequences" are well within the restrictive provisions of the Sherman Act.

In making appraisal of a particular set of facts, a Court need not find that specific practices violate the law. It may take into account, as suggested above, the ultimate result of the sum total of the circumstances revealed by the evidence. Following this process, it is my conclusion that the General Electric Company and its co-conspirators are revealed by the proof before me to have been guilty of a large number of specific illegal practices, and that these illegal practices, as disclosed by the record as a whole, condemn the scheme that the parties had in mind. First of all, I shall discuss the indicia of illegality, and I shall then set forth the reasons which lead me to reject the various defenses on which I am asked to acquit the defendants.

A cross licensing of patents providing that one licensee would grant sublicenses and fix selling prices which all would follow

In *United States v. Line Material Company,* 333 U. S. 287, 1948, it was held that such a cross-license violated Section 1 of the Sherman Act although one of such patents dominated the other, so that the latter could not be practiced without a license from the holder of the dominant one. The Krupp-GE license and three of the manufacturing licenses cross-licensed patents. At best, these were improvement patents, and not competing basic patents. The Firth-Sterling and Ludlum contracts did not cross-license then existing patents, but did cross-license future patent rights to be acquired by the licensees. I have no doubt that these agreements also came within the rule of the *Line Material* case. Cf. also *U. S. v. Masonite Corp.,* 316 U. S. 265, 276, 1942.

Defendants contend that to apply the *Line* case, or *United States v. U. S. Gypsum Company,* 333 U. S. 364, 1948, rehearing denied 333, U. S. 869, 1948, both of which were decided on March 8, 1948, would be to violate the prohibition against ex post facto laws contained in Article 1, Section 9 of the Constitution. In the first place, such prohibition applies only to statutes, and not to judicial decisions. *Ross v. Oregon,* 227 U. S. 150, 1913; *Frank v. Mangum,* 237 U. S. 309, 1915. Secondly, these opinions did not overrule any prior decisions of the Court, and there is thus absent the element of reliance which has seemed to some courts to justify extending only prospective application to an overruling decision. *State v. Longino,* 109 Miss. 125, 67 So. 902, 1915.

Manufacturing licenses providing for price control over unpatented products

As I have noted, the manufacturing licensees sold both hard metal composition material and hard metal composition products, that is, the raw material or parts, and the finished product. With a few exceptions, these products were unpatented. The Carboloy Company felt that if it did not fix the price of the finished product, it would be unable to maintain price control over the carbide component. Manufacturing licensees and manufacturing

agents it was believed would take a loss on their labor or material costs in order to depress the final price. Consequently, Carboloy made a careful study of what actual material and labor costs should be for the production of price-fixed products, and required that the final selling price reflect these estimated average costs. By this device it was possible to fix a uniform price for all sellers, though costs actually varied between them. So long as the complicated formulae of the price manual were correctly computed, the minimum prices would be identical to the penny. As already noted, this did not apply to so-called "particular tools," although even for such tools the agency contract said that the labor supplied was for the account of the principal.

The Government contends that the true purpose of this arrangement was to prevent price competition in the tool line among the licensed family. A finding on the real purpose of the defendants is not required here since, whatever the purpose, such an arrangement is illegal. Individual practices within the scope of the patent grant are condemned only if "pushed to evil consequences." But there can be no justification for fixing the price of an unpatented product. A patentee may not employ his patent to restrain trade beyond the scope of his grant. *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U. S. 661, 1944. As was stated in that case, "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly." Permissible price control can not be protected by price control on an unpatented item. Cf. *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 1940; *U. S. v. U. S. Gypsum Co., supra.*

The license agreements now before the court provide that the licensee would follow Carboloy's prices "so long as such articles or their processes of manufacture continue to be covered by any patents within the license." While this circuit had been in conflict with others on whether product price-fixing on the basis of process patents was justified, *Straight Side Basket Corp. v. Webster Basket Co.,* 82 F. 2d 245 (C. C. A. 2nd. 1936); *Barber-Colman Co. v. National Tool Co.,* 136 F. 2d 339, (C. C. A. 6th, 1943); *Cummer-Graham Co. v. Straight Side Basket Corp.,* 142 F. 2d 646, (C. C. A. 5th, 1944) cert. den. 323 U. S. 726, 1944, Judge Learned Hand suggested in *U. S. v. Aluminum Co. of America,* 148 F. 2d 416, 438 (C. C. A. 2nd, 1945) that this circuit considered the problem to be "in flux."

Licensing on condition that the licensee or agent should assign or cross-license future patent rights

The Carboloy Company ensured for itself access to any patent rights which any of its manufacturing licensees or agents might subsequently acquire. In the case of the manufacturing licensees, Carboloy was either automatically licensed, or was required to be licensed on request, to any such patent rights. In the majority of cases, these licenses, in effect, were exclusive. The agency contracts required the agents "upon request of the Company at any time," to "assign to the Company, without further charge, all such inventions and applications for United States patents which relate to cemented hard metal carbide or similar material or to the manufacture thereof, and the Agent shall receive back without further charge, full, free, non-exclusive, non-divisible, non-transferable licenses. . ." Both licensees and agents were obligated to do everything possible to secure the rights to any inventions made by any of their employees. In fact, though some patents were offered by agents, Carboloy never accepted any.

In *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.,* 329 U. S. 637, 1947, a clause requiring the licensee to assign over to the patentee any patentable improvements that might be made by the licensee was held not to be illegal, per se, but the Supreme Court remanded the case for an anti-trust finding. On remand, the arrangement was upheld. 161 F. 2d 565 (C. C. A. 2nd, 1947). In that case, however, the contracting parties were two relatively small concerns and were without an extensive control of market conditions.

This point of view is also set forth in the opinion in *U. S. v. National Lead Co.,* 63 F. Supp. 513, decided by Judge Rifkind in 1945, and affirmed by the Supreme Court in 1947, after the *Transparent-Wrap* case was decided. 332 U. S. 319. In the lower court opinion, one of the factors relied

upon in condemning the arrangements between the leading producers in the field, was that they

> "applied to patents not yet issued and to inventions not yet imagined. . . . They embraced acknowledgment of patent validity with respect to patents not yet issued, nor applied for, and concerning inventions not yet conceived . . ."

The trade position of the present defendants closely approximates that of the defendants in the *National Lead* case, and not that which is found in the *Transparent-Wrap* case. The employment of basic patents, or patents which may be basic, to compel the transfer of future patent rights, is condemned per se, when practiced on a scale such as is found in this suit. With regard to this question, there would seem to be no difference between licensing a patent with such a condition, and granting an agency conditional on such a clause.

Resale price fixing

Resale price-fixing is illegal even when the product is patented. *Bauer & Cie. v. O'Donnell*, 299 U. S. 1, 1913. In part, at least, Carboloy and the manufacturing licensees distributed their products through the medium of agents. The government contends that these agents were really purchasers, and that Carboloy's control of their selling prices amounted to resale price fixing. Defendants maintain that true agencies had been established. In my judgment, the evidence justifies a finding that the arrangement violated the prohibition against resale price fixing for two reasons: (a) the agents were really purchasers, and (b) the agents were competitors within the meaning of *U. S. v. Masonite Corp.*, 316 U. S. 265, 1942.

Some of the carbide which the agents obtained from the manufacturing licensees was in the form of completed tools, dies, wear resistant parts, etc. The agents resold these articles without performing any work on them. The remaining portion of the supply obtained from the manufacturers was not in the form of completed usable products. Of this, a part was sold to users who made their own finished products. The remaining portion the agents themselves manufactured into finished products. As already noted, the labor going into such manufacture was estimated to be from one-half to two-thirds the value of the completed tool. Perhaps most of the tools thus made and sold by the agents were particular tools, that is, tools on which the price was not fixed for the completed product. However, many of them were not particular tools, but were price-fixed tools.

Having already held that it was unlawful for Carboloy to fix the price of a completed tool manufactured by one of the licensees who also manufactured the carbide material, I likewise conclude that when the manufacturing was performed not by a manufacturing licensee, but by a so-called agent, the arrangement was contrary to the statute.

The agency contracts contained the following clause: "The Agent is authorized to supply for the account of the Company such incidental labor and material as may be required to transform articles consigned hereunder into articles of any of the types and classes specified in Article 7 hereof." Article 7 specified the various categories of finished products the agent was allowed to make.

On cross-examination Robbins could not explain why the word "incidental" was used. He said: "I suppose you would say it is more than incidental. I don't know how the incidental word happened to get in there." As a matter of fact, there was little or no difference between the operation of the "agency" system, and the manner in which control was exercised over the manufacturing licensees. Both groups followed Carboloy's estimates of average labor and material costs. These costs did not reflect the actual costs of the individual agent any more than they reflected the costs of the individual manufacturing licensee. Carboloy kept no record and exerted no control over the labor and costs of the agents. The agency arrangement, as applied to the manufacturing operations of the agents, was a pure sham, designed to invoke the rule of *U. S. v. General Electric Co.*, 272 U. S. 476, 1926, but came short of falling within its protection because of the nature of the agents' activities.

The agents did not perform manufacturing operations on all the material they handled. As already noted, they sold to users some unfinished material and some finished products. Having held that the unfinished material obtained for manufacture was purchased and not consigned, it perhaps follows that the unfinished ma-

terial that was sold as such was also purchased, and not consigned, because the supplying manufacturing licensees never knew whether the material was to be used in the one way or the other. There are additional reasons for finding that in this respect also these were only simulated agencies.

The standard of *U. S. v. General Electric Co.,* 272 U. S. 476 is not perfectly applicable on these facts. The article with which the court was there concerned was the incandescent lamp, which is a standard item. Cemented carbide blanks and finished products are not standard products. They come in a great number of sizes, shapes, and grades. Since an agent who ordered a large stock on consignment might never get an order for a great proportion of the items he stocked, the practice, with a few exceptions, was for agents to carry extremely small stocks, if they carried any at all. The common procedure was to obtain an order from a user before ordering the necessary carbide or carbide product from the manufacturing licensee.

Despite this circumstance, some agents did carry stock. Although there is evidence supporting the contrary view, I have concluded that the agencies were feigned, even with respect to material on which the agent in fact performed no manufacturing operations. Perhaps the controlling factor is that normally the principal, Carboloy or a manufacturing licensee, never knew whether or not the agent carried consigned stock. The real difference between this case and the 1926 one is that there the parties regulated their conduct by the contract, while here the so-called agency contracts were mere forms. Thus in both cases the contract provided a discount for prompt servicing. In the lamp case, the discount was truly for prompt servicing; here it was for purchase. The lamp agents remitted to the company the proceeds of lamps actually sold. The carbide agents paid for their "consignments" whether or not they had already sold the material. While the lamp agents kept stock in accordance with the directions of General Electric and sold only to those to whom the principal permitted them to sell, the carbide agents ordered what they wished and sold to whom they wished. Further, the principals in the lamp case kept accurate records of the outstanding consigned stock, and often shifted such stock from one agent to the other. The carbide agents were originally required to file monthly reports of their sales, but, beginning in 1937, it was provided that "The Agent's remittances to the Company will be regarded as reports of the sale or withdrawal (for use in the agent's plant) of the consigned articles remitted for." The early provision for a semi-annual inventory was dropped in 1934. Also dropped in 1934, was the provision that upon termination of the agency all unsold goods were to be returned to the principal. While the 1937 contract did provide for a monthly report showing "all articles on hand on the last day of the previous calendar month covered by consignment invoices dated more than 60 days prior to the last day of the preceding calendar month and not sold or withdrawn for the Agent's own use," the Carboloy Company did not make any checks or inspections to verify these reports. As Robbins testified: "We rely 100 per cent upon the agent's integrity."

Furthermore, these agencies, whether sham or not, are condemned by the rule of the *Masonite* case, *supra.*

In the *Masonite* case, patent differences were settled when formerly competing manufacturers all became del credere agents of the Masonite Company. The agents discontinued the manufacture of hardboard, and devoted themselves to the sale of hardboard manufactured by Masonite. The Court assumed that true del credere agencies had been established, but found, nevertheless, that the arrangement offended the Sherman Act.

In some instances, alleged infringers of one or more of the patents here involved settled their differences with Carboloy by becoming agents of one of the manufacturing licensees, but this was not true of the great bulk of the agents. They never were competing manufacturers of carbide material as the agents in Masonite were competing hardboard manufacturers. Defendants claim that for this reason the Masonite rule does not apply. I think this would be so, were it not for the fact that the agents were competing manufacturers of completed carbide products.

Undoubtedly a high percentage of the agents were established tool manufacturers. If there was to be any competition in the sale of completed products, these companies had to be the source of such competition.

By adopting the agency scheme Carboloy made it impossible for such competition to exist, except for particular tools. The evidence fully establishes that the Carboloy policy was not to permit the sale of carbide material to tool-makers for fabrication into non-particular tools for resale unless the tool-maker signed an agency agreement, and this policy was strictly enforced. The manufacturing licenses obligated the licensees to observe Carboloy's "prices, terms and conditions of sale" and "general sales rules." Further, several of the licenses explicitly required the licensee to observe the agency distribution system. The 1930 price manual also required it, and subsequent price manuals prohibited the sale of material for resale and not for the customer's own use. Consequently there can be no doubt that in this case, in contrast with the 1926 GE case, there was agreement to adopt the agency scheme.

In these circumstances, the agency system was just such an arrangement of potential competitors as was condemned in the *Masonite* case. There the patents were assumed to be valid, and hence the agents were no more free to compete with Masonite than the agents here were able to compete with the licensed manufacturers in the sale of carbide. The *Masonite* case turns on the loss of potential competition, and the present facts illustrate the evils at which that ruling was directed. There was no price competition in finished carbide products, except for particular tools. If the licensed family wished to utilize the resources of the numerous established tool-makers who became agents, it should have done so by selling them the blanks and nibs for fabrication.

In *Masonite* the conspiracy was between the patentee and the agents. Here the impetus behind the plan was the assent among Carboloy and its manufacturing licensees. The agents were more the victims of the scheme, than its instigators. However, I do not believe that this distinction is controlling. The gist of the *Masonite* case is that a patentee may *not* exploit his patent in this way. How willing his potential competitors may be, is immaterial. That the manufacturing licensees joined with the patentee but aggravates the restraint. It is enough that such agency contracts were made, that the agents knew they could not obtain the material without signing the contract, that they knew the contract imposed the price restraint, and that the contracts were made with potential competitors with a purpose and in a manner designed to prevent effectually price competition in the distribution of carbide products. Cf. the discussion below of *Interstate Circuit, Inc. v. U. S.*, 306 U. S. 208, 1939.

Boycott

The *Masonite* case condemns the agreement among these potential competitors. I have mentioned the assent with the licensees to show that no tool-maker could obtain material without signing the contract. But this agreement among the licensees is also condemned itself, as an illegal boycott to prevent competition in the sale of unpatented tools. The Sherman Act condemns not only the horizontal boycott directed against a competitor's business, *Fashion Originators' Guild v. FTC*, 312 U. S. 457, 1941, but also the vertical boycott, directed at controlling the terms and manner of distribution of the subject article. *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 1945; *Paramount Famous Lasky Corp. v. U. S.*, 282 U. S. 30, 1930; *U. S. v. First National Pictures, Inc.*, 282 U. S. 44, 1930.

Territorial division of markets

Under the 1928 Krupp-GE contract, Krupp was permitted to export, though the Government contends it tacitly agreed not to do so. The evidence shows that, in fact, GE only exported to South America and refrained from other exports. These export-import rights were cancelled in the 1936 contract, Krupp not being any longer permitted to import, or GE to export, except that Canada became GE territory. Of the five principal manufacturing licenses, four contained express prohibitions against exports, and a similar clause was contained in all the agency contracts.

It is the contention of the defendants that the German patents were basic, and that all the other patents were for improvements thereon. Assuming this to be so for the moment, and assuming that the parties might have been permitted to enter into a cross-licensing contract which divided territories as the 1936 contract did, what was done here would still be without justification. The 1928 contract licensed the basic patents. The 1936 contract was not really a cross-license at all but more a naked

division of markets among two former competitors. Krupp had been importing into the United States; in the future it would refrain. GE had exported to some extent; in the future it would refrain. What Judge Rifkind said in the *National Lead* case, *supra,* is applicable here:

> "No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act."

Purchase of competitors

Carboloy purchased Morris Simons' Union Wire Die Company, and Thomas Prosser & Sons, for two reasons: (1) to effectuate that 1936 agreement removing Krupp from the U. S.-Canadian market, and (2) prevent the competition which Simons was able to offer aside from his position as a Krupp outlet. Krupp agreed to the new contract only on condition that satisfactory arrangements were made with these two outlets. Further, Simons was manufacturing on his own account, and had available other sources of supply, so as to constitute a threat to Carboloy aside from his relations with Krupp.

The test governing the legality of such purchases was set forth in the recent opinion in *U. S. v. Columbia Steel,* 334 U. S. 495, 1948, rehearing denied 334 U. S. 862, 1948:

> "The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action spring from business requirements or purpose to monopolize, the probable developments of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." (Page 527).

The record before me does not disclose the total amount of business done by Carboloy and the manufacturing licensees. There is no doubt, however, that Simons and Prosser did a proportionally large business. For the seven years preceding the sale, the two companies between them sold an average of 935,000 grams per year; in 1935 Carboloy sold 2,106,951 grams. According to defense counsel, total sales for the country in that year amounted to about 4,500,000 grams. Carboloy profits before taxes in 1936 were $406,422.48; Simons' profits were estimated to be at least $254,000 per year, and perhaps as high as $482,000.

The decisive factors are to be found in the fact that Simons was the only source of competition outside the price-fixed area, and that the prime intent and motive of the purchases was to remove this competition. Purchases under such circumstances, and for such a purpose, violate the law. Cf. *U. S. v. Parker-Rust-Proof Co.,* 61 F. Supp. 805, D. C. Mich., 1945.

Direct price fixing

The defendants engaged in direct price-fixing. I have already discussed in some detail the reasons why I have concluded that such agreements were reached with Morris Simons prior to the purchase of his business. That such agreements were not watertight contracts, so that it was not expected that Simons would abide 100 per cent by the Carboloy price manual, does not save them. *U. S. v. Trenton Potteries Co.,* 273 U. S. 392, 1927; *U. S. v. Socony-Vacuum Oil Co, supra.* It is enough that the purpose and effect of such agreements was to preclude the possibility of a trade war that would have forced the Carboloy prices to come tumbling downward. Carboloy threatened such a war, but it never materialized. What prevented it was some degree of understanding between the parties.

Direct price-fixing was also revealed in the matter of the Heald Company. Heald manufactured tungsten carbide gauges which it was free to price as it wished. Appleton, of the Heald Company, wrote to Robbins, stating: "We are therefore pass-

ing them (these prices) along to you and if you feel that these prices are in line with your costs you will pr~bably want to quote prices somewhat sim .." Robbins thereupon instructed his salesman to tell Appleton that "we would be pleased to adhere to those prices." He cautioned, however, "that you will note from Mr. Appleton's letter that he is apparently not familiar with the antitrust laws," and instructed the salesman not to reply in writing but to tell Appleton "verbally" that Carboloy would adhere to Heald's prices. Robbins' explanation on the stand for this conduct was that Heald was a good customer, and that rather than antagonize a good customer Carboloy was willing to go along on the prices.

Adequate proof was also presented of two other practices which come within the price-fixing rule laid down in *U. S. v. Socony Vacuum Oil Co., supra.* At one time, the sales manual prohibited the sale of large blanks, but this prohibition was subsequently removed because there was actually some industrial use for such pieces. However, at least one of the licensees developed a practice of selling large pieces to be cut into smaller ones. Since the manual prices were proportionally much lower for such large pieces, substantial savings could be effected in this way. Carboloy was much concerned about this threat to the price structure, and a gentleman's agreement was reached prohibiting the sale of large pieces for cutting. Similarly, it was always possible to offer price competition by submitting to a user a line of carbide products containing a smaller carbide content than the other sellers were offering. Since the manual was based on the size, a lower price could be offered without offending the manual. This practice was regarded as "chiselling," and it is clear from the record that much was accomplished in the way of reaching understandings to prevent it.

Defendants, by their counsel, have frankly admitted that they were monopolists, and that they sought to prevent price competition. In the course of the trial, Mr. Merritt said:

> "It is true that having acquired this grant of monopoly from the Germans it became our property, our monopoly, and we set out to treat it as our monopoly and prevent all competition in the field covered by the patents so far as price monopoly is concerned and to cut out all competition by way of unlawful infringement of our monopoly."

The evidence clearly establishes that a price-fixing motive was largely responsible for many of the activities of the defendants. At the time of the first American Cuttings Alloys contract, Jeffries wrote Firth that "our first objective would be to bring the Cutanit material under price control." Regarding the Eisler license, Robbins wrote: "We feel that the signing of our license with Mr. Laise solved a serious price competitive problem." Robbins believed the most important advantage of purchasing Simons' business was that "an effective price control on all merchandise would immediately be possible." Discussing the second American Cuttings license Robbins wrote: ". . . As a result of these proposals we have been able to work out a license which puts him under price control on anything he manufactures, and as part consideration he has agreed to give up all of the contracts which he has temporarily negotiated with General Motors, Chrysler, and Ford. These contracts were designed to sell material lower than our manual prices and thereby seriously upset our apple cart." The record is replete with many similar declarations.

The eight illegal practices already discussed, especially when supplemented by the evidence to which reference has just been made, and when taken along with the character of the various licenses and agencies, and the course of dealing among all the parties, establishes beyond a reasonable doubt that defendants conspired among themselves to achieve a monopoly, and to fix prices in violation of the Sherman Act.

In *Interstate Circuit, Inc. v. U. S.,* 306 U. S. 208, 1939, the Supreme Court laid down the test for proving a conspiracy under Section 1:

> "While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked

to participate; each knew that cooperation was essential to the plan. . . .

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequency of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. . . ."

This reasoning applies to patent pool cases. In *U. S. v. Masonite, supra,* it was said there could be an unlawful conspiracy although:

"The District Court found that in negotiating and entering into the first agreements each appellee, other than Masonite, acted independently of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others. It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that as the arrangement continued each became familiar with its purpose and scope."

See also *U. S. v. U. S. Gypsum Co., supra,* applying the same reasoning where manufacturing licenses were involved.

In this view of the case, it is not necessary to find that defendants pooled independent competing patents. The monopolistic price-fixing scheme in which they were engaged is illegal regardless of the relation between the patents they accumulated. *Standard Sanitary Mfg. Co. v. U. S., supra,* was a patent pool case in which it was found that the law was violated although the patents infringed. In *U. S. v. Line Material, supra,* the same result was reached in a cross-licensing case, and the rule also is found in *Transparent-Wrap Machine Co. v. Stokes & Smith, supra,* which was remanded for an anti-trust finding. *Standard Oil (Indiana) v. U. S., supra,* and *U. S. v. National Lead Co., supra,* are both patent pool cases in which it was held that the law had been violated. Neither case stressed the question of whether the patents were independent basic patents or not. In the *Masonite* case the court did not rely on the relation of the patents, noting rather that "The presence of competing patents serves merely to accentuate that tendency (to impair competition) and to underline the potency of the forces at work." A patentee may exploit his patent, but only by lawful means. He may, for instance, issue a manufacturing license in which he fixes the price to the patented manufactured product. But there are many paths of exploitation he may not pursue, including the eight that have heretofore been discussed. Moreover, he may not combine with others in a scheme, the purpose and intent of which is to clamp price control on an entire industry, horizontally and vertically, including patented and unpatented products.

It is not a significant distinction that, practically speaking, in the present case the industry was born with and at the time of the initial license. As stated in *U. S. v. United Shoe Machinery Co.,* 247 U. S. 32, 53, 1918, "neither the letter of the law nor its purpose 'distinguishes between strangling of commerce which has been born and preventing the birth of a commerce which does not exist.'" Because the manufacturing licensees perhaps could not have entered the field without acceding to the Carboloy plan—and I make no finding on what the licensees really thought of the validity of the Carboloy patents—it does not follow that they could combine with Carboloy in a scheme the primary purpose and objective of which was industry-wide price control, which scheme was effectuated [by] a whole series of unlawful practices.

[*Defenses*]

I turn now to the defenses urged upon me.

The major defense is based on the manner in which the indictment was framed. Paragraph 13 of the indictment sets forth ten "purposes and objects" in general terms. Paragraph 13 (j) refers to "restraints, limitations and restrictions . . . as hereinafter set forth." Paragraph 14 in 19 subparagraphs occupying 24 printed pages sets forth the "means and methods" with particularity.

Defendants argue that paragraph 14 is to be included with paragraph 13 as stating the crime charged, and in particular, that paragraph 14c is part of the crime charged. 14c charges guilty knowledge, to wit: "As the defendants well knew, hard metal compositions made in accordance with certain

of the letters patent contributed by General Electric and Carboloy to said patent pool would not have infringed the patents contributed thereto by Krupp insofar as they may have been valid," with similar averments concerning the Krupp patents and the sublicensees' patents.

Defendants draw two arguments from these pleadings. First, it is said that the indictment charges a ten-purpose conspiracy, and that therefore it is necessary to prove almost all those purposes. "Of course, if just one of the ten purposes has not been established it might be a close question. But failure to establish nine of the purposes hardly leaves any room for doubt. The crime proven differs in character from the crime charged." It is claimed that at most one of the ten purposes was proved. Secondly, defendants claim that there can be no conviction without proof beyond a reasonable doubt that defendants "well knew" that they were combining independent competing patents. "If the Government is to prove a case it must prove that these defendants well knew that these patents were independent competing patents, and the first thing to prove is that fact. It is not so important as to whether they were or not as it is whether these defendants well knew that."

The first argument may be summarily rejected. Of the ten purposes alleged, defendants claim that seven would be lawful if incidental to a lawful patent monopoly, and of another, they say it would be lawful in part if protected under a proper patent structure. I have concluded that defendants did not, to use their term, possess a lawful patent structure, but an unlawful one. The activities complained of, dominating trade and commerce, pooling patents, limiting the number of persons who could engage in the trade, excluding others, fixing prices, forbidding export, etc., were sufficiently proved.

The second argument is the nub of the defense. It is my feeling that I cannot accept either of the two reasons that are presented in its support.

(1) The first reason is that paragraph 13 is not sufficiently particular to withstand demurrer, and that consequently resort must be had to paragraph 14c. Defendants admit that such resort is permissible under *U. S. v. Waltham Watch Co.*, 47 F. Supp. 524 (S. D. N. Y. 1942). This is a *non sequitur*. Because paragraph 14 must be referred to for particularity, it does not follow that 14c must be referred to. Paragraph 14 occupies 24 pages.

(2) The second reason is that under the law of indictments 14c must be proved because it was averred. In support of this contention defendants cite two types of cases, i. e. (i) Surplusage cases in which an averment was stated with greater particularity than is necessary to an indictment, and it was held the averment had to be proved. *U. S. v. Howard,* 20 Fed. Cases 388 (No. 15,403), C. C. Mass., 1837; *U. S. v. Brown,* 24 Fed. Cases 1265 (No. 14,666) C. C. Ohio, 1843. (ii) A type of variance case, i. e., those where the proof made out a crime contained in the averments of the indictment, but not the particular statutory crime made out by all the averments of the indictment. *Butler v. U. S.*, 20 Fed. 570, (C. C. A. 8, 1927), and perhaps *U. S. v. Eisenminger,* 16 F. 2d 816, D. C. Del., 1926.

In this circuit the law is not so strict in either surplusage cases, *U. S. v. Lesser,* 66 F. 2d 612, 1933; *U. S. v. Groopman,* 147 F. 2d 782, 1945, cert. den. 326 U. S. 745, 1945, or in this variety of variance cases. *U. S. v. Satuloff Brothers,* 79 F. 2d 846, 1935; *Maresca v. U. S.*, 277 F. 727, 1921, cert. den. 257 U. S. 657, 1922. Moreover, the problem here is not one of variance between different statutory crimes at all. The question is not which one of two statutory crimes defendants are charged with, but what facts the government relies on to make out the statutory crime charged. It might well be a fatal defect to charge a crime under one section of the Criminal Code and prove a crime under another section, while it would not be fatal to prove a crime stated under a named section by proving all the particular averments except one. *Kutler v. U. S.*, 79 F. 2d 440 (C. C. A. 7th, 1935) cited by defendants, does not hold otherwise. Moreover, the Supreme Court in cases involving variance of the proof within one crime has indicated its approval of the more liberal rule. Cf. *Berger v. U. S.*, 295 U. S. 78, 1935; *Kotteakos v. U. S.*, 328 U. S. 750, 1946, and has also done so in a case which may be construed as involving the surplusage problem. *American Medical Assoc. v. U. S.*, 317 U. S. 519, 1943.

Aside from the argument that guilty knowledge must be proven because pleaded, it is claimed that no substantive crime under the Sherman Act can be made out without such proof. I do not accept this view. The

rules developed in Section 1 cases which do not involve patents apply as well to cases which do involve patents. *Standard Sanitary Mfg. Co. v. U. S., supra; National Harrow Co. v. Hench,* 83 F. 36, (C. C. A. 3rd, 1897); *U. S. v. Masonite, supra; U. S. v. U. S. Gypsum Co., supra.* The rule for Section 1 cases has been stated as follows: "In suits under Sec. 1 charging a restraint of trade, it is settled by authoritative pronouncement of the Supreme Court that wrongful intent need not be established by the Government and that good motives will not condone action in contravention of the statute." Handler, TNEC Monograph Number 38, page 78, footnote 81. See also *U. S. v. Patten,* 226 U. S. 525, 1913; *U. S. v. Reading Co.,* 226 U. S. 1912; *Board of Trade of the City of Chicago v. U. S.,* 246 U. S. 231, 1918; *U. S. v. General Motors Corp.,* 121 F. 2d 376, (C. C. A. 7th, 1941) cert. den. 314 U. S. 618 (1914); *U. S. v. Paramount Pictures, Inc.,* 334 U. S. 131, 1948; *U. S. v. L. C. Griffith,* 334 U. S. 100, 1948. Further, there are patent pool cases under Section 1 containing explicit pronouncements on the question. *Standard Sanitary Mfg. Co., v. U. S., supra; U. S. v. U. S. Gypsum Co., supra; Standard Oil Co. (Indiana) v. U. S., supra.*

To the defendants' contention that it is harsh to punish them by a criminal conviction for their reliance on the grant given them by the Patent Office, the answer must be that the Patent Office grant did not permit them to conspire together to abuse their patent rights in the manner revealed by this trial. See *Nash v. United States,* 229 U. S. 373, 1913.

Section 2 of The Sherman Act

So far as I am aware, this is the first criminal patent pool anti-trust case. It is therefore the first patent case in which the distinction between the various crimes within Sections 1 and 2 of the Act becomes of some importance.

The indictment charges three offenses under Section 2: conspiracy to monopolize (Count I); attempt to monopolize (Count III); and monopolization (Count II). I will first discuss Count II, monopolization.

There may be considerable difference between the issues in a monopolization case which does not involve patents, and one which does. In a case not concerned with patents the first, and perhaps major, fact issue, is whether the defendants possessed the necessary percentage of market control to constitute a monopoly. Assuming that the requisite size is present, a number of legal questions present themselves which have only been conclusively answered in very recent Supreme Court pronouncements. These include the problem of whether actual exclusion of competitors is necessary, whether it is necessary to achieve the monopoly position by unlawful means, whether the monopoly position, once achieved, must have been abused, and what the requisite intent is. See *U. S. v. Aluminum Co. of America,* 148 F. 2d 416, (C. C. A. 2d 1945); *American Tobacco Co. v. U. S.,* 328 U. S. 781, 1946.

On the other hand, depending upon the type of patents, in a patent case there may be no question of whether defendants monopolized. Here the patents defined a whole new industry. The defendants admit to monopoly. The defense is that the monopoly was lawful, coming within the protection of the patent grants. Decision must turn on whether or not the patent privilege has been misused. Although in a non-patent case exclusion, unlawful achievement, and abuse of monopoly power may not need to be proved, elements of such conduct are necessary in a patent case before Section 2 may be invoked.

At the same time, Section 2, in a patent case, is distinguished from Section 1 by the same criteria which distinguish the two sections in a non-patent case. In a famous footnote in *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 1940, Justice Douglas wrote: "But the crime under Sec. 1 is legally distinct from that under Sec. 2 . . . though the two sections overlap in the sense that a monopoly under Sec. 2 is a species of restraint of trade under Sec. 1." In the *Tobacco* case Justice Burton wrote: ". . . we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by Sec. 1 and the other by Sec. 2." See also *U. S. v. Griffith,* 334 U. S. 100, 1948.

Assuming patents of the variety here in suit, which define a whole new industry, in this type of case the distinction between the sections is the degree of success attained by way of these unlawful business practices. The present defendants used their patents as a lever to win domination over the entire cemented carbide business. The

total absence of price competition, coupled with defendants' price-fixing practices, are the sure signs of monopoly control. Competitors were excluded by purchase and by boycott, prices on unpatented products were fixed, resale prices were fixed, future patent rights were forced into the pool, world markets were divided, and on occasion prices were fixed beyond the scope of any asserted patent protection. Furthermore, many other restrictive practices were employed, such as a Supervision Bureau and numerous threats of infringement suits. It can not be argued that defendant's position in the industry was thrust upon them, and I do not think it can be maintained that their position was justified by the patents they owned. Section 2 does not permit a patentee to use his patents to combine an entire industry under his price-fixing regime, unlawfully controlling both the manufacture and distribution of the patented product. See *U. S. v. U. S. Gypsum Co., supra.* Defendants did unlawfully monopolize.

It is established that to make out the crime of actual monopolization it is not necessary to prove specific intent "in the sense in which the common law used the term," but "It is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements." *U. S. v. Griffith, supra.* See *U. S. v. Aluminum Co. of America, supra.* Turning now to Count III, the attempt to monopolize, the important distinction is that here specific intent is necessary. As was said in *Swift & Co. v. U. S.,* 196 U. S. 375, 1905, at page 396: "Intent is almost essential to such a combination and is essential to such an attempt." See also *U. S. v. Aluminum Co. of America,* 148 F. 2d 416, at page 431.

Thus while there can be actual monopolization without any purpose or intent to create a monopoly, so long as "monopoly results as a necessary consequence of what was done," *U. S. v. Paramount, supra,* there can be no attempt without a specific intent to create a monopoly. What this means is that defendants must have done certain things with monopoly as their objective, which, if performed without the requisite intent, but with complete success, would have resulted in actual monopolization. This also serves to distinguish the required intent from that guilty knowledge that they were pooling independent competing patents which defendants argued had to be proved before they could be convicted under Section 1. It is not necessary that they were aware they were pooling competing patents, so long as they knew what they were doing, and did it with the intent to create a monopoly. Since I have found that defendants' primary purpose was a system of price-control that ranged over the entire cemented carbide industry, and since I have also found them guilty of actual monopolization, it is clear that they must also be found guilty on the count of attempted monopolization. In addition to the factors, already discussed, and which support these conclusions, confirmation thereof is to be found in several practices appearing in the record, and which were not relied upon as indicia of illegality under Section 1. These include the private policing system, *U. S. v. Eastman Kodak,* 226 F. 62, 78 (W. D. N. Y. 1912), the numerous infringement suits and the discriminatory practices complained of in paragraph 24f of the indictment, which avers that Carboloy discriminated even against its co-conspirators, a charge which was substantially supported by the record.

Court I requires the same proof of intent as does Count III, except that it is a conspiracy count while Count III charges attempt. I find this count also sufficiently well established, for reasons apparent from the conclusions reached in the other three crimes.

The Supreme Court has ruled in *American Tobacco Co. v. U. S., supra,* that conviction on all four counts does not involve double jeopardy. While that was not a patent case, I believe the reasoning is applicable in this prosecution. In the course of the opinion I have spelled out what I believe are the different elements going into the different crimes. No two are the same.

The Wilson Tariff Act

Court V charges violation of Section 73 of the Wilson Tariff Act of 1894, 15 U. S. C., Section 8. That section reads in part as follows:

> "Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or

to increase the market price in any part of the United States of any article or articles imported into the United States, or of any manufacture into which such imported article enters or is intended to enter."

There is very little authority on the construction of the section, and none on the nature of the requisite intent. However, defendants have not argued that they may be acquitted on this count, although convicted under the Sherman Act counts, and I do not think there can be any doubt but that the statute applies. As stated in *U. S. v. General Dyestuff Corp.*, 57 F. Supp. 642, S. D. N. Y. 1944, the statute "makes explicit the prohibitions of the Sherman Act in the field of foreign commerce." See *U. S. v. Sisal Sales Corp.*, 274 U. S. 268, 1927.

It follows that I must adjudge each of the defendants to be guilty of each and all the charges made against them.

[¶ 62,319] **United States v. National City Lines, Inc., American City Lines, Inc., Pacific City Lines, Inc., Firestone Tire & Rubber Company, General Motors Corporation, Phillips Petroleum Company, Mack Manufacturing Corporation, Standard Oil Company of California, Federal Engineering Corporation.**

In the United States District Court for the Southern District of California, Central Division. No. 6747-Y Civil. October 12, 1948.

Sherman Antitrust Act

Change of Venue—Transfer of Cause—Balancing of Conveniences.—A civil action seeking injunctive and other relief against the defendants for violation of the Sherman Antitrust Act was instituted in 1947, and was dismissed in that year on the ground of *forum non conveniens.* On appeal to the Supreme Court, the dismissal order was reversed on the ground that the doctrine of *forum non conveniens* does not apply to civil actions under special venue statutes. After the return of the mandate to the district court in California, defendants moved to transfer the cause to the district court in Illinois. The motion is granted under a provision of the revised Judicial Code, effective September 1, 1948, which reads: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." It is held that the provision was intended to apply to antitrust actions, and that the discretion to apply the provision should be exercised under the facts in the instant case, inasmuch as the Supreme Court, in reversing the dismissal, did so solely on the ground that *forum non conveniens* did not apply to antitrust actions, and did not undertake to determine the sufficiency of the facts. Upon a balancing of conveniences, it is found that transfer of the cause is warranted.

See the Sherman Act annotations, Vol. 1, ¶ 1610.101, and prior opinions reported in CCH *Trade Cases,* 1946-1947, at ¶ 57,617, and at ¶ 62,259.

For plaintiff: William C. Dixon, Special Assistant to the Attorney General; Jesse R. O'Malley, Edwin U. Driscoll, Alex D. Fred, Special Attorneys.

For defendants: O'Melveny & Myers, Jackson W. Chance; Cosgrove, Clayton, Cramer & Diether, T. B. Cosgrove, Leonard A. Diether; Wright & Millikan, Charles E. Millikan; Finlayson, Bennett & Morrow, H. T. Morrow; Haight, Trippet & Syvertson, Oscar A. Trippet; Lawler, Felix & Hall, John M. Hall, all of Los Angeles, California; Hodges & Reavis; Pantaleoni & Downey, Martin Jacobs, New York, New York; Henry M. Hogan, Detroit, Michigan; Joseph Thomas, Akron, Ohio.

I

The Motion To Transfer

[*Digest*] This civil action seeking injunctive and other relief against the defendants for violation of the Sherman Anti-Trust Act was instituted on April 10, 1947. On September 29, 1947, I granted the motion of the defendants to dismiss the action on the ground that our district was an inappropriate forum for its maintenance and prosecution. On direct appeal to the Supreme Court, pursuant to the special provision of the Judicial Code, that Court reversed the order upon the ground that the doctrine of *forum non conveniens* does not apply to

civil actions of this character, in which the choice of venue is determined by Section 12 of the Clayton Act.

After the return of the mandate to this Court, the defendants moved to transfer the cause to the district court for the Northern District of Illinois, Eastern Division,—the district to which a companion criminal prosecution against nine corporate defendants involved in this action and seven individuals, originally instituted in this district, was transferred by me on August 14, 1947. The transfer was made under the provision for change of venue contained in the Federal Rules of Criminal Procedure.

The motion to transfer the present proceeding is made under a new section of the revised Judicial Code, which went into effect September 1, 1948.

The Government resists the motion and has filed a countermotion to strike the motion to transfer.

II

Change of Venue

In the main, the position of the parties to this litigation is the same as to both motions. For, in the last analysis, it relates to the applicability or non-applicability of the new provision for the transfer of civil actions to other districts to an action of this character, which reads:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any other district or division where it might have been brought." (Emphasis added)

The clause is part of a section which the Revisers have entitled "Change of Venue," and which also allows the transfer of civil actions from one division to another, and the trial of any civil action at any place within the division.

A consideration of this enactment calls for certain general and almost obvious observations.

We are not dealing with an *amendatory* statute, but with a revision of the entire Judicial Code, the first one attempted since 1911. This aim was set forth with thorough emphasis in the Reports of the Senate and House Judiciary Committees.

The Report of the House Committee on the Judiciary, dated April 25, 1947, which accompanied the Resolution, stressed the object of the resolution *"to revise, codify and enact into law."* It called attention to the changes in the national scene which "make imperative this *revision* of the Judicial Code." (Emphasis added)

In attempting to discern the purpose of the enactment, we are, at the outset, confronted with the proposition that it created *a new procedural* scheme, namely, a method of transferring cases from one district to another, which did not exist before. This was accomplished not by amending existing law, but by including the particular provision in a single piece of legislation, the object of which was to enact a revised code dealing with the jurisdiction of, and procedure in, the courts of the United States.

In endeavoring to achieve this object, the Congress strove to attain uniformity and simplicity of expression. The various circumlocutions, which had heretofore been used to designate the varieties of actions, were abandoned and the phrase "civil action" was substituted. The reviser's notes, which the Committees made a part of their report to the two Houses of the Congress, reveal this intention. Indeed, this appears in the very section on change of venue. The phrase "any civil action" is given as the equivalent of "any action, suit, or proceeding of a civil nature" used in subdivision (b). And the reviser's notes leave no doubt that this was their intention in the entire revision.

III

The Manner of Changing Venue

The aim of the Congress in enacting the section allowing transfers from one district to another, and from one division to another, was to cover the entire field and set down the circumstances under which such transfers could be had, either by the consent of the parties, or upon a proper showing.

The aim of the Congress was (1) to establish, through this revision a single procedural scheme to cover all incidences of procedure in the federal courts not provided for by the Rules of Civil Procedure; and (2) to apply the provisions, except where otherwise indicated, *to all civil actions,* of whatever nature.

The aim being procedural, it is axiomatic that, unless the contrary appears, the provisions are applicable to pending proceedings.

The principle which forbids application of new enactments or revisions to pending

actions applies to statutes dealing with substantive rights only. At times, it is difficult to draw a distinct line between substantive law and procedure. And many procedural changes have, historically, had a lasting effect on substantive rights, as, for instance, the rule allowing the jury to judge both the law and the facts in criminal libel. Nonetheless, matters of venue and change of venue are, as a rule, mere incidences of procedure. And statutes relating to remedies and procedure operate retrospectively.

IV

Change of Venue in Antitrust Cases

These premised, we come to the nub of the controversy, which is:

Does the provision for transfer apply to the present action?

I am of the view that it applies to *all* pending civil cases, as readily appears from the legislative history and the legal principles just considered. And it applies to antitrust cases unless we can find in the decision of the Supreme Court in the present case language indicating that the special venue statute in antitrust cases, as the Supreme Court construes it, immunizes such actions against a general transfer enactment of the type under consideration, as the Court has held it protects it from the impact of the doctrine of *forum non conveniens.*

So it becomes imperative to analyze the language of the Court in its proper setting. The gist of the majority opinion is contained in the statement of Mr. Justice Rutledge:

"When, therefore, Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suits might defeat the plaintiff's choice to serve their own convenience. *Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust* policy. Insofar as convenience in bringing suit and conduct-trial was involved, *the purpose was to make these less inconvenient for plaintiffs or, as was said in the Eastman opinion, to remove the 'often insuperable obstacle' thrown in their way by the existing venue restrictions.*

"To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by *forum non conveniens* would have been incongruous, to say the least. In making the change Congress did not authorize plaintiffs to institute civil antitrust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by #7. *It intended trial to take place in the district specified by the statute and selected by the plaintiff."* (Emphasis added)

The Government sees in the last italicized sentence a declaration that the institution of the action, and the consequent right to choose venue, imply *the absolute right of trial* in the place chosen.

We need not consider the contention of the defendants that the legislative history *does not* support the Court's interpretation. We cannot make our own gloss in a matter in which the Supreme Court has spoken so recently. We must give to the language used its full implication. So doing, however, we must bear in mind the theoretical basis of the opinion.

It was the Government's contention before the high court, *as it was before me,* that the doctrine of *forum non conveniens does not apply to actions instituted under special venue statutes.* Mr. Justice Jackson, who wrote the majority opinion in the *Gulf* and *Koster* cases, adopted this view as flowing from those decisions.

Under this view of the law, the doctrine of *forum non conveniens* would apply only to cases arising under *general venue statutes.* It would not apply to those brought under *special venue statutes,* such as the Federal Employers' Liability and the Antitrust statutes. But the majority opinion *did not so hold.* It did not choose to establish a principle to serve as a guide in all cases. It preferred to hold merely that *the history of antitrust legislation shows an intent not to limit the choice of forum by the application of the doctrine of forum non conveniens.* And it interpreted its prior decisions as applying the same principle *to the Federal Employers' Liability* statute, in the light of *its* particular history. So the language of the majority opinion, when read in this perspective, means simply that, because of the legislative history of antitrust laws, the court declined to allow the application to them of the doctrine of *forum non conveniens.* So,

any implication of absolute choice of place of trial in antitrust cases must be read in the light. The stand proof against interference by the application of the doctrine of *forum non conveniens*. But are they impregnable to the legislative power of the Congress which granted the choice of forum in the first instance? I think not. The legislative history of the revision of the Judicial Code shows that the intent of the Congress was to overcome the absolute choice in cases of this character, in which the court's interpretation had resulted. And the "legislative intent" they sought to overcome was *their own* as found by the Court.

One other observation. It is a fundamental rule of statutory interpretation that a statute general in its language is to be given general application. No exceptions will be read into a statute of such character. The legislative history of the revision of this portion of the Judicial Code evidences an intention to follow the accepted pattern in this respect. This also appears from the use of the adjective "any."

"Any" covers everything in a category or class. Its use excludes exceptions unless they are specifically given. For its primary meaning is "one indefinitely, or indifferently, out of a number." And that the aim was to use the word in that sense is evident from the legislative history already given. This is also apparent from the fact that whenever, in this revision, the Congress intended either the whole revision or a specific provision in it, *not* to apply, they made specific exceptions from the generic phraseology. An example of this is found in Section 2680, 28 U. S. C. The revisers, after recodifying the Tort Claims Act, specifically excluded from its operation twelve distinct types of claims, which would have been included under the general terminology of the section.

So the whole scheme of the revision stands in the way of a construction which would exempt this special type of action from any of the incidences of procedure codified. More, this interpretation is not inconsistent with the aim of the special venue provision in antitrust cases. *It stands unimpaired. The Government still has the choice of venue.*

However, the court may, under conditions prescribed by the Congress and "in the interest of justice," change the venue.

On the whole, therefore, there is no legal or factual reason for not giving full effect to the intention of the revisers in making this section applicable to antitrust actions.

V

The Discretionary Power To Transfer

There remains the question: Do the facts warrant the granting of the motion?

Before answering this question by reference to the facts, we consider briefly the meaning of the transfer provision.

The wording of the clause is different from that of the corresponding provision in the criminal rules. The latter calls for a transfer "if the Court is satisfied that in the interest of justice, the proceeding should be transferred." The section under consideration provides for transfer "for the convenience of parties and witnesses, in the interest of justice." While both sections use the identical phrase "in the interest of justice" as a criterion, the civil transfer rule uses the phrase in juxtaposition with the convenience requirement. But the meaning of the phrase is the same in both instances.

In the present case, the conclusion was arrived at after a balancing of conveniences. This is of the very essence of the judicial process in any matter which calls for the exercise of discretion.

The transfer provision which concerns us here depends on discretion for its application, as do the kindred provision in the criminal cases and the doctrine of inconvenient forum.

Having determined that the transfer provision is applicable to this litigation, our next inquiry is whether the discretion should be exercised under the facts in the case.

The factual situation did not change while the matter was before the Supreme Court. It is the same as existed when I granted the motion to dismiss. The affidavits filed with the prior motion have been refiled and adopted for the purposes of the present motions. The Government has filed no additional affidavits. But it was agreed at the hearing that the additional facts contained in the affidavit of Jesse R. O'Malley, one of counsel for the Government, in opposition to the affidavit of Denis B. Sullivan, filed in opposition to the Government's motion for an early trial date, might be considered. The affidavit merely recites that a transfer to the Northern District of Illinois, Eastern Division, might result in delay because of the crowded condition of the

calendar of that court. It points to the fact that the transfer of the criminal case had resulted in delay.

Speculations as to possible time of trial are not determinative of the matter. Regardless of the condition of their calendars, district courts have it within their power to advance cases when public interest so requires. And if the need for immediate action is brought home to the judges of the District Court of Illinois, I am certain that they will arrange for as early a trial of this cause as could be had in this district. In the instant case, the Government could very readily have avoided the delay which resulted from its direct appeal from my ruling by refiling the case immediately in the Northern District of Illinois, Eastern Division, especially when the defendants had stipulated that they would not seek a dismissal if so refiled.

I do not question the Government's right to seek the alternative of appeal in order to avoid a decision which it disapproved and which it did not desire to become established as an unchallenged precedent. However, in balancing the conveniences, we must exclude situations such as delay brought on by the voluntary act of the Government when it had another alternative.

I need not repeat the summary of the affidavits given in the two previous opinions. Having re-examined them, and having considered the additional affidavits and facts in the record to which my attention has been called by both parties, I am of the view that the convenience of the parties and witnesses require the transfer of this case in the interest of justice.

Anticipating that such conclusion might be based on a balancing of conveniences, counsel for the Government intimated at the hearing that no resort could be had to such method in resolving the conflicting contentions. I agree that when the section speaks of the convenience "of parties and witnesses," it means that the convenience of both sides must be examined. But I know of no way of applying the requirement to a particular situation than by viewing the facts from both standpoints and giving preference to those which, in the court's opinion, preponderate to *such an extent as to make the choice in the interest* of justice. Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts.* For if the mere assertion by the Government of its own convenience and the convenience of its witnesses were sufficient to stay action, we would be confronted with a power to paralyze judicial discretion, beside which the devastating effect of the historic *liberum veto* (*"Nie Pozwalan"*—"I don't permit") of the Polish nobles in their Diet (1572-1697) would dim into insignificance.

As I cannot so interpret the meaning of the section, I conclude that the showing in this case warrants transfer to the Northern District of Illinois, Eastern Division.

This conclusion is reached on the conviction that the Supreme Court, in reversing the order of dismissal, did so solely on the ground that the doctrine of *forum non conveniens did not apply* to antitrust actions. It did not undertake to determine whether the findings were supported by the evidence or there was abuse of discretion. The opinion of Mr. Justice Rutledge very pointedly states that the *sole question* which the Court was deciding was the applicability of the doctrine to cases of this character.

The sufficiency of the facts, therefore, not having been determined by the Supreme Court, their revaluation is before me. On such revaluation, I conclude that the motion to transfer should be granted.

[¶ 62,320] Edison Products Corporation v. National Pressure Cooker Company, et al.

In the United States District Court for the Southern District of New York. Civ. 39-205. July 1, 1948.

Clayton Antitrust Act

Unfair Competition—Service of Process—Motion to Quash.—A motion by defendant to quash service of process upon it as to a cause of action for unfair competition is granted where the service of process pursuant to Section 12 of the Clayton Act is insufficient to support the jurisdiction over that defendant as to that cause of action.

See the Clayton Act annotations, Vol. 1, ¶ 2032.25.

For plaintiff: Benjamin, Galton & Robbins.

For defendant: Cleary, Gottlieb, Friendly & Cox.

[*Nature of Action*]

COXE, D. J.: The service of process on the defendant National Pressure Cooker Company in Wisconsin, pursuant to Section 12 of the Clayton Act (15 U. S. C. A., § 22), is insufficient to support the jurisdiction over that defendant as to the second cause of action for unfair competition. This was the holding in *Sure-Fit Products Co. v. Fry Products,* 23 F. Supp. 610, and I adhere to that decision.

[*Motion Granted*]

The motion of the defendant National Pressure Cooker Company to quash the service of process upon it as to the second cause of action is granted.

[¶ 62,321] Combs, Inc. v. Brooklyn Mills, Inc.

In the United States District Court for the Southern District of New York. Civ. 45-424. October 19, 1948.

Sherman Antitrust Act

Motion to Add Third Party Defendants—Motion for Summary Judgment—Motion to Limit Examination.—In a private suit for damages under the antitrust laws, permission to add as a third party defendant a corporation which is a resident of the district in which the suit was brought is granted, for the purpose of granting complete relief. Process in suits under the antitrust laws may be served on a corporation wherever it is an inhabitant or may be found. However, defendant is denied permission to add as a third party defendant a corporation which does not appear to be resident in the district. Addition of such a party would extend the jurisdiction of the court. A motion for summary judgment is denied where it appears that defendant's answer denies almost every allegation in the complaint, and where the papers submitted in support of the motion do not dispose of the issues of fact created by the pleadings. A motion to limit the examination is denied as to the question regarding the type of damage, if any, suffered by plaintiff, and as to a specific inquiry as to the amount and extent of defendant's use of the alleged infringing articles.

See the Sherman Act annotations, Vol. 1, ¶ 1640.261, 1640.291.

Memorandum

CONGER, J.: Motions by the defendant (1) for summary judgment under Rule 56, F. R. C. P., (2) to add additional or third party defendants, and (3) to limit the examination of defendant's president.

Motion by the plaintiff to compel the defendant's president to answer certain questions.

[*Summary Judgment Denied*]

The defendant's answer denies almost every allegation in the complaint. The papers submitted in support of the motion for summary judgment in no way dispose of the issues of fact created by the pleadings, and, in fact, do not purport to do so. Motion for summary judgment is denied.

[*Addition of Defendant Allowed*]

The defendant presents no ground, under Rule 14, F. R. C. P., for impleader of third party defendants. However, the relief sought against Diadem, Inc. seems proper under Rule 13 (h) of the F. R. C. P. in connection with the counterclaim and for

the purpose of granting complete relief in the determination of the counterclaim herein. For that reason, Diadem may be added as a party defendant. Proceeds in suits under the antitrust laws may be served on a corporation wherever it is an inhabitant or may be found. 15 U. S. C. § 22. Therefore, permission to add Diadem, Inc. would not extend the jurisdiction of the Court. But the defendant has shown no basis for adding Sawyer without extending the jurisdiction of the Court. He does not appear to be resident here. Motion granted in part and denied in part as indicated. See *Sure-Fit Products Co. et al. v. Fry Products, Inc.,* 23 F. Supp. 610.

[*Limitation of Examination*]

The motion to limit the examination is denied as to the first disputed question. The second disputed question is very general and calls for a general answer. It asks for the manner and means in and by which defendant was damaged. It does not call for figures. It calls for the type of damage, *if any,* suffered by plaintiff. I see no reason why this question should not be answered. The third disputed question presents a rather serious problem. Defendant's objection to answering this question was based on the theory that such a question would only be proper for an accounting proceeding. I do not so regard it. Defendant has interposed a defense of laches herein [paragraph 12 of the answer]. I presume defendant in support of that defense intends to rely to some extent upon its own use of the alleged infringing articles. That being so, plaintiff is entitled to inquire specifically and not generally into the amount and extent of that use for the limited purpose only of preparing to controvert the defense of laches. Under those circumstances the third disputed question is proper. Names of customers, of course, need not be given in connection with this branch of the examination.

[¶ 62,322] **Burnham Chemical Company v. Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, and American Potash and Chemical Corporation.**

In the United States Court of Appeals for the Ninth Circuit. No. 11,766. October 27, 1948.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Sherman Antitrust Act

Treble Damage Suit—Injury Pursuant to Conspiracy—Statute of Limitations.—A cause of action for damages for violation of the antitrust laws accrues when the damage is sustained, and the statute of limitations begins to run at that time. The state statute applies where federally created rights to sue are involved. An action predicated upon damages allegedly suffered and proven to have occurred between 1924 and 1929 is barred by the California statute of limitations. Under that law, the only damages for which a recovery may be had are those which accrued and were suffered within three years prior to the filing of the complaint, and the record reveals that none were shown during this period. The judgment of the district court holding the cause barred is affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1640.435.

For appellant: Sterling Carr, San Francisco, California; Thurman Arnold, Washington, D. C., of counsel.

For appellees: Maurice E. Harrison, Moses Lasky, Brobeck, Phleger & Harrison, San Francisco, California; Gurney Newlin, Paul Sandmeyer, Newlin, Holley, Sandmeyer & Tackabury, Los Angeles, California; Joseph W. Burns, Fulton, Walter & Malley; Michael F. McCarthy, Oliver & Donnally, all of New York, New York; Charles A. Beardsley, Oakland, California.

Before MATHEWS, HEALY and BONE, Circuit Judges.

[*Nature of Action*]

BONE, Circuit Judge: This is an appeal from a final judgment of the district court entered on May 9, 1947, dismissing appellant's action for treble damages brought in July, 1945 under Section 4 of the Clayton Act, (15 U. S. C. A. 15). Appellant, a Nevada corporation, brought the action for damages claimed to have been sustained by it as the result of a conspiracy or conspiracies by appellee corporations. The prayer of the complaint is for an award of money (trebled) as damages, for costs, interest and attorneys' fees with a general prayer for other and further relief deemed fit and proper.

Appellant was organized in 1921 for the purpose of producing borax in the State of California and in its complaint asserts that up to 1933 it had invested $1,168,564 in the development of leased property and a patented process. The great length of the complaint makes an adequate summary within reasonable limits of space an impossible task. Many of its 84 paragraphs deal with historic facts concerning the borax industry and charge generally that prior to 1929 world trade in borax was dominated by certain of the appellees, a domination which still exists as a result of unlawful monopoly practices of appellees.

It is alleged generally that appellees conspired in violation of Federal antitrust laws and committed certain overt acts in 1925 and 1928 in pursuance of the conspiracy or conspiracies which caused the damage to appellant and which gave rise to this action; that *all of the acts* done and performed by appellees or some of them were done with the intent and purpose of destroying appellant's activities; that due to said intents, purposes and acts of appellees, the appellant had been damaged in the sum of $1,168,564.

The complaint alleges that for the reasons therein stated the plant and business of plaintiff were shut down and closed on or about January, 1929 since when its struggle for financial rehabilitation was unsuccessful, the resultant loss and damage to appellant being the amount above named, which is the exact amount demanded as a judgment against appellees in the prayer of the complaint.

Reference appears in the complaint, in the evidence at trial, and in the briefs on appeal, to what was declared to be appellees' last "overt act" this act being generally spoken of as "The Little Placer" matter. This was a reference to appellant's efforts (continuing up to filing of suit) to secure a Government lease on a certain tract of California land containing kernite deposits, and it claimed that its efforts before a Government agency were there thwarted by resisting activities of appellees. (See footnote 13.) Relevance of this matter arises from the fact that at the trial the court asked appellant's counsel what (overt) act of appellees occurring *after* 1929 resulted in damage to appellant, aside from the futile attempts to secure a Government lease on The Little Placer. Appellant's counsel responded that nothing else had occurred; that appellant did not allege any other incidents in its complaint and that it could prove no damage from The Little Placer incident.

Appellant has at all times contended that its complaint is cast in a form which, while demanding treble damages for injuries to a private suitor resulting from violation of the Federal antitrust laws, is nonetheless a suit in equity and not an action at law. Here and below appellees have wholly disagreed with this argument. It presents an important question and we think it necessary to dispose of the issue at the outset by rejecting appellant's theory regarding the character of its pleading, a view that we think finds support in the cases.

An examination of the complaint convinces us that its allegations clearly indicate an intention to state a claim for relief under the Sherman Act. They describe and charge injuries or damages, some sustained in 1924 or 1925, and others sustained as a result of *acts* (price cutting in 1928 by appellees) which forced appellant to close its plant and business in 1929. We think there can be no doubt that appellant's action should be regarded as an action at law for damages predicated upon a liability created by statute, and not a civil action for equitable relief, as appellant would have it. The form in which the complaint is cast does not serve to disguise or change the basic nature of the claim upon which appellant rests its demand for relief. Where (as here) a private suitor asserts a claim under the Sherman Act for damages, the gravamen of the complaint is not the conspiracy. The damage for which a recovery is allowable is the damage which the suitor has suffered as the result of *acts* of the conspirators directed against him and committed in the course of

the conspiracy and in furtherance of its purpose. (See cases cited by appellees, infra.)

In order that the proceedings in the lower court may be better understood they should be considered in light of the issues raised by the complaint and the material contentions of appellant urged both in that court and on this appeal. For that reason we first present these contentions at some length together with cases cited by appellant as supporting them, since this will serve clearly to delineate and clarify the material issues presented to and decided by the lower court. Appellant's contentions are lengthy and are necessarily summarized.

Appellant's Contentions

(1) Under the doctrine of *Holmberg v. Armbrecht,* 327 U. S. 392, this is an action in equity; (2) *the conspiracy itself* was a *fraud* upon appellant giving rise (thereby) to a claim for relief for fraud; (3) appellant was injured by *this fraud* (the conspiracy itself); (4) appellant's cause of action is founded on, and exclusively on, the 1929 conspiracy and not upon overt acts; (5) because this is an action in equity the State statute of limitations is not applicable; (6) where a plaintiff has been injured by *fraud* (the conspiracy itself) and remains in ignorance of *this fraud* without any fault or want of diligence [1] or care on his part, the bar of the statute of limitations does not begin to run until the fraud is *discovered* though there may be no special circumstances or efforts on the part of the party committing the fraud (of conspiring) to conceal it from the other party, (citing as authority *Holmberg v. Armbrecht, supra*); (7) in actions *founded* on conspiracy and where fraud and concealment are alleged the question underlying that of the bar of the statute of limitations is not whether plaintiff had "cause to believe" that conspiratorial action by defendants was responsible for his damage, but whether plaintiff had "knowledge" of the existence of the conspiracy (this because "cause to believe" is not synonymous with "knowledge") or, having been put on notice, whether plaintiff exercised reasonable diligence to acquire the "knowledge" giving rise to a cause of action;[2] (8) appellant did not know of the existence of the alleged conspiracy and was without means of ascertaining knowledge of such conspiracy until the Federal Government filed suit against most of appellees in September, 1944, (appellant states that the greater part of its complaint is a copy of the Government's complaint) therefore by reason of this ignorance, and its "discovery" of the fraud (through the filing of this 1944 Government suit), neither the statute of limitations, if applicable, nor laches began to run against appellant until this "discovery"; (9) the conspiracy here was a "continuing conspiracy" and it continued, so far as the statute of limitations is concerned, so long any further action (an overt act) was taken in furtherance of the conspiracy (citing as authority *United States v. Kissel,* 218 U. S. 601). Reference is also made to *Pinkerton v. United States,* 328 U. S. 640, and *Fiswick v. United States,* 329 U. S. 211; (10) "The Little Placer" incident was such an "overt act," completed in 1945; (11) its action although personal in form, is brought additionally as a representative of the public interest (see *Neuman v. Bastian-Blessing Company, et al.,* 70 Fed. Supp. 447 (1947)), *ergo,* greater latitude should be shown toward it otherwise public interest will suffer.

As indicated above, these were the basic contentions of appellant advanced at the time of trial.

The Proceedings Below

Appellees made timely motions to strike portions of the complaint, as amended, and to dismiss for failure to state a claim upon which relief may be granted, and also because the action was barred by a California

[1] Whether the application of the statute of limitations or the doctrine of laches is concerned in a case where the plaintiff's right to damages is founded on a conspiracy must depend upon whether plaintiff had knowledge of the existence of the conspiracy, or by the exercise of reasonable diligence could have acquired such knowledge. *Russell v. Todd,* 309 U. S. 280; *Benedict v. City of New York,* 250 U. S. 321, 328; *Holmberg v. Armbrecht,* 327 U. S. 392.

[2] *Holmberg v. Armbrecht, supra; Hansen v. Bear Film Company,* 28 Cal. (2d) 154; *Kimball v. P. G. & E. Co.,* 220 Cal. 203; *Pashley v. Pac. El. Ry. Co.,* 25 Cal. (2d) 226, 231. Also see *Hobart v. Hobart Estate Co.,* 26 Cal. (2d) 412 and *West v. Great Western Power Co.,* 36 Cal. App. (2d) 403. As supporting appellant's contentions of the action being deferred until discovery by the aggrieved party under Section 338, subd. (4) Cal. Code of Civil Procedure, see rule announced by the Ninth Circuit in *Fleishhacker v. Blum,* 109 F. 2d 543. On the ground that suspicion on the part of plaintiffs that defendants were violating the antitrust law, and even their belief that such was the fact, does not start the running of the statute of limitations under the doctrine announced in *American Surety Co. v. Pauly,* 170 U. S. 133; *Hazel-Atlas Co. v. Hartford Empire Co.,* 322 U. S. 238 and *Shawkee Mfg. Co. v. Hartford Empire Co.,* 322 U. S. 271.

three-year statute of limitations (Section 338 (1) of the California Code of Civil Procedure).[3] Appellees supported their motions by affidavits and appellant filed counter-affidavits. The parties entered into a written stipulation in which it was agreed that appellees' motions should (also) be treated and considered as motions for summary judgment, total or partial, under Rule 56, R. Civ. P. Appellant reserved the right to apply for a separate trial of the issue of the State statute of limitations or any other issue (under Rule 42 R. Civ. P.) in the event the motions were denied.

Being of the view that justice and the interests of the parties required that the issue of the State statute of limitations should be resolved preliminarily upon a separate trial (under Rule 42 (b) R. Civ. P.) before litigating the larger issues involved in the merits of the controversy, the court ordered (among other matters) that appellees file special answers setting up the defense of the statute of limitations. In this order the court also reserved decision on the motions to strike and dismiss the cause until this special issue was decided. (Rule 12 (d) R. Civ. P.)

Appellees filed such special answers whereupon appellant claimed that this special defense tendered an issue of fact and demanded (and the court ordered) a jury trial thereon. The court then formulated the special issue to be submitted to the jury, which reads as follows:

> "At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?"

Subsequently, a jury was duly empaneled and oral and documentary evidence received at a trial on this special issue of the statute of limitations, the evidence being almost entirely derived from the testimony of George B. Burnham, President and Director of appellant. At the conclusion of the testimony on April 3, 1947, all parties to the action moved for a directed verdict; the court, by a so-called "minute order" thereupon granted motion of appellees, withdrew the case from jury consideration (appellant tendering no objection when the court had previously indicated that it might later take this step) and dismissed the jury, announcing from the bench that the court would grant appellees' motion to dismiss the cause, and itself decide the issue.

Thereafter and on May 6, 1947, the court entered an order dismissing appellant's cause, with costs to appellees. Subsequently and on May 9, 1947, the court made and entered final judgment dismissing the cause with costs to appellees. By what is obviously an inadvertence, the judgment was made to recite that a directed verdict had been entered, whereas no such verdict was returned due to the procedure adopted by the court.

It is clear that the court elected to regard the oral testimony and the various documents, introduced at the jury hearing on the statute of limitations as supplementing the original affidavits filed in support of the motions for summary judgment, and (under the stipulation) as being in the same category and having the same force and relevance as the papers, depositions and admissions which may be employed under Rule 56 R. Civ. P. This posture of the case justified the court in so regarding this additional evidence, and the procedure it adopted appears to be both rational and in harmony with the spirit and purpose of the Rules of Civil Procedure. (See R. Civ. P. 43 (e).) Furthermore, we think that the state of the evidence was such that it was well within its right and its duty in disposing of the special issue of fact without submission to the jury.

The opinion expressed by the court when dismissing the jury[4] makes evident that if the case had been given to the jury and it

[3] "§ 338 [Within three years.] Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture.

* * * * * * *

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. [Enacted 1872; Am. Stats. 1921, p. 192; Stats. 1933, p. 878; Stats. 1935, p. 1673.]"

[4] "* * * The evidence was concluded yesterday, April 2nd. Only one witness testified in the case, the president of the plaintiff corporation, and all evidence on behalf of both the plaintiff and the defendants was elicited either from him or while he was on the witness stand.

"The plaintiff, at the conclusion of the evidence yesterday, moved that the court direct the jury to answer the special inquiry in the negative. The defendants separately moved that the court direct the jury to render a verdict on the special issue in the affirmative. The court

had returned a verdict for appellant, the court would later have felt obligated to set aside the verdict and any judgment entered thereon and grant appellees' motions for summary judgment. Thus, where a party moves for a directed verdict, the court may discharge the jury without receiving a verdict, and, on timely motion, enter judgment as if a verdict had been returned in favor of the moving party. See *Bluebird Taxi Co. v. American F. & C. Co.*, 26 Fed. Supp. 808; *Ryan Distributing Corporation v. Caley*, 147 F. 2d 138, 142; Cf. *Domarek v. Bates Motor Lines*, 93 F. 2d 522 (Rule 50 (b) R. Civ. P.)

Appellant asserts prejudice because the court did not make and enter findings of fact and conclusions of law, claiming that the judgment may not stand without the support of one or the other. Respecting the failure to make findings where the opinion of the trial court is before us, see *Hazeltine Corporation v. General Motors Corporation*, 131 F. 2d 34, 37. The opinion here provides a clear understanding of the basis of the decision below, and the absence of findings of fact and conclusions of law is not sufficient to justify a reversal in this case.

The court was fully persuaded that if the evidence then before it was taken as true, and all reasonable inferences favorable to appellant were drawn therefrom, this evidence would still lead a reasonable man impartially exercising his judgment, to conclude that it revealed an entire absence of any genuine issue in the case as to any material fact. (Rule 56 R. Civ. P.)

The merits of appellant's case were given so thorough an examination at the hearing on the special issue that the resultant judgment was not the product of mere trial by

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may and it should direct a verdict if the evidence is undisputed or if the evidence, even though it be conflicting, be so conclusive that the court, in the exercise of sound judicial discretion, should set aside a verdict in opposition to it. *Brady v. The Southern Railway Company*, 320 U. S. 476; *Farr Company v. Union Pacific Railroad*, 106 Fed. (2d) 437; *National Mutual Casualty Company v. Eisenhower*, 116 Fed. (2d) 891; *Mutual Benefit Life Insurance Company v. Snyder*, 109 Fed. (2d) 469; *Oklahoma Natural Gas Company v. McKee*, 121 Fed. (2d) 583.

"It appears to the court in this case that the evidence upon the issue now before the jury is undisputed. All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by acts of the defendants in violation of the Antitrust Laws. The statements of the president of the defendant corporation, who was the only witness in the case, that he had no knowledge or cause to believe, are opinions, and in the opinion of the court are therefore not proper evidence. However, even if the statements of the president of the corporation, who was the only witness, that he had no knowledge or cause for belief be considered as evidence, the court would still direct a verdict in the affirmative upon the special issue, because the evidence is so conclusive in favor of an affirmative answer upon the special issue that the court would set aside a negative reply by the jury to the special issue. Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact. There has been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff from timely presentation of its claim in this court. The so-called Zabriskie and Emlaw conversations do not by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them.

* * * * * *

"* * * there has been a contention made by the plaintiff that the plaintiff made every effort and used every diligent procedure at its command to endeavor to obtain what it stated to be the necessary evidence in connection with its asserted cause of action. However, the law does not excuse an untimely presentation upon the ground that the party asserting the claim has been unable to obtain others to aid in the presentation of the claim. The burden of presenting an asserted claim in a legal proceeding always rests upon the party who has and asserts it, and he may not excuse untimely presentation because he has been unable to enlist the aid of others in order to bring about adjudication in the court of his claim.

"The plea of the statute of limitations is not a technical one. No court can disregard it because of a personal desire that someone may ultimately obtain recompense for an injury alleged to have been suffered. The statute of limitations plea is as much a component part of the scheme of administration of justice as is the theory that a just claim should be given consideration by a court. There are many reasons why claims must be timely presented. For the reasons the court has stated, the plaintiff's motion for a directed verdict will be denied and the defendants' several motions will be granted."

affidavits. We think that this judgment of the court was rested not only upon cases which clearly sustain it but it is also fortified by substantial and convincng evidence of such persuasive and controlling force as to compel its entry. (See *Brady v. Southern Railway Co.,* 320 U. S. 476 and *Farr Company v. Union Pacific Railway Co.,* 106 F. 2d 437, 439.) If the most critical appraisal of the procedure here adopted revealed that employing it worked an invasion of the substantive rights of appellant, or resulted in an injustice on it, we would unhesitatingly condemn it. (Rule 61 R. Civ. P.) It did not sacrifice the substance of justice to mere form; it produced exactly the same result as though the jury had rendered the directed verdict demanded by appellees. Nor was there error in formulating the controlling issue in the language employed by the trial court.

We note that in appealing from the judgment appellant stated the points on which it intended to rely but did not designate the absence of a formal (jury) verdict. Moreover, appellant did not object in the lower court to the omission of a formal verdict by the jury and does not here assign it as error in its specifications. The objection is technical and we fail to see how appellant is prejudiced by the procedure followed. We think that the absence of a verdict is an irrelevant fact which did not interfere with the disposition of the case on the merits of appellees' motion since on the merits the judgment of the court was clearly right. Nor are findings prerequisite to the validity of the judgment here entered on the motions for summary judgment.

Specifications of Error

On this appeal appellant specifies as error that the lower court (1) granted appellees' motion to dismiss; (2) entered the judgment appealed from; (3) made the pre-trial order that the special issue to be submitted to the jury be in the words we have quoted above; (4) held that the conspiracy charged in the complaint was not a continuing conspiracy; (5) held that the cause of action was barred by the California statute of limitations; (6) denied appellant's motion for a directed verdict and a new trial on the question of the statute of limitations and (7) refused to allow appellant to read the complaint to the jury.

Whether appellant's claims of error possess merit is best determined by laying them alongside the contentions of appellees and the cases they cite in support thereof. The arguments of appellees are also lengthy and must be summarized.

Appellees' Contentions [5]

A

(a) On the face of the complaint this is a civil (private) action for treble damages arising under the Federal antitrust laws (Sherman Act) and is therefore an action upon a liability created by statute, other than a penalty or forfeiture (see 338 (1) California Code section, supra); (b) as such, it is not based upon any conspiracy, continuing or otherwise, (which the Government might prosecute) which may have been charged since any conspiracy to restrain trade and commerce under these laws does not, in and of itself, give rise to a private cause of action; such a *right* is based solely upon the *injury* or *damage* caused a plaintiff pursuant to the conspiracy; [6] a right of action for violation of the Sherman Act is based, not on the conspiracy, but on the *acts* done pursuant thereto which *damage* a plaintiff; [7] (c) appellant's plea that the (mere) existence of the conspiracy and appellant's ignorance thereof is sufficient to invoke the rule that the statute of limitations does not begin to run on an action until this fraud was discovered, is lacking merit and wholly irrelevant: (d) the instant suit for damages under the Sherman Act is an action at law, and not a suit in equity as appellant contends; [8] (e) the test is the type of relief sought (here only money damages) and the mere use of the term

[5] Briefs on behalf of all of the appellees present substantially the same contentions and are considered as one brief.

[6] *Nalle v. Oyster,* 230 U. S. 165, (1913); *Alexander Milburn Co. v. Union Carbon & Carbide Corp.,* 15 F. 2d 678 (4-Cir. 1926), cert. den. 273 U. S. 757; *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F. 2d 885 (4-Cir. 1934); *Foster & Kleiser v. Special Site Sign Co.,* 85 F. 2d 742 (9-Cir. 1936), cert. den. 299 U. S. 613. (See also *Hicks v. Bekins Moving & Storage Co.,* 87 F. 2d 583, 585; *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 753; *Sullivan v. Associated Billposters and Distributors,* 6 F. 2d 1000, 1009; *Strout v. United Shoe Mach. Co.,* 195 Fed. 313, 317.)

[7] *Foster & Kleiser Co. v. Special Site Sign Co., supra,* and cases cited therein; see also rule applying in civil actions for violation of antitrust law, *Alexander Milburn Co. v. Union Carbon & Carbide Corp., supra,* and *Momand v. Universal Film Exchange,* 43 F. Supp. 996, 1007.

[8] *State of Oklahoma v. American Book Co.,* 144 F. 2d 585 (10-Cir.); *Fleitman v. Welsbach Co.,* 240 U. S. 27; *Williamson v. Columbia Gas & Electric Co.,* 110 F. 2d 15 (3-Cir.). Cf. *Venner v. Pennsylvania Steel Co.,* 250 Fed. 292, 296.

"fraud" in the complaint does not transform this suit into an equitable action since a suit for *damages* is a suit at law even though the cause of action be fraud (see *Philpott v. Superior Court,* 1 Cal. (2d) 512; *Ambler v. Choteau,* 107 U. S. 586 and 12 Cal. Jur. 785, 786); (f) appellant conceded at the trial that an action for damages under the Federal antitrust laws was not an action for fraud but urged that the *charge* of fraud tolled the statute of limitations under the doctrine of *Holmberg v. Armbrecht, supra,* (a class suit, i.e., a creditor's bill to recover on stockholder's liability under the Federal Farm Loan Act, where the action was necessarily one in equity and could never be at law);[9] (g) the applicable limitation statute is Section 338 (1) of the California Civil Code, *supra;* (h) this court in *Foster & Kleiser v. Special Site Sign Co.,* 85 F. 2d 742 held that Section 338 (4) of the said California statute is not applicable to a treble damage suit; (i) the mere fact that the alleged conspiracy may have continued subsequent to the time of the alleged damage does not toll the statute of limitations or extend the time within which the action may be brought.[10]

B

(a) The antitrust laws do not contain a statute of limitations and the courts have held that the state statute applies where federally created rights to sue are involved, as in the case at bar;[11] (b) a cause of action for damages for violation of the antitrust laws accrues when the damage is sustained and the statute of limitations begins to run at that time;[12] (c) the instant cause is predicated upon damages allegedly suffered, and proven to have occurred, on two occasions, first in 1924 and 1925, when appellees allegedly conspired to have the Post Office Department issue a certain fraud order against appellant, and second, in 1928, when under the claimed conspiracy, appellees reduced the price of borax below appellant's cost of production and thereby drove him out of business at the end of 1928 or in January, 1929; (d) appellant charges in its complaint that at this time (January, 1929) and *by reason of these acts* it suffered "loss and damage" in the sum of $1,168,564 which is the exact amount demanded as a judgment for money damages in the prayer of the complaint; (e) information concerning "The Little Placer" incident admittedly was disclosed to appellant by the pleadings in certain Government suits filed in 1944, but, as indicated above, appellant frankly conceded at the trial that while "making an issue" of the incident as an "overt act," it *could not prove any damages from it.*[13]

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[9] The remedy available in a class suit is in equity. *Wheeler v. Greene,* 280 U. S. 49; *Christopher v. Brusselback,* 302 U. S. 500; *Russell v. Todd,* 309 U. S. 280; *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U. S. 390.

[10] The contention that a treble damage suit was not barred because the conspiracy alleged was a continuing conspiracy under the rule of *United States v. Kissel, supra* (a criminal prosecution) was made in the *Foster & Kleiser* case, *supra,* where the court pointed out that in a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based on the conspiracy, but on the injuries resulting therefrom, a doctrine followed in *Momand v. Universal Film Exchange,* cited above. See also *Twin Ports Oil Co. v. Pure Oil Co.,* 46 F. Supp. 149.

[11] *Chattanooga Foundry and Pipe Works v. Atlanta, supra; Campbell v. Haverhill,* 155 U. S. 610, 616; *Foster & Kleiser v. Special Site Sign Co., supra; Bluefields S. S. Company v. United Fruit Company,* 243 Fed. 1 (3-Cir. 1917) writ of error dismissed 248 U. S. 595; *Ben C. Jones & Co. v. West Publishing Co.,* 270 Fed. 563 (5-Cir. 1921) writ of error dismissed 270 U. S. 665; *State of Oklahoma v. American Book Co., supra; Momand v. Universal Film Exchange, supra; Rawlings v. Ray,* 312 U. S. 96; *Holmberg v. Armbrecht, supra,* p. 395; *Cope v. Anderson,* 331 U. S. 461, 466. (The *Chattanooga* and *Bluefields* cases were actions for treble damages under the Sherman Act.) *Barnes Coal Corp. v. Retail Coal Merchants Ass'n,* 128 F. 2d 645, 647.

[12] *Foster & Kleiser Co. v. Special Site Sign Co., supra; Bluefields S. S. Company v. United Fruit Co., supra.*

[13] "The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy, and that the statute does not run as long as the conspiracy continues to be in effect?

"Mr. Carr: No, I don't go that far. My idea would be that it would run from the last overt act.

"The Court: What do you allege in the complaint to be the last overt act?

"Mr. Carr: The Little Placer claim * * * it has no applicability. **We could not prove any damage from it,** but we make a live issue of that thing in the complaint." (Emphasis supplied)

The "overt act" alleged was appellees' opposition to appellant's attempt to secure a lease on the so-called "Little Placer" claim. The Department of the Interior denied appellant a lease on The Little Placer claim. Appellant claims that this formal refusal of a Government Department to grant a lease was a result of the conspiracy among appellees which instigated the refusal. See *American Banana Company v. United Fruit Company,* 213 U. S. 347 and *Buckeye Powder Co. v. duPont de Nemours Powder Co.,* 248 U. S. 55.

C

(a) California cases hold that mere *failure* by a defendant to disclose to a plaintiff the existence of the facts does not constitute "fraudulent concealment" of the cause of action unless a defendant is under a *duty* to disclose these facts, a situation not present in this case; [14] (b) appellant's President, George B. Burnham had a conversation with Emlaw and Zabriskie (officers of certain of appellees) in 1929 in which these officers did nothing more than *deny* that appellees had conspired to cut prices in 1928; (c) that Burnham testified below that these conversations "dispelled" his belief that appellant had a cause of action (see *Feak v. Marion Steam Shovel Co.*, 84 F. 2d 670 (9-Cir.) cert. den. 299 U. S. 604 and *Turman v. Holmes*, 29 Cal. App. (2d) 198); (d) the testimony reveals that by their "denials" appellees' officers merely *failed to disclose* the existence of a cause of action, and the statute of limitations is not suspended merely by reason of appellant's ignorance of, or failure to "discover," the existence of the cause of action; [15] (e) no facts are pleaded and proved from which the court may conclude the date of "discovery" other than the sole allegation that appellees fraudulently concealed the cause of action and that this *fact* was not "discovered" until appellant became aware of the "concealment" by means of the allegations in the said suits instituted by the Government in 1944; (f) the only *fact* of concealment upon which appellant relies is that in the said suits the Government *accused* appellees of violation of antitrust laws, but this did not provide greater means of discovery than appellant apparently possessed at the time Burnham inquired of Zabriskie, and appellant must allege *facts* which establish that it could not have made the discovery earlier by the exercise of ordinary diligence; [16] (g) finally, giving a private individual a right to recovery does not enlarge the right of a private plaintiff since he must show personal pecuniary damages, his right of action being personal and for his own benefit and not (also) for the benefit of the public (as appellant vigorously contends). The public interest is vindicated by a criminal prosecution while the suit for damages merely redresses the private injury.[17]

Quotations from the lengthy oral testimony and the numerous exhibits, and a detailed analysis of the many cases cited by the parties are not necessary to sustain the conclusion we here reach. The entire record convinces us that under the evidence and upon the authority of the cases the contentions of appellees as to the facts and the law are fully supported and that the judgment of the lower court must be sustained. We agree with the conclusions expressed by that court (see footnote 4) that the record firmly establishes as a fact that during the time from May 17, 1929 to October 10, 1939 appellant knew, or had good cause and reason to believe, that its business had been theretofore damaged and that it had been driven out of business by acts of appellees which violated the antitrust laws of the United States; that appellant was, during this period, convinced that it had a good case against appellees for the damage it had then suffered and that its attorneys so believed and so advised it. We hold that this is an action at law for damages under Federal antitrust laws and the only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint and the record reveals that none were shown during this period. The court therefore properly held the cause barred by Section 338 (1) of the California statute of limitations.

The judgment is modified by striking therefrom the words "* * * and a directed verdict thereon having been entered * * *" and as so modified, is affirmed.

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[14] *Pashley v. Pacific Electric Co., supra; Kimball v. Pacific Gas & Electric Co., supra; Bryan v. United States*, 99 F. 2d 549, 553 (10-Cir. 1938) cert. den. 305 U. S. 661.

[15] *Scafidi v. Western Loan and Building Co.*, 72 Cal. App. (2d) 550; *Strout v. United Shoe Machinery Co.*, 208 Fed. 646; *Lattin v. Gillette*, 95 Cal. 317; *Lambert v. McKenzie*, 135 Cal. 100; *Medley v. Hill*, 104 Cal. App. 309; *Neff v. New York Life Insurance Co.*, 30 Cal. (2d) 165.

[16] *Vertex Investment Co. v. Schwabacher*, 57 Cal. App. (2d) 406; *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 486; *Wood v. Carpenter*, 101 U. S. 135, 140; *Johnson v. Ehrgott*, 1 Cal. (2d) 136; *Myers v. Metropolitan Trust Co.*, 22 Cal. App. (2d) 284. See also *Feak v. Marion Steam Shovel Co., supra; Turman v. Holmes, supra*, on what constitutes concealment and the duty of a party put on notice of fraud.

[17] *Maltz v. Sax*, 134 F. 2d 2; *Ketchum v. Denver & R.G.R. Co.*, 248 Fed. 106; *Bruce's Juices v. American Can Co., supra; Keogh v. Chicago & N. W. Ry. Co.*, 271 Fed. 444; *United States v. Cooper Corp.*, 312 U. S. 600.

[¶ 62,323] United States v. Libbey-Owens-Ford Glass Company, et al.

In the United States District Court for the Northern District of Ohio, Western Division. Civil Action No. 5239. October 30, 1948.

Sherman Antitrust Act

Consent Judgment—Agreements in Restraint of Trade—Acts Enjoined.—A consent judgment entered in an action charging manufacturers of flat glass with combining to fix prices and otherwise to restrain trade, in violation of the antitrust laws, prohibits the corporate defendants from entering into agreements to restrict manufacture, allocate sales territories and markets, fix prices and other terms of sale, or disseminate information concerning production, demand, inventories, sales, costs, prices, or similar information pertaining to the condition or operation of the flat glass industry. The entering into or adherence to agreements to exchange patent rights in such a way as to exclude third persons is also prohibited, as are the use of price lists, participation in a trade association, and the institution of infringement suits. Defendants are required to grant non-exclusive, royalty-free licenses to make, use, and vend flat glass under certain domestic patents, and to furnish to licensees certain technical information and assistance. All resale price maintenance agreements now in effect between defendants and their customers are terminated.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10, 1530.50, 1590.

Clayton Antitrust Act

Same—Lessening of Competition—Acts Enjoined.—The corporate defendants are enjoined from selling or causing to be sold flat glass at any industry level at unreasonably low or discriminatory prices for the purpose of destroying a competitor or suppressing competition in the manufacture or sale of flat glass, and from entering into or performing any contract under which a purchaser is obligated to make purchases of flat glass for a period of more than one year. The acquisition of competing units, and interlocking directorates are also prohibited.

See the Clayton Act annotations, Vol. 1, ¶ 2022.23, 2027.13, 2028.10.

Wilson Tariff Act

Same—Restraint of Export Trade—Agreements Enjoined.—The corporate defendants are enjoined from entering into and adhering to agreements to restrict or prevent the manufacture, processing, distribution or sale of flat glass for export to the United States, or the export of flat glass from the United States. The corporate defendants are ordered to cause foreign subsidiaries to withdraw from any such agreements.

See the Wilson Tariff Act, Vol. 1, ¶ 696, and the Sherman Act annotations, Vol. 1, ¶ 1021.361.

For plaintiff: Phillip E. Pearlman, Acting Attorney General; Herbert A. Bergson, Assistant Attorney General; Phillip E. Pearlman, Acting United States Attorney; George L. Derr, Chief, Great Lakes Office, Antitrust Division; Curtis Shears, Sigmund Timberg, Special Assistants to the Attorney General.

For defendants: Marshall, Melhorn, Wall & Bloch, Stuart S. Wall, William A. Belt; Shumaker, Loop, Kendrick & Winn, Ross W. Shumaker, Leland Hazard, Maurice W. Hibschman, Cyrus V. Anderson; Reed, Smith, Shaw & McClay, Paul J. Winschel, H. Eastman Hackney; Welles, Kelsey, Fuller, Cobourn & Harrington, George D. Welles, Charles F. Babbs; Fulton, Walter, & Halley, Joseph W. Burns; Yager, Bebout & Stecher, Joseph A. Yager.

Final Judgment

The plaintiff, United States of America, having filed its amended complaint herein on March 19, 1946; the defendants Libbey-Owens-Ford Glass Company, Pittsburgh Plate Glass Company, American Window Glass Company, Fourco Glass Company, Franklin Glass Corporation, National Glass Distributors Association, Rolland Glass Company, American Securit Company and

Blue Ridge Glass Corporation, having appeared and filed their answers to the amended complaint denying the substantive allegations thereof; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment herein, without adjudication of any issue of fact or law herein and without this judgment constituting evidence or admission in respect of any such issue;

NOW, THEREFORE, without adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto and not upon evidence, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

[*Jurisdiction*]

I

The Court has jurisdiction of the subject matter herein and of all of the parties hereto. The amended complaint of the United States of America herein states a cause of action against the defendants under Sections 1, 2 and 3 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act under Sections 2, 3 and 7 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for other Purposes," commonly known as the Clayton Act, and under Section 73 of the Act of Congress of August 27, 1894, commonly known as the Wilson Tariff Act, and the Acts amendatory thereof and supplementary thereto.

[*Terms Defined*]

II

As used in this judgment:

A. "Flat glass" means each and all of the following kinds of glass, namely, sheet glass, plate glass, laminated or safety glass and tempered glass, or any size, quality of thickness thereof, whether substantially flat or bent, but shall not include rough rolled glass, wire glass, microscopic cover glass, non-transparent glass, specialty colored glass, or opaque glass, or other specialty glasses made of special compositions or any glass which is further processed or treated for special purposes or products made or fabricated from flat glass other than by cutting, edging, drilling or bending.

B. "Sheet glass" (sometimes called window glass in the trade) means a clear, transparent unground and unpolished glass with a finish known as fire finished, formed when the glass passes from a molten to a hard state and includes common window glass, thin glass and heavy or crystal sheet glass, or any size, quality or thickness thereof, whether substantially flat or bent.

C. "Plate glass" means a clear transparent glass, the surfaces of which have been rendered substantially parallel by grinding and polishing, or any size, quality or thickness thereof, whether substantially flat or bent.

D. "Laminated" or "safety glass" means a clear transparent glass which is made of two or more pieces of flat glass bonded to plastic material interposed between them, or any size, quality or thickness thereof, whether substantially flat or bent.

E. "Tempered glass" means a clear, transparent flat glass which has been strengthened by being heated to the softening point of the glass and then cooled suddenly, or any size, quality or thickness, thereof, whether substantially flat or bent.

F. PPG means the Pittsburgh Plate Glass Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office at Pittsburgh, Pennsylvania.

G. LOF means the Libbey-Owens-Ford Glass Company, a corporation organized and existing under the laws of the State of Ohio, with its principal office at Toledo, Ohio.

H. AWG means the American Window Glass Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office at Pittsburgh, Pennsylvania.

I. Fourco means the Fourco Glass Company, a corporation organized and existing under the laws of the State of West Virginia, with its principal office at Clarksburg, West Virginia.

J. Franklin means the Franklin Glass Corporation, a corporation organized and existing under the laws of the State of New York, with its principal office at Butler, Pennsylvania.

K. NGDA means the National Glass Distributors Association, a voluntary unincorporated association with its principal office at Chicago, Illinois.

L. Rolland means the Rolland Glass Company, a corporation organized and existing under the laws of the State of West Virginia, with its principal office at Clarksburg, West Virginia.

M. American Securit means the American Securit Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office at Washington, D. C.

N. Blue Ridge means the Blue Ridge Glass Corporation, a corporation organized and existing under the laws of the State of New York with its principal office at Kingsport, Tennessee.

O. Blackford means Blackford Window Glass Company, a corporation organized and existing under the laws of the State of Indiana, with its principal office at Vincennes, Indiana.

P. Harding means Harding Glass Company, a corporation organized and existing under the laws of the State of West Virginia, with its principal office at Fort Smith, Arkansas.

Q. Adamston means the Adamston Flat Glass Company, a corporation organized and existing under the laws of the State of West Virginia, with its principal office at Clarksburg, West Virginia.

R. The American Bicheroux Company means a corporation organized and existing under the laws of the State of Delaware.

S. "Fourco Group" means the defendants Fourco and Rolland and non-defendants Adamston and Harding. The members of said Group shall constitute one person for all purposes of this judgment.

T. The term "domestic flat glass patents" means United States Letters Patent and Applications therefor, all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications, covering any product, process, or apparatus used or usable in the manufacture of flat glass.

U. "United States" means the United States and its territories and possessions.

V. "Subsidiary" of a corporation means a corporation more than 50 per cent whose stock entitled to vote upon election of directors (other than preferred stock so entitled to vote upon the failure of the corporation to pay certain dividends) is owned, or directly or indirectly controlled, by such other corporation.

W. "Person" means an individual, partnership, firm, association or corporation. For the purpose of this definition, a corporation (including any corporate defendant) and its subsidiaries shall be considered to be one person.

X. "Corporate defendants" as used herein shall mean LOF, PPG, AWG, Fourco, Rolland, Franklin, Blue Ridge and American Securit, or any of them.

[*Applicability*]

III

The provisions of this judgment applicable to any corporate defendant shall apply to such defendant, its officers, directors, agents, employees, successors, assigns, and all other persons acting under, through or for such defendant.

[*Agreements Enjoined*]

IV

The corporate defendants are severally and jointly enjoined and restrained from combining or conspiring with, or from entering into, adhering to, renewing, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding or concerted plan of action with any other person engaged in the manufacture of flat glass to:

A. reduce or restrict the kinds, quantities, qualities or sizes of flat glass manufactured;

B. allocate or divide production or markets on a quota, past participation or any other basis or to determine, establish or maintain manufacturing or sales quotas for flat glass;

C. create, allocate or divide manufacturing or sales territories, on an exclusive or other basis, or apportion customers or markets or the manufacture of kinds, qualities or sizes of flat glass;

D. restrict any purchaser of flat glass in the use or disposition thereof;

E. determine, fix, maintain or adhere to prices, differentials, discounts or other terms or conditions of sale for flat glass sold to third persons;

F. designate any single person to initiate a price or discount to be thereafter followed by the remaining manufacturers of flat glass;

G. form joint sales agencies for the marketing of flat glass in the United States;

H. classify or list purchasers of flat glass at any industry level;

I. limit the amount of flat glass which may be sold to any third person;

J. discriminate against or refuse to sell to jobbers, distributors, dealers or other persons buying flat glass;

K. sell, or cause to be sold, any kind of flat glass at any industry level at unreasonably low prices for the purposes of destroying a competitor or suppressing competition;

L. reduce or restrict flat glass imports into or exports from the United States;

M. collect, compile, compare, disseminate or communicate to any other person engaged in the manufacture, sale or distribution of flat glass in the United States, or to any flat glass trade association or central agency of persons so engaged, any information concerning production, demand, capacity, inventories, sales, shipments, orders, commitments, costs, prices, discounts or other terms or conditions of sale of flat glass, or similar information pertaining to the condition or operation of the flat glass industry, for the purpose of accomplishing any of the things enjoined and restrained in Subparagraphs A to M of this Section IV.

[*Acts Enjoined*]

V

The corporate defendants are severally and jointly enjoined and restrained from:

A. Selling, or causing to be sold, flat glass at any industry level at unreasonably low or discriminatory prices for the purpose of destroying a competitor or suppressing competition in the manufacture or sale of flat glass;

B. Entering into or performing any contract, agreement or understanding under which a purchaser is obligated to make purchases of flat glass for a period of more than one year. This provision, however, shall not apply to, nor shall it adjudicate the legality or illegality of, any contract, agreement or understanding in effect at the time of entry of this judgment which satisfies all of the following conditions:

(1) The purchaser is a person engaged in the business of manufacturing a product or products other than flat glass;

(2) The flat glass purchased is a minor constituent of a product manufactured by such purchaser;

(3) The flat glass has to be cut by the defendant to meet the specifications of the purchaser;

(4) The volume of purchases provided for by the contract, agreement or understanding is such that it will require all or substantially all of the output of a plant, and an immediate and complete termination of such purchases at the end of the primary contract period not to exceed one year would cause a shutdown of the operations of one or more plants involving one or more continuous tanks of the defendant with resulting unemployment;

(5) The contract, agreement or understanding provides for a substantial reduction of purchases, at the option of the purchaser, amounting to twenty five per cent (25%) during the first year following the primary contract period and fifty per cent (50%) during the second year following said primary contract period and for complete termination of any obligation to sell or buy flat glass thereunder at the end of said second year;

(6) The contract, agreement or understanding, if renewed at any time, can be renewed only upon consent of both parties, upon the same or similar terms and for periods not to exceed one year each.

The burden of proof shall be on the corporate defendant to establish compliance with the above mentioned conditions.

C. Controlling or attempting to control the use or disposition of flat glass by any purchaser;

D. Refusing to fill, or discriminating in the filling of, any order covering at least the equivalent of a carload of flat glass from one plant, because said order involves more than one purchaser, provided that nothing contained in this subsection shall prevent differentials which make only due allowance for the differences in the cost of handling and shipping resulting therefrom;

E. Refusing to sell or discriminating in the sale of flat glass to any purchaser because the purchaser offers, sells or ships or intends to offer or sell or ship flat glass into any territory, or otherwise restricting or attempting to restrict the territories in which purchasers of flat glass may offer to sell, sell or ship flat glass;

F. Refusing to sell, restricting the sales of, or discriminating in the sale of flat glass to any purchaser because:

(1). The purchaser refuses to buy all or the preponderant part of his requirements for a particular kind or specification of flat glass from such defendant; or

(2) The purchaser has not purchased or will not agree to purchase any other kind of flat glass, or purchase flat glass from any source other than said defendant; or

(3) The purchaser was not, is not, or will not become a member of any trade organization; or

(4) The purchaser has not previously been listed on any quantity or qualified buyers list of any other person.

Provided, however, that nothing contained in this judgment shall be deemed to eliminate the general legal right of any defendant to select its own customers in good faith in bona fide transactions.

[*Disclosure of Information*]

VI

A. Each of the corporate defendants is severally and jointly enjoined and restrained from disclosing, disseminating or communicating to any other person engaged in the manufacture, sale or distribution of flat glass in the United States, or to any trade association of or central agency for persons so engaged (any or all of which are hereinafter collectively referred to as the recipient), any information concerning the production, demand, capacity, inventories, sales, shipments, orders or commitments, costs, prices, discounts or other terms or conditions of sale of flat glass:

(1) In such manner as to disclose, directly or indirectly,

(a) to any recipient competing with said defendant, any such information concerning or relating to said defendant, or

(b) to any recipient, any such information concerning or relating to any competitor of the recipient,
(other than terms and conditions of employment necessarily disclosed in bona fide labor disputes, and other data necessarily disclosed in good faith in legislative, administrative, or judicial proceedings); or

(2) Where the purpose is:

(a) To enable the recipient to control the channels or agencies through or by means of which flat glass shall or may be manufactured, sold or distributed or;

(b) To enable the recipient to exclude any person or persons from engaging in the business of manufacturing, sale or distribution of flat glass; or

(c) To enable the recipient to formulate, promote or take part in any plan with any other person engaged in the manufacture, sale or distribution of flat glass for the allocating or sharing of present or future business in the manufacturing, sale or distribution of flat glass.

B. If any information in the categories set forth in Subsection A of this Section (other than as described in the parenthetical clause of Section VI A (1) and in Subsection D of this Section) is disseminated in a manner not prohibited by said Subsection A:

(1) It shall be available upon request at the time of initial dissemination or communication to all persons engaged in the distribution of flat glass and to the general public, except when a disclosure would violate the provisions of Subsection A (1) of this Section VI; and

(2) The burden of proof shall be on the corporate defendant to establish that any information communicated or disseminated less than ninety (90) days after the last transaction or event to which it relates is not prohibited by the provisions of that Subsection.

C. The corporate defendants herein are severally and jointly enjoined and restrained from:

Making any inquiries, directly or indirectly, in furtherance of the practices forbidden by Sections IV and V.

D. Nothing contained in Subsection IV M, and Section VI shall be construed to forbid or prevent the dissemination or communication by a single defendant of information to customers or prospective customers in bona fide transactions involving the sale or purchase of flat glass.

[*Patent Rights*]

VII

The corporate defendants are severally and jointly enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under, any contract, agreement, understanding, or concerted plan of action with any person engaged in the manufacture of flat glass:

A. To exchange, in such a way as to exclude third persons, any rights to patents, inventions, processes, or technical information relating to the manufacture of flat glass;

B. To acquire from, or transfer to, any third person in such a way as to exclude him or any other third person, any rights to any patent, invention, process, or technical information relating to the manufacture of flat glass;

C. To determine or prescribe the terms or conditions upon which licenses or immunities under any patent, invention, or tecnical information relating to the manufacture of flat glass shall be available to others;

D. To acquire or grant rights in such a way as to exclude third persons, under patents or processes relating to the manufacture of flat glass not then in existence;

E. To acquire exclusive rights to domestic patents, processes, inventions or technical information relating to the manufacture of flat glass without simultaneously acquiring the right to sublicense such rights.

[*Orders*]

VIII

A. The defendant PPG is ordered and directed to increase the average number of establishments, other than those owned by PPG, to which PPG shall deliver plate and/or sheet glass at its then current factory buyer prices during the period of calendar years 1948 to 1952, both inclusive, by not less than 10 per cent above the average number of such establishments for the period of calendar years 1944 to 1948, both inclusive.

B. The defendant LOF is ordered and directed to increase the average number of establishments to which it shall deliver plate and/or sheet glass at its then current factory buyer prices during the period of calendar years 1948 to 1952, both inclusive, by not less than 10 per cent above the average number of such establishments for the period of calendar years 1944 to 1948, both inclusive.

[*Agreements Terminated*]

IX

A. The following agreements are hereby terminated and the defendants are hereby enjoined and restrained from the further performance of any of said agreements, and of any agreements or arrangements amendatory thereof or supplemental thereto:

(1) Agreement between LO Sheet, American Bicheroux Company, Blue Ridge et al., dated June 1, 1929.

(2) Agreement between LOF and American Bicheroux Company, dated November 6, 1931.

(3) Agreement between Blue Ridge and American Bicheroux Company, dated November 6, 1931.

(4) Agreement between LOF and PPG, dated February 27, 1932 (Triplex patents).

(5) Agreement between LOF, PPG and Duplate Corporation, dated February 27, 1932, as amended on March 29, 1937, January 12, 1938, May 31, 1938 and December 31, 1938.

(6) Agreement between LOF and PPG, dated May 24, 1932.

(7) Agreement between LOF and PPG, dated August 30, 1932.

(8) Agreement between LOF and American Securit Company, dated June 2, 1933.

(9) Agreement between PPG and American Securit Company, dated June 2, 1933.

(10) Agreement between Blue Ridge and Franklin, dated January 22, 1935.

(11) Agreement between American Bicheroux Company and Franklin, dated April 1, 1935.

(12) Agreement between LOF and PPG, dated June 3, 1936.

(13) Agreement between LOF and PPG, dated April 14, 1937 (Flow Process Agreement).

(14) Agreement between LOF and PPG, dated April 14, 1937 (Sub-license under Blythe patents).

(15) Agreement between LOF and PPG, dated January 12, 1938 (Synthetic resins agreement).

B. Each of the corporate defendants herein is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves or with any other person, except as otherwise provided in Sections XIII and XIV of this judgment, which has as its purpose or effect the continuing or renewing of any of the agreements listed in Subsection A of this Section.

[*Acquisition of Competitors Enjoined*]

X

A. Defendants LOF and PPG are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought or incidental to the ordinary course of business) or goodwill, or any part thereof, or any capital stock or securities of any other person engaged in the manufacture of flat glass within the United States.

B. Defendant LOF, for a period of three years from the date of entry of this judgment, and defendant PPG, for a period of ten years from the date of entry of this judgment, are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought or incidental to the ordinary course of business) or goodwill, or any part thereof, or any capital stock or securities of any other person engaged in the sale or installation of flat glass within the United States.

C. Defendant LOF, after three years from the date of entry of this judgment, and defendant PPG, after ten years from the date of entry of this judgment, are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought or incidental to the ordinary course of business) or good-will, or any part thereof, or any capital stock or securities of any other person engaged in the sale or installation of flat glass within the United States until after it has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to the Court that such acquisition would promote competition in the manufacture, sale or distribution of flat glass.

D. The defendants Fourco, Rolland and AWG are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought or incidental to the ordinary course of business) or good-will, or any part thereof, pertaining to the window glass business, or any capital stock or securities of any other person (except as to Fourco and/or Rolland the window glass business, assets and good-will of Blackford) engaged in the manufacture of window glass within the United States.

E. Defendants Fourco, Rolland and AWG are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought or incidental to the ordinary course of business) or good-will, or any part thereof, other than pertaining to the window glass business, or any capital stock or securities of any other person engaged in the manufacture of flat glass, other than window glass, or in the sale or distribution of flat glass within the United States (or as to Fourco and/or Rolland the window glass business, assets or good-will of Blackford) until after it has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to the Court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of flat glass.

F. Defendants Franklin and Blue Ridge are each enjoined from acquiring directly or indirectly, by purchase, merger, consolidation or otherwise after the entry of this judgment and from holding or exercising after such acquisition ownership or control of, the business, physical assets (except goods or merchandise bought [in] or incidental to the ordinary course of business) or good-will, or any part thereof, or any capital stock or securities of any other person engaged in the manufacture, sale or distribution of flat glass within the United States until after it has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to the Court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of flat glass.

G. The defendant LOF is ordered and directed:

(1) Forthwith upon entry of this judgment to dedicate to the public the domestic

flat glass patents relating to the Bicheroux process as listed in Part I of Appendix A hereof;

(2) Within three years from the date of judgment, to divest itself of any and all capital stock or other financial interests in American Bicheroux Company, by dissolution of the American Bicheroux Company or otherwise;

(3) Thereafter to refrain from any participation or influence, direct or indirect, over the policies and activities of American Bicheroux Company, except as directly incidental to the dissolution of said corporation;

(4) To refrain from acquiring from or granting to American Bicheroux Company any exclusive rights to patents, processes, inventions, or technical information relating to the manufacture of flat glass.

[*Interlocking Directorates Enjoined*]

XI

A. Each individual defendant now acting in the capacity of officer, director, or employee of more than one person engaged in the manufacture of flat glass in the United States shall elect the person for which he desires to act as officer, director or employee, and shall within 30 days from the entry of this judgment sever his connections from all other persons engaged in the manufacture of flat glass in the United States. Thereafter each corporate defendant is enjoined and restrained from causing, authorizing or knowingly permitting any of its officers, directors, or employees to serve as an officer, director, or employee of any other person engaged in the manufacture of flat glass in the United States.

B. Within sixty days after making the election provided for in the above paragraph, each individual defendant shall sell and dispose of any shares of stock or other financial interest which he then owns or controls in any person engaged in the manufacture of flat glass (other than the one elected pursuant to Subsection A of this Section) in the United States. Thereafter, each individual defendant may own or control shares of stock or other financial interest in only one person engaged in the manufacture of flat glass in the United States.

C. Each corporate defendant herein is enjoined and restrained from causing, authorizing, or knowingly permitting any of its officers, directors, or employees holding policy-making positions to acquire ownership or control of shares of stock or other financial interest in any other person engaged in the manufacture of flat glass in the United States.

D. Defendant Rolland is enjoined from selling or assigning any portion of the shares of stock in defendant LOF now owned or controlled by said defendant Rolland or any interest therein to any corporate defendant other than LOF and is enjoined from the date of entry of this judgment, from exercising, directly or indirectly, any voting rights in said stock.

[*Infringement Suits Enjoined*]

XII

Each of the corporate defendants is enjoined and restrained from instituting or threatening to institute, or maintaining, or continuing any suit or proceeding for acts of infringement of any of its domestic flat glass patents alleged to have occurred prior to the date of this judgment.

[*Patent Licensing Directed*]

XIII

A. Each of the defendants, LOF and PPG, is ordered and directed, in so far as each has the power to do so, to grant to any applicant therefor, including any defendant, a non-exclusive royalty-free license to make, use and vend any kind of flat glass under any domestic flat glass patent now owned or controlled by it listed in Appendix A hereof [*omitted herein*], which license shall continue during the entire term of such patent. Each of said defendants is furthermore enjoined and restrained from making any disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee thereof shall observe the requirements of these Sections XII and XIII of this judgment and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section of this judgment.

B. Each of the defendants, LOF and PPG, is ordered and directed, in so far as it has power to do so, to license any domestic flat glass patents now owned or controlled

by it (which are listed in Appendix B) or which are hereafter issued or applied for within a period of five years from the date of this judgment in conformity with the provisions of Section XIV of this judgment.

XIV

A. Each of the corporate defendants other than LOF and PPG, is hereby ordered and directed, in so far as each has power to do so, to grant to each applicant therefor, including any other defendant, a non-exclusive license to make, use and vend any kind of flat glass under any, some, or all domestic flat glass patents now owned or controlled by such defendant (which are listed in Appendix B), or which are issued or applied for within five years from the date of this judgment, and is hereby enjoined and restrained from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires as a condition of such sale, transfer or assignment that the purchaser, transferee, or assignee shall observe the requirements of this Section of this judgment and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section of this judgment.

B. Each corporate defendant is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this Section except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty days' notice in writing to the licensor.

C. Upon receipt of a written request for a license under the provisions of this Section, a defendant shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty days from the date such request for the license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on the defendant owning or controlling said patents to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant, shall have the right to make, use and vend any kind of flat glass under the patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of Subsection D of this Section.

D. Where the applicant has the right to make, use and vend any kind of flat glass under Subsection C of this Section, said applicant or the defendant owning or controlling said patents may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, defendant shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under Subsection C shall terminate. Where an interim license or sublicense has been issued pursuant to this Subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant files his application with the Court.

E. Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents nor

shall this judgment be construed as importing any validity or value to any of the said patents.

XV

Each of the corporate defendants herein is ordered and directed, in so far as it has power to do so, to grant upon written request to any applicant licensed under the provisions of Sections XIII and XIV of this judgment with respect to any products manufactured in the United States pursuant to such license, a non-exclusive grant of immunity from suit under foreign patents or patents issued on foreign applications for patents corresponding to any domestic flat glass patents under which the applicant is licensed.

[*Disclosure of Information Required*]

XVI

Each of the corporate defendants LOF and PPG is ordered and directed, for a period of five (5) years from the date of entry of this judgment, to give to each domestic licensee pursuant to the provisions of Section XIII A hereof, upon written request therefor, technical assistance and information disclosing the methods and processes used by it in its commercial practice under the licensed invention. Wherever practicable, such technical assistance and information shall be furnished in writing. However, where not practicable to furnish such technical assistance and information in writing, technical personnel shall be made available to help install and initiate the operation of the methods and processes by the licensee. Such technical assistance and information shall be charged for at no more than actual cost to the licensor, without allocating any overhead or general administrative expense.

[*Agreements Prohibited*]

XVII

The corporate defendants are severally and jointly enjoined and restrained from entering into, adhering to, maintaining, furthering, or renewing, directly or indirectly, any contract, agreement, understanding or arrangement which provides for:

(1) a license or immunity under any patent; or

(2) the rendering available or receipt of any invention, formula, process, or any technical information relating to the manufacture of flat glass, upon the condition or requirement that the other party thereto shall:

(a) request or accept a license or immunity under any other patent owned or controlled by any defendant;

(b) render available or disclose on an exclusive basis, any invention, formula, process, or technical information;

(c) reduce or restrict the manufacture of any kind of flat glass;

(d) determine, fix, maintain or adhere to prices or price ranges, or other terms and conditions of sale;

(e) maintain or adhere to any restrictions upon exportation from, or import into, the United States;

(f) maintain or adhere to any restrictions upon the customers, markets or territories in which flat glass may be sold or distributed in the United States.

[*Patent Licensing or Exploitation*]

XVIII

A. Each of the corporate defendants is enjoined and restrained from initiating, forming, creating, establishing, participating in, or adhering to any patent licensing or exploitation company, involving, directly or indirectly, flat glass, with any other domestic manufacturer of flat glass, or acquiring or holding, directly or indirectly, any stock or other financial interest, or any control over any such company.

B. Each of the corporate defendants is enjoined and restrained from initiating, forming, creating, establishing, participating in, or adhering to any research or development company, involving, directly or indirectly, flat glass, with any other domestic manufacturer of flat glass, or acquiring or holding, directly or indirectly, any stock or other financial interest, or any control over any such company, except with the approval of the Court on adequate notice to the Attorney General.

[*Use of Lists Ordered Discontinued*]

XIX

A. The corporate defendants and each of them are ordered and directed within twelve months from the entry of this judgment to discontinue the use, and to refrain from requesting, assisting, or facilitating the use by others, of any of the following lists: the American Window Glass Co. Price Lists

of April 23, 1928, Jan. 1, 1938, December 3, 1941, and December 7, 1945; Libbey-Owens-Ford Glass Company's Price List of April 23, 1928, and List Prices of Sept. 1, 1930, Sept. 1, 1938, December 16, 1941, and December 15, 1945; Pittsburgh Plate Glass Company's Pennvernon Price List of April 23, 1928, and List Prices of January 31, 1938, December 31, 1941, and December 7, 1945; Fourco Glass Company's Price Lists dated April 23, 1928, November 8, 1937, and January 1, 1942, and List Prices of December 7, 1945; or any price or prediscount list containing prediscount figures copied from any of the above lists.

B. The corporate defendants, and each of them, are ordered and directed within eighteen months from the entry of this judgment to discontinue the use, and to refrain from requesting, assisting, or facilitating the use by others, of any of the following NGDA Lists: the Window Glass List, August 15, 1938; the Net Window Glass Light List, August 15, 1938; Polished Plate Glass List of July 1, 1937; the prediscount and price portions of the Auto Glass Part Service catalogues; any other price or prediscount list compiled or prepared by NGDA; and any prediscount list containing prediscount figures copied from any of the above described lists.

[*Participation in Trade Association Enjoined*]

XX

A. The corporate defendants are severally and jointly enjoined and restrained, for a period of five (5) years from the entry of this judgment, from creating, adhering to, maintaining, or otherwise participating in, any flat glass trade association or similar flat glass organization among themselves or with any person or persons engaged in the manufacture of flat glass.

B. The corporate defendants (including any person engaged in warehousing or other flat glass sales, installation or distribution activities now or hereafter owned or controlled by any of them) are severally and jointly perpetually enjoined and restrained from creating, adhering to, contributing money to, supporting, controlling, attempting to control, or exerting any pressure upon any flat glass trade association or similar flat glass organization comparable in membership to the defendant N. G. D. A., or consisting of distributors or dealers of flat glass not engaged in the manufacture thereof.

C. Defendant N. G. D. A. and each division thereof is ordered to be dissolved within ninety (90) days from the date of entry of this judgment. There shall within ten (10) days after such dissolution be delivered to the Court, after notice to the Attorney General, adequate proof of such dissolution.

D. The corporate defendants are severally and jointly enjoined and restrained from creating, adhering to, maintaining, or otherwise participating in any flat glass trade association or similar flat glass organization, or central agency, which engages in or promotes any activity prohibited by Sections IV, V and VI of this judgment.

E. The corporate defendants herein are severally and jointly enjoined and restrained from causing, authorizing, or knowingly permitting any distributor or dealer of flat glass not engaged in the manufacture of flat glass to become a member of, or otherwise promote or support the activities or policies of any flat glass trade association or similar flat glass organization of which any such corporate defendant is a member.

[*Fair Trade Contracts Terminated*]

XXI

All Fair Trade resale price maintenance contracts or schedules now in effect between any of the corporate defendants and customers of such defendants, relating to flat glass are hereby terminated, and each such defendant shall give notice within thirty days hereof to each of its customers that the contracts or schedules have been terminated and are no longer in effect. Each of the corporate defendants is enjoined and restrained from enforcing or attempting to enforce any of said contracts or schedules; and each such defendant is enjoined for a period of three years from the date of this judgment from entering into any Fair Trade resale price maintenance contracts or schedules relating to flat glass, or exerting any type of pressure, directly or indirectly, by acts, suggestion or otherwise, as to the resale prices of flat glass.

[*Agreements Restraining Export Trade Prohibited*]

XXII

A. The corporate defendants and each of them are severally and jointly enjoined

and restrained from entering into, adhering to, renewing, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, or concerted plan of action with any person (including any trade association or group, but not including any bona fide agent) engaged, outside the United States, either in the manufacture of flat glass, or in patent licensing or exploitation or other research and development relating to flat glass:

(1) to restrict or prevent the manufacture, processing, distribution or sale of flat glass for export to the United States, or the export of flat glass from the United States, or the import of flat glass into the United States;

(2) wherein any such other party covenants or promises to refrain from shipping flat glass to the United States, or wherein any defendant pays or offers to pay commissions or any other sums or benefits in connection with such covenant or promise to refrain from shipping.

B. The corporate defendants and each of them are ordered and directed to cause any presently wholly-owned or controlled foreign subsidiary to withdraw from, and are enjoined and restrained from causing or permitting any wholly-owned or controlled foreign subsidiary to become or be a party to, any agreement, contract, or understanding containing provisions enjoined in Subsection A of this Section.

C. Each corporate defendant is ordered and directed to notify each of its licensees under any patent license involving the manufacture of flat glass, and each party to any contractual arrangements covering the manufacture of flat glass involving countries outside the United States, and all third parties known to said corporate defendant receiving patent licenses or other contractual rights pursuant to such license grants or contractual arrangements, that (1) any terms of the license grants or contractual arrangements, arrangements forbidding export, sale or use of flat glass in the United States are terminated, and (2) they may henceforth export to, sell or use flat glass in the United States regardless of the existence of any domestic process or machine patent, and (3) they may, with respect to any valid United States product patent to which Sections XIII and XIV are applicable (which may hereafter be issued), obtain licenses to vend in the United States under Sections XIII and XIV of this judgment. Within ninety (90) days following the giving of such notice each defendant shall furnish to the Attorney General of the United States in form approved by him, satisfactory proof of the giving of such notice.

D. Nothing in this judgment shall prevent a defendant from accepting a license containing provisions described in Subsection A of this Section, upon the independent and unilateral insistence of a foreign licensor and approval of the Court after sixty (60) days' written notice to the Attorney General.

XXIII

The corporate defendants are severally and jointly enjoined and restrained from:

(1) Selling flat glass in the United States on condition that it be resold only in the United States;

(2) Refusing to sell flat glass to, or threatening to withhold supplies of flat glass in the United States from any purchaser because he is engaging in or desiring to engage in the exportation of flat glass from the United States;

(3) Initiating or prosecuting any inquiry or investigation concerning the destination of specific shipments of flat glass, or shipments of specific persons, after the first sale from the factory;

(4) Discriminating in regularly offered terms and conditions of sale as to any purchaser of flat glass because he engages in the United States in its export or import trade, provided that nothing herein contained shall prohibit sales at prices lower than those for comparable flat glass sold within the United States, made in good faith to meet the lower prices of competitors outside the United States.

XXIV

A. Where a corporate defendant as of the date of this judgment owns directly or indirectly less than the entire capital stock entitled to vote in elections of directors (other than qualifying shares for local directors) of a corporation engaged outside the United States in the manufacture of flat glass, or in the licensing or exploitation of patents or other research or development in connection therewith, the defendant is enjoined and restrained, except as otherwise in this section provided, from:

(1) exercising the voting power of any stock which it owns or controls in;

(2) controlling or participating in, either directly or indirectly, any commercial policies of;

(3) acquiring or holding, in the future, directly or indirectly, the ownership or beneficial interest in any additional shares of stock entitled to vote in elections of directors or any right to vote additional shares of stock in;

(4) acquiring the right in the future to control or participate in, directly or indirectly, any commercial policies of;

(5) joining in the future in the limitation, establishment or promotion of, or participating in any joint manufacturing, sales, patent holding or exploitation, research or development company with respect to flat glass with;

any such foreign corporation, unless said defendant acquires complete ownership of such stock (other than qualifying shares for local directors) of such corporation.

B. The provisions of this Section XXIV, where otherwise applicable, are not applicable to any foreign flat glass manufacturer in which the voting shares or rights other than those owned or controlled by any one of the defendants or its subsidiaries are at the times in question directly or indirectly owned or controlled by a person or persons not otherwise engaged in flat glass manufacture or acting as a substantial source of supply for another flat glass manufacturer. The burden shall be on the corporate defendant of maintaining records, and submitting to the Court and to the Attorney General an annual report, containing a full and accurate listing of such foreign ownership or control, and the amounts thereof. Upon failure to maintain such records or submit such reports, the provisions of Section XXIV shall immediately become applicable.

C. Pursuant to Subsection A of this Section XXIV, each of the corporate defendants affected thereby shall expeditiously but in any event within one year from the date of entry of this judgment, submit for approval by the Court its plan, a copy of which shall be forwarded to the Attorney General at least sixty (60) days prior to the date of filing such plan with the Court, with respect to each foreign flat glass manufacturer to which the provisions of Subsection A are applicable to

(1) establish a trust under which a trustee, acting independently of any defendant, shall exercise all of the powers and voting rights in any and all shares of stock of such manufacturer which are held or owned at any time during the effective time of this judgment directly or indirectly, by, or on behalf of, or under the control of, any such defendant, or

(2) to comply with the provisions of Subsection A of this Section in such manner as this Court may deem appropriate.

D. Upon approval by the Court of the plan referred to in Subsection C (1) of this Section, the Court shall appoint a trustee, individual or corporate, who shall have no affiliation or interest, direct or indirect, with any corporate defendant, or its subsidiaries, successors or assigns, or with any person engaged in the manufacture of flat glass. Such trustee shall act as an officer of the Court and under its direction and shall assume the obligation of exercising all the powers vested in him so as to conform with the provisions of this judgment.

E. Nothing contained in this Section XXIV shall apply to any Canadian subsidiary of any corporate defendant, so long as it shall remain as such subsidiary, provided that with respect to any such subsidiary such defendant shall file with the Attorney General or with the Assistant Attorney General in charge of the Antitrust Division, on or before June 30, 1949 and thereafter semi-annually, an affidavit of compliance with each applicable provision of this judgment (other than Section XXIV) signed by the officer of such defendant directly responsible with respect to the affairs of such subsidiary, which affidavit shall be accompanied by a written report setting forth in reasonable detail the policies adopted, instructions given and actions taken, to secure and maintain compliance with the provisions of this judgment applicable to such subsidiary. Upon written request of the Attorney General or an Assistant Attorney General, and upon reasonable notice made to its principal office, such corporate defendant shall submit any additional written reports as from time to time may be reasonably necessary for the purpose of enforcement of the provisions of this judgment applicable to such subsidiary.

Failure of the Attorney General or Assistant Attorney General in charge of the Antitrust Division to take any action following receipt of any information pursuant to this Subsection E shall not be construed

as an approval of the matters and things set forth in such affidavit, and shall not operate as a bar to any action or proceeding, civil or criminal, which may later be instituted or then be pending.

Nothing contained in this Subsection E shall be deemed to determine, adjudicate, or affect the legality or illegality of the relationship of any corporate defendant to any such subsidiary.

F. Nothing contained in this Section XXIV shall preclude any defendant now owning less than the entire voting shares or rights of any foreign flat glass manufacturer (other than qualifying shares for local directors) from acquiring additional shares or rights in such foreign flat glass corporation at any time subsequent to the date of this judgment, provided, however, that such additional voting shares or rights acquired shall be not subject to the provisions of Subsections A, C and D of this Section XXIV for a period of three months after the first acquisition of such additional shares or rights, and thereafter only if and while the defendant shall not own or control the entire capital stock of such corporation (other than qualifying shares for local directors).

XXV

Within six months from the entry of this judgment, the defendants PPG and LOF shall each cause any officers, directors, agents, or employees who are serving as officers, directors, agents, or employees of any person engaged outside the United States in the manufacture of flat glass, or in patent licensing or exploitation or in research or development relating to such manufacture, in which such defendant owns directly or indirectly less than the entire capital stock entitled to vote in election of directors (other than qualifying shares for local directors) to resign from such other positions. Thereafter each defendant is enjoined from causing, authorizing or knowingly permitting any of its officers, directors, agents or employees to serve as officer, director, agent or employee of any such foreign person.

[*Webb-Pomerene Act*]

XXVI

The corporate defendants are severally and jointly enjoined and restrained for a period of five years following the entry of this judgment, from availing themselves of the benefits of the Webb-Pomerene Act. Thereafter, the corporate defendants shall not avail themselves of such benefits except upon application to and subsequent approval by this Court, upon adequate notice to the Attorney General and in accordance with the terms of that Act.

XXVII

Except to the extent provided in Sections XXI and XXVI, nothing contained in this judgment shall prevent any defendant from availing itself of the benefits of (1) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act; (2) the Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies"; or (3) the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act.

[*Sales Agency Agreement Ordered Terminated*]

XXVIII

A. Effective December 31, 1949, defendant Fourco is ordered to terminate its existing sales agency agreement with Blackford. It is further ordered that, if Blackford shall within 15 days after the entry of this judgment serve upon Fourco and file with the Court Blackford's written agreement to be bound by the provisions of this Section XXVIII, said existing agreement shall be terminable by either party thereto upon sixty (60) days' written notice to the other. Upon the termination of the sales agency relationship between them, defendant Fourco shall be obligated to purchase from Blackford and Blackford shall be obligated to sell to Fourco the shares of Fourco stock now held by Blackford at a fair and equitable price. Within sixty (60) days after the effective date of the termination of the sales agency relationship between Blackford and Fourco, Fourco shall file with the Court upon not less than ten (10) days' notice to Blackford and to the Attorney General, a plan setting forth (a) the price proposed to be paid by Fourco for Blackford's stock in Fourco and the time and terms of payment therefor, and (b) the basis for arriving at such price. Blackford shall within sixty (60) days thereafter file with

the Court upon ten (10) days' written notice to Fourco and to the Attorney General either its acceptance of such plan or an alternative plan setting forth its objections to Fourco's plan and its counter-proposal as to the price of said stock and the terms of payment therefor. The Court thereafter, after due opportunity for hearing to all interested parties, will determine the value of such stock and make such other orders as are necessary or proper. The value placed by Fourco on its stock owned by Blackford shall be calculated as of the first day of the month immediately preceding the filing of such plan with the Court by Fourco, and Blackford and the Court shall likewise use the same date as that used by Fourco. Blackford shall be entitled to interest at the rate of 4% per annum on the sale price as finally determined by the Court from the first day of the month preceding the filing of such plan by Fourco to the date of payment, but Blackford shall not be entitled to participate in Fourco's earnings subsequent to the date as of which interest becomes payable as aforesaid. The value fixed for such stock shall take into consideration Fourco's trade name "Clearlite" and Blackford shall have no right to any use of such trade name after the termination of such sales agency relationship except that it shall be permitted to utilize packing boxes labeled "Clearlite" on hand at the termination of such sales agency relationship subject to reasonable limitations to be agreed upon by Fourco and Blackford (or in the event of disagreement to be determined by a Master appointed by the Court, the expense of such proceedings to be shared equally by Fourco and Blackford) as to the quantity of such boxes to be used and the period of such use by Blackford.

B. No action taken by Blackford under this Section XXVIII shall be deemed to be an entry of a general appearance herein by Blackford, or be deemed to make it a party defendant herein, but shall be a special appearance, limited strictly to, and shall constitute only a submission of, the questions arising under this Section XXVIII of this judgment.

C. Nothing in this Section XXVIII shall be deemed to determine, adjudicate or affect the legality or illegality of the sales agency relationship between Fourco and Blackford.

D. Until the effective date of the termination of the sales agency relationship between Fourco and Blackford and the consummation of the sale of Blackford's stock to Fourco as required by this Section XXVIII, any relationship between Fourco and Blackford shall be exempt from the other sections of this judgment, but defendant Fourco is enjoined from taking any action either in the administration of the sales agency agreement or otherwise which discriminates against Blackford.

XXIX

After sixty (60) days' written notice to the defendants the plaintiff may file a petition with this Court after three years following the date of this judgment for divestiture, divorcement, or dissolution of defendants PPG, LOF, AWG, Rolland or Fourco, or for the reopening of the provisions of Sections IV and V of this judgment, and such other relief as may be incidental thereto, without showing a change in circumstance subsequent to the date of entry of this judgment. In the event a petition is filed for divestiture, divorcement or dissolution as aforesaid, the provisions of Sections IV and V shall also be deemed reopened thereby. The entry of this judgment shall not be deemed a bar to any of the above mentioned relief that the Court may grant after a hearing upon such petition. Upon the hearing on such petition, the record of all proceedings in this case prior to the entry of this judgment shall be part of the record before the Court on such petition and shall be considered by the Court, together with any additional evidence which the plaintiff or the defendants may submit to support or oppose the relief sought. The defendants or any of them shall have the unrestricted right to contest such petition for further relief upon any ground (including facts and circumstances arising before or subsequent to May 23, 1945, and without any bar or estoppel arising by reason of the entry of this judgment) except that of failure to show a change in circumstances or that such relief is barred by this judgment.

[*Inspection for Purpose of Securing Compliance*]

XXX

For the purpose of securing compliance with this judgment, or of determining the need for other and further relief pursuant to Section XXIX of this judgment, duly

authorized representatives of the Department of Justice shall upon written request of the Attorney General or an Assistant Attorney General and on reasonable notice to any defendant corporation or association made to its principal office be permitted subject to any legally recognized privilege (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, and upon reasonable notice to its principal office, shall submit such written reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or obtaining other and further relief pursuant to Section XXIX of this judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

XXXI

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment or for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 62,324] Opinion of the Attorney General of Wisconsin.

Addressed to Anthony E. Madler, Counsel, State Department of Agriculture, by Grover L. Broadfoot, Attorney General. Vol. XXXVII, page 420. August 10, 1948.

Wisconsin Unfair Sales Act

Unfair Sales Act—Marketing and Trade Practices.—A wholesaler may sell below cost "distress merchandise" to another wholesaler. In such a sale, the reduced price to the purchasing wholesaler is his "invoice cost" and it controls his resale price for the next 30 days. The determination of a bona fide clearance sale under Section 100.30(6)(a) must rest upon the intent of the seller inferred from the facts of each transaction and viewed in the light of the statutory purpose to outlaw loss leaders and to prevent unfair competition. A merchant may sell below statutory cost goods on hand which his supplier has notified him will be reduced in price.

See the Wisconsin Unfair Sales Act, Vol. 2, ¶ 8948.

[*Questions*]

You have asked several questions relating to the enforcement of sec. 100.30, Stats., which is the unfair sales act of the state of Wisconsin. This section is designed to protect industry and agriculture from unfair competition in the form of sales below cost.

The questions raised are as follows:

1. If a wholesaler has a large stock of merchandise which is not selling at the statutory minimum price, and he desires to liquidate it to free his capital for investment in other goods, in order to earn his usual profit, may he classify such stock as "distress merchandise" and sell it to another wholesaler at less than "cost to the wholesaler" as defined in sec. 100.30 (b) (2)? The answer should take into consideration the fact that out-of-state wholesalers occasionally offer to sell the same merchandise below cost.

2. Is the reduced selling price referred to in question 1 the "invoice cost" to the

dealer who buys such merchandise and, if so, does it control his resale price during the next 30 days?

3. May a merchant who has a large stock of seasonal merchandise such as fruit cocktail, which is moving slowly at the statutory minimum price, sell out such stock at a clearance sale as provided in sec. 100.30 (6) (a), where he admits that he will reorder the item under the same or other brand name?

4. May a merchant who is overstocked on an item, a particular brand of soap or washing powder, for example, which he believes will be reduced in price in the near future, sell out such merchandise at a clearance sale at less than the statutory minimum price to avoid financial loss?

5. May a merchant who is overstocked with an item such as tomato catsup, which will deteriorate slowly in the container if kept too long, sell out such merchandise at less than the statutory minimum price?

[*"Distress Merchandise"*]

In answering the first question we understand that the phrase "distress merchandise" is used to describe certain classes of goods which are in salable condition but not in demand.

It is clear that a sale of such goods must meet the minimum price requirements of sec. 100.30 (2) (b). However, the seller need not comply with the section if the circumstances surrounding the sale bring the transaction within any of the exceptions provided in sec. 100.30 (6). The labeling of goods as "distress merchandise" does not in itself permit the seller to avail himself of the exceptions. Goods sold at a bona fide clearance sale must be advertised, marked and sold as such. Sec. 100.30 (6) (a). If these condition are met, there does not appear to be any reason why one wholesaler cannot sell to another wholesaler. The requirements of a bona fide clearance sale within the meaning of the statute are discussed in the answer to the third question.

Similarly, in our opinion, a Wisconsin wholesaler may lower the price of such goods below the statutory cost when necessary to meet the prices of out-of-state wholesalers. If the Wisconsin wholesaler reduces prices in good faith to meet his out-of-state competition, he comes within the exception provided in sec. 100.30 (6) (g). An out-of-state wholesaler should be considered a competitor of a Wisconsin wholesaler if they sell in the same area. See Callmann, *Unfair Competition and Trade Marks*, Vol. I, § 27.6.

[*Invoice Cost*]

As to the second question, we believe that the reduced selling price of the merchandise is the "invoice cost" to the purchaser of such merchandise and it controls his resale price during the next 30 days. The term "invoice cost" has been defined to mean prime cost or cost of goods. *Sturn v. Williams*, 38 N. Y. Super. Ct. 325, 342. See Callmann, *supra*, Vol. I, § 27.4 (e). It is still a sale at cost even though competitors cannot meet the price without a loss. Callmann, *supra*, Vol. I, § 27.3 (c).

[*Bona Fide Clearance Sale*]

A categorical answer cannot be given to the third question. It requires a definition of the term "bona fide" clearance sale. Each transaction must be considered in the light of actual market conditions and the purposes of the unfair sales act.

The purpose of the unfair sales act is to prohibit sales at less than cost made for the purpose of injuring competitors or destroying competition. 52 Am. Jur. 647; *Wholesale Tobacco Dealers B. v. Nat'l Candy & T. Co.*, (Cal.) 82 P. (2d) 3. The statute is not violated unless the merchant who sells below cost does so with the intent to (1) induce the purchase of other merchandise, (2) unfairly divert trade from a competitor, or (3) otherwise injure a competitor. Advertising, offering, or selling below cost is prima facie evidence of intent to violate the statute, Sec. 100.30 (4). In prosecutions under this statute, the state must prove an intent to violate the statute beyond a reasonable doubt. *State v. 20th Century Market*, 236 Wis. 215; *State ex rel. Heath v. Tankar Gas, Inc.*, 250 Wis. 218.

The term "bona fide" has been defined by the courts to mean good faith as distinguished from bad faith. The belief or act must not be attended by fraud, deceit, or collusion. See the cases cited in 5 Words and Phrases 609. Good faith in relation to the unfair sales acts has been discussed in only a few cases. See *Rust v. Griggs,* (Tenn.) 113 S. W. (2d) 733; *Kentucky Utilities Co. v. Carlisle Ice Co.,* (Ky.) 131 S. W. (2d) 499; *State v. Sears,* (Wash.) 103 P. (2d) 337, 345, Callmann, *supra,* Vol. I, § 27.5 (a), states the rule as follows:

> "If a vendor is not prompted by the need to meet competition in the usual course of business or is not otherwise desirous of availing himself of the statutory exceptions, it is apparent that his continuous undercutting and selling below cost is actuated by an intent to force a competitor to match his prices and also sell below cost until he is driven out of business."

A clearance sale at less than cost must be an honest, unfeigned attempt to accomplish a proper merchandising function. A loss leader may not be offered in the guise of a clearance sale. The intent of the merchant must be drawn from the facts of each transaction. If the evidence shows that he has sold below cost for the purpose of inducing customers to purchase other merchandise or unfairly diverting trade from a competitor or otherwise injuring a competitor, he has not conducted a bona fide clearance sale.

The merchant in this instance wishes to sell below cost a large stock of canned fruit cocktail which he intends to reorder under the same or other brand name. The fact that he intends to reorder the same or similar merchandise arouses a suspicion that the clearance sale is not in good faith. However, the reordering of fruit cocktail under a different brand name may indicate the honest belief that the new merchandise will sell where the former has failed. A continuous or repeated selling below cost of the same or similar items systematically replenished, suggests a campaign to injure a competitor and may supply the intent required to violate the unfair sales act. See Callmann, *supra,* Vol. I, § 27.5 (c).

[*Reduction in Supplier's Price*]

In the fourth question, the seller believes that his supplier is about to reduce the price of goods which he, the seller, has on hand. He wishes to sell out his present stock below the statutory cost to avoid the risk of a greater loss which may result from a reduction in his supplier's price.

Under these circumstances, the validity of the sale must be determined by the nature of the information relied upon by the seller. His good faith will appear from an investigation of the source of the report of imminent reduction of price. If the seller actually received notice from his supplier and acted upon it, his good faith in selling below cost is evidenced.

[*Perishable Merchandise*]

The answer to the fifth question requires a definition of the term "perishable merchandise" as used in sec. 100.30 (6) (b). This phrase has been defined by the courts in many cases cited in 32 Words and Phrases 64, 65.

Some decisions construe the adjective "perishable" to mean a natural liability to speedy decay, and distinguish such articles from articles liable to deteriorate from keeping. *Jolley v. Hardeman,* (Ga.) 36 S. E. 952; *Poole v. U. S.,* 9 Ct. Cust. App. 271, 275. Other decisions indicate that the term perishable includes property subject to depreciation in value from causes other than decay. An article may be treated as perishable where it is shown likely to become worthless by keeping. *Witherspoon v. Cross,* (Cal.) 67 P. 18, 19; *McCreery v. Berney Nat'l Bank,* (Ala.) 22 So. 577, 579.

In our opinion, the latter is the better rule and the merchant who has in stock an article which experience or inspection has shown to deteriorate when stored a considerable length of time may consider the same perishable within the meaning of sec. 100.30 (6) (b).

We do not believe that it is the intention of the unfair sales act to require a merchant to retain on his shelves merchandise which does not move at the statutory minimum price and which is slowly deteriorating and losing merchantability.

[¶ 62,325] **Ford Motor Company v. United States.**

Commercial Investment Trust Corporation, Commercial Investment Trust, Inc., Universal Credit Corporation, et al. v. United States.

In the United States Supreme Court. Nos. 1, 2. November 15, 1948.

Appeals from the United States District Court for the Northern District of Indiana.

Sherman Antitrust Act

Suspension of Consent Decree Provisions—Persuasion or Coercion to Deal with Auto Finance Companies—Affiliation Between Auto Manufacturer and Finance Company.—The decision of a district court denying the motion of parties to a consent decree entered in proceedings under the Sherman Act, seeking suspension of provisions of the decree restraining an automobile manufacturer from recommending, endorsing, advertising or arranging for visits to finance companies until such time as similar restraints are imposed upon a competitor, is reversed and remanded. It is held that the acts prohibited by the provisions in question amount to persuasion, exposition and argument, which conduct on the part of the competitor was not enjoined, was not found to be violative of the antitrust laws, and does not amount to such coercion as was found in a criminal suit against the competitor. The dissenting opinion would affirm the denial of the motion to suspend the provisions for the reason that the economic power of the auto manufacturer over its dealers is so great that the dealers cannot afford to resist the manufacturer's influence or persuasion, whether legalistically called coercion or not. The denial of the motion of one of the parties for an order permitting the manufacturer to acquire ownership of a finance company is reversed, inasmuch as there has been no adjudication of illegality of such acquisition, and since the prohibition in the decree has expired. The dissenting opinion would continue the ban against affiliation with a finance company because the manufacturer has failed to propose any plan for affiliation, and has failed to show that continuance of the decree will cause it to suffer competitive disadvantage in the sale of cars. The majority opinion found that the resumption of full-scale competition in the auto industry has made such a showing unnecessary.

See the Sherman Act annotations, Vol. 1, ¶ 1550.10, 1560.25.

Reversing and remanding the decision of the United States District Court for the Northern District of Indiana, reported in 1946-1947 Trade Cases at ¶ 57,505.

For appellants: Clifford B. Longley, Wallace R. Middleton, Frederick C. Nash, Detroit, Michigan; Charles E. Hughes, Jr., Samuel S. Isseks, Melbourne Bergerman, Wright Tisdale, Alphonse A. Laporte; Seymour Kleinman, of counsel; Scheer, Scheer & Taylor, of counsel.

For appellee: George T. Washington, Acting Solicitor General; Wendell Berge, Assistant Attorney General; Holmes Baldridge, James C. Wilson, Victor O. Waters, Special Assistants to the Attorney General.

[*Nature of Action*]

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases were brought here on appeal, prior to the revision of Title 28, United States Code, under what was § 345 and since September 1 has become § 2101 of that Title, to review final decrees of the United States District Court for the Northern District of Indiana in a suit in equity brought by the United States under § 4 of the Sherman Law, 26 Stat. 209, as amended, 36 Stat. 1167, 15 U. S. C. § 4. The cases present another phase of a multifarious litigation which has been occupying the attention of the federal judicial system for more than a decade. *United States v. General Motors Corp.*, 26 F. Supp. 353 (N. D. Ind.); *United States v. General Motors Corp.*, 121 F. 2d 376 (C. A. 7th Cir.), cert. denied, 314 U. S. 618, rehearing denied, 314 U. S. 710; *United States v. General Motors Corp.*, 2 F. R. D. 346 (N. D. Ill.); *United States v. General Motors Corp.*, 2 F. R. D. 528 (N. D. Ill.); *Chrysler Corp. v. United States*, 314 U. S. 583, rehearing denied, 314 U. S. 716; *Chrysler Corp. v. United States*, 316 U. S. 556. An analytical summary of this litigation will make clear the immediate issues before us and, indeed, largely dispose of them.

On May 27, 1938, indictments were returned in the District Court of the United States for the Northern District of Indiana, South Bend Division, against the three leading automobile manufacturers and the companies which financed the sale of their automobiles. One indictment was against the present appellants, Ford Motor Company, and Commercial Investment Trust Corporation, Commercial Investment Trust, Inc., and Universal Credit Corporation, these three referred to collectively as CIT; another against Chrysler Corporation and Commercial Credit Company; a third against General Motors Corporation and its subsidiary, General Motors Acceptance Corporation, to be abbreviated as GMAC. The indictments charged the automobile manufacturer and the jointly named finance companies with violations of the Sherman Law by influencing dealers who sold the automobiles of the respective manufacturers to give the finance companies the business of financing the dealers' wholesale purchases and retail sales of automobiles.

Following these charges, negotiations were set afoot to secure the elimination through consent decrees of the practices described in the indictments. As to the Ford and Chrysler groups the Government, on November 7, 1938, filed suits in equity and arranged for the dismissal of their indictments. (For present purposes we are not further concerned with Chrysler.) Although Ford and CIT formally resisted the complaint, denying its allegations and pleading affirmative defenses, negotiations for a consent decree proceeded. Efforts toward an amicable settlement with General Motors and GMAC failed. The Government therefore pressed the criminal charges against them. In view of the competitive conditions in the automobile industry it obviously became of crucial importance to Ford not to consent to any restraints beyond those which would fall upon General Motors through the contingencies of litigation against it. But it would not have been enough merely to provide that restraints which Ford accepted should eventually be lifted to the extent not imposed upon General Motors at some remote time defined merely by the vicissitudes of litigation. Protection against competitive disadvantage, the appropriateness of which the Government recognized, required a time certain at the end of which the restraints against Ford would expire if General Motors were still free of them.

[*Provisions of Decree*]

Accordingly, the consent decree, entered on November 15, 1938, assured Ford essential equality of position with the unconsenting General Motors by two explicit conditions. Their terms are fully set out in the margin;[1]

[1] "12. The Respondent Finance Company shall not pay to any automobile manufacturing company and the Manufacturer shall not obtain from any finance company any money or other thing of value as a bonus or commission on account of retail time sales paper acquired by the finance company from dealers of the Manufacturer. The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company or any other finance company, and if it shall pay any money to Respondent Finance Company or any other finanee company with the purpose or effect of inducing or enabling such finance company to offer to the dealers of the Manufacturer a lower finance charge than it would offer in the absence of such payment, it shall offer in writing to make, and if such offer is accepted it shall make, payment upon substantially similar bases, terms and conditions to every other finance company offering such lower finance charge; provided, however, that nothing in this paragraph contained shall be construed to prohibit the Manufacturer from acquiring notes, bonds, commercial paper, or other evidence of indebtedness of Respondent Finance Company or any other finance company in the open market.

"It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

"12a. It is a further express condition of this decree that:

"(1) If the proceeding now pending in this court against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, or any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, is finally terminated in any manner or with any result except by a judgment of conviction against General Motors Corporation

their essence can be briefly summarized. Paragraph 12 forbids Ford from acquiring control of any finance company. After enumerating various forbidden forms of financial interest, the paragraph provides that if the Government should not have obtained a final decree against General Motors by January 1, 1941, requiring it to divest itself of all interest in GMAC, its affiliated finance company, the prohibition against Ford would cease. The second express condition, designed to relieve from restraints imposed by earlier paragraphs in the decree against various means of influencing dealers to patronize CIT, is found in paragraph 12a. That paragraph addressed itself to the possible eventualities of the criminal proceeding against General Motors and GMAC: (1) its termination with a result other than a judgment of conviction; (2) a general verdict of guilty; (3) a special verdict of guilty; (4) a plea of guilty or *nolo contendere.* Upon the first contingency all restrictive terms of the decree against Ford would be suspended until similar restraints were imposed upon General Motors and GMAC. The second was to be "deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty." The third and fourth were, respectively, to be deemed determinations of the illegality of "any agreement, act or practice" which was their subject matter.

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and General Motors Acceptance Corporation therein, then and in that event every provision of this decree except those contained in this sub-paragraph (1) of this paragraph 12a of this decree, shall forthwith become inoperative and be suspended, until such time as restraints and requirements in terms substantially identical with those imposed herein shall be imposed upon General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries either (a) by consent decree, or (b) by final decree of a court of competent jurisdiction not subject to further review, or (c) by decree of such court which although subject to further review continues effective. The court reserves jurisdiction upon application of any party to enter orders at the foot of this decree in accordance with the provisions of this paragraph.

"(2) A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or *nolo contendere* by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purposes of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1041;

"(3) After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporation by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:

"(i) suspending each of the restraints and requirements contained in sub-paragraphs (d) to (f) and (h) to (l), inclusive, of paragraph 6 of this decree to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in sub-paragraphs (a), (c) and (d) of paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree, or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective, or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the provisions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to sub-paragraphs (j) and (k) of paragraph 6 of this decree are different from said sub-paragraphs of this decree, then upon application of the respondents any provision or provisions of said sub-paragraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

These provisions furnish a litmus-paper test for determining what restraints survive the result of the proceeding against General Motors and GMAC. What was not illegal for General Motors was not longer to be prohibited to Ford. The sword of justice was to strike both alike. Paragraph 12a further defines how and when the restraints were to be relaxed. Sub-paragraph (3) provides that after the entry of a decree against General Motors, or after the entry of a judgment of conviction in the pending criminal proceedings "or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders" suspending any restraint against it (with exceptions not now relevant) "to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms" upon General Motors or GMAC.

[*Suit Against Competitor*]

On November 17, 1939, the jury returned a general verdict of guilty against General Motors, the Court of Appeals for the Seventh Circuit affirmed the judgment upon that verdict, 121 F. 2d 376, and this Court denied further review. 314 U. S. 618; *id.* at 710.

On October 4, 1940, the Government finally brought a suit in equity against General Motors seeking divestiture of its control of GMAC. But it was then too late for a decree to be entered before the lapse of Ford's agreement not to become affiliated with a finance company. On December 21, 1940, therefore, the Government made a motion asking to have paragraph 12 modified by moving forward the date when the prohibition against affiliation would expire if a decree against General Motors had not then been entered. Each year after that, as the new deadline came near, the Government made a new motion to have it extended, and year after year Ford consented to the extension. On December 31, 1945, the Government again moved to have the prohibition against affiliation extended, this time to January 1, 1947. Ford now resisted the motion, and on May 4, 1946, both Ford and CIT filed motions of their own. They asked the District Court to suspend sub-paragraphs (i) and (k) of paragraph 6 and sub-paragraph (d) of paragraph 7 and to modify sub-paragraph (e) of paragraph 6 on the ground that the practices enjoined by these provisions of the decree were not "held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty." Ford also moved that "an order be entered pursuant to paragraph 12 . . . that nothing therein shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company . . ." The District Court denied the motions by Ford and CIT and granted the Government's motion for extension of the prohibition against affiliation

"(ii) suspending each of the restraints and requirements contained in the remaining sub-paragraphs (a), (b), (c) and (g) of paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining sub-paragraphs, and suspending each of the restraints and requirements contained in sub-paragraph (b) of paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its subsidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement, act or practice prohibited to Respondent Finance Company by said sub-paragraph (b) of paragraph 7;

"(iii) Suspending the restraints of sub-paragraph (d) of paragraph 7 of this decree as to Respondent Finance Company, in the event that the restraints of sub-paragraph (i) of paragraph 6 of this decree are suspended as to the Manufacturer.

"(4) The right of the respondents or any of them to make any application for suspension of any provision of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted.

"In the event that at any time prior to the date when General Motors Corporation has permanently divested itself of all ownership and control of and interest in General Motors Acceptance Corporation, General Motors Acceptance Corporation shall make available to dealers of General Motors Corporation in any area a finance charge, on all or any class of automobiles sold by dealers of General Motors Corporation, less than the finance charge then generally available to dealers of the Manufacturer within such area, nothing in this decree shall prevent the Manufacturer from making, and the Manufacturer may make, adjustments, allowances or payments to or with all of its dealers in such area who agree to reduce to an amount approved by the Manufacturer (but not less than that then made available by General Motors Acceptance Corporation) the finance charges which such dealers of the Manufacturer in such area receive from any class of retail purchasers of automobiles, provided that such adjustments, allowances or payments shall not discriminate among such dealers in such area."

to January 1, 1947. The present appeals followed. Although the particular extension of paragraph 12 appealed from has expired, the equity suit against General Motors has not yet been set down for trial and the Government's motion for a further extension has been held in abeyance pending the outcome of these appeals. It is not a moot question therefore whether the District Court properly granted the extension to January 1, 1947. See *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U. S. 433, 452; *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U. S. 498, 514-16.

[*Charge to the Jury*]

The restraints imposed against Ford by sub-paragraphs 6 (e), 6 (i), 6 (k) and 7 (d) must survive the outcome of the conviction against General Motors if the language of the trial judge's charge to the jury in the criminal prosecution of General Motors can fairly be equated with the language of those sub-paragraphs. If, on the other hand, the judge's charge falls short of holding illegal what those sub-paragraphs proscribed, appellants are entitled to a suspension of sub-paragraphs 6 (i), 6 (k) and 6 (d) and a modification of sub-paragraph 6 (e).

First, then, to summarize the contents of these provisions of the decree.[2] Sub-paragraph 6 (i) precludes Ford from arranging with CIT or any other finance company "that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize" the finance company. Sub-paragraph 6 (k) provides that "the Manufacturer shall not recommend, endorse, or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public . . ." Sub-paragraph 7 (d), the counterpart of 6 (i), is directed against CIT. Sub-paragraph 6 (e) restrains Ford from establishing "any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers" not equally available to any other finance company. Modification of this sub-paragraph is asked only to the extent necessary to permit them freedom to act in a manner otherwise permissible, if suspension of sub-paragraphs 6 (i), 6 (k) and 7 (d) is granted.

[2] Their full text is as follows:

"[6.] (e) Except as provided by sub-paragraphs (j) and (k) of this paragraph 6,

"(i) the Manufacturer shall not establish any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility or privilege extended by the Manufacturer pursuant to such practice, procedure or plan if such service, facility or privilege or a service, facility or privilege corresponding thereto, is not made available upon its written request to any other finance company upon substantially similar terms and conditions; and

"(ii) so long as the Manufacturer shall continue to afford any service, facility or privilege not otherwise specifically referred to in this decree to Respondent Finance Company or any other finance company or companies, it shall not refuse to afford similar or corresponding services, facilities or privileges upon substantially similar terms and conditions and upon written request to any other finance company for the purpose of giving Respondent Finance Company or any other finance company or companies a competitive advantage in obtaining the patronage of dealers; provided that it shall not be a violation of this decree for the Manufacturer to afford such service, facility or privilege only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6 or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer;

"the written request shall specify in each instance the particular service, facility or privilege desired;

. . . .

"[6] (i) The Manufacturer shall not, except in each instance upon written request of the dealer or prospective dealer, arrange or agree with Respondent Finance Company or any other Finance company that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize Respondent Finance Company or such other finance company; provided, however, that it shall not be a violation of this decree for the Manufacturer to assist any dealer or prospective dealer, because of said dealer's or prospective dealer's financial situation or requirements, by joint conference with him and a representative of a particular finance company, to obtain special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) from the particular finance company and, in part consideration of such special facilities or services, for such dealer or prospective dealer to arrange to do business with such finance company on an exclusive basis for a reasonable period of time as may be agreed between them;

. . . .

"[6.] (k) The Manufacturer shall not recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public;

This brings us to the trial judge's instructions, which, insofar as relevant, are fully set forth below.[3] Their plain effect is to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of "coercion," and other practices for which "persuasion," "exposition" or "argument" are fair characterizations. As a mere matter of interpreting language, the Government hardly challenges the fitness of the terms "persuasion," "exposition" or "argument," which the jury was charged were open to General Motors, to cover acts such as arranging for the presence of agents of both Ford and CIT with a view to putting the claims of CIT to a dealer or recommending, endorsing, and advertising CIT to a dealer. But all these acts were specifically forbidden Ford by the consent decree. The Government's insistence is that since the indictment charged that advertising, endorsement and recommendation violated the Sherman Law and since evidence was introduced to support the charge, the jury might have found General Motors and GMAC guilty of "coercion" at least partly on the basis of that evidence. But sub-paragraph 12 (a) (2) was not designed to authorize speculative reconstruction of the jury's process in reaching its verdict. It provided a definite standard for ascertaining what rules of law were at a future date to be made binding on a competitor of Ford. The rules which the trial judge formulated against General Motors were thereafter to be the rules of law against Ford. The trial judge used the word "coercion" to summarize practices which, if the jury found them to exist, would call for a verdict against General Motors. He used the words "persuasion," "exposition" and "argument" to describe conduct which, in common usage, is not "coercion" and therefore would not support such a verdict. Nothing in other portions of the judge's charge erases or blurs this line of distinction. The restraints imposed by the paragraphs appellants seek to have suspended are properly described by the terms "ex-

provided, however, that nothing in this decree contained shall prevent the Manufacturer in good faith:

"(1) From adopting from time to time a plan or plans of financing retail sales of new automobiles made by the Manufacturer or from time to time withdrawing or modifying the same;

"(2) From recommending to its dealers the use of such plans;

"(3) From advertising to the public and recommending the use of such plans.

. . . .

"7. The Respondent Finance Company:

. . . .

"(d) Shall not, except upon written request of the dealer or prospective dealer, arrange or agree with the Manufacturer that an agent of the Manufacturer and an agent of Respondent Finance Company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective dealer to patronize Respondent Finance Company; provided, however, that it shall not be a violation of this decree for Respondent Finance Company by joint conference with a dealer or prospective dealer and a representative of the Manufacturer to agree to furnish to such dealer or prospective dealer, because of his financial situation or requirements, special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) and in part consideration of such special facilities or services to arrange for the dealer or prospective dealer to do business with Respondent Finance Company on an exclusive basis for such reasonable period of time as may be agreed between them."

[3] "It is not unreasonable for the General Motors Company to have a finance company. It is not unreasonable for the General Motors Company to have contracts with its dealers for a year or to have a cancellation clause in them. They have a perfect right to have a finance company and to recommend its use. They have a perfect right to cancel a contract from their dealer as long as they are not performing any unreasonable act.

"They have a right to determine whom they will sell their cars to, and they have a right to determine whom they will not sell their cars to because cars are their product and they are their property and no law compels them to sell them to any man they don't want to sell them to; but that is not the charge in this case. The charge is not that by having difficulty in contracts in itself, these defendants did anything wrong; it is not charged here that to recommend the use of GMAC there is anything wrong; it is not charged here that cancellation for cause is anything wrongful; but the Government's theory in this case is irrespective of these contracts and independent of them and outside of them the conditions have been asserted that they, under the designation of those to the grand jurors unknown, the actions have been such that the possibility, the ability to cancel, the ability to refuse to renew a contract, have been used as clubs upon the dealers to force them to use GMAC and that these acts that are complained of were acts that were used to force the dealers to use GMAC, the Government insists that these acts inspired by that motive have been such as to result in cancellations that otherwise would not have occurred; in discriminations that would not otherwise have occurred in the shipment of cars in interstate commerce and in refusals to renew that would not otherwise have occurred,

position," "persuasion" and "argument." So long as these paragraphs remain in effect and so long as there is no comparable decree enjoining their substance against General Motors and GMAC, Ford and CIT cannot do without risk of violating the consent decree that which General Motors and GMAC are free to do. Only a lawyer who is obtuse or reckless would advise Ford and CIT that they could subject a dealer to "persuasion," "exposition" or "argument" without the hazard of contempt of the paragraphs under discussion. Thus the conditions have been fulfilled which entitled Ford and CIT to suspension of the restraints imposed by those terms of the decree.

[*Illegality of Practices*]

Quite apart from Ford's and CIT's consent to forego the opportunities outlawed by sub-paragraphs 6 (e), (i), (k) and 7 (d), the Government urges that a court of equity should refuse to suspend or modify them by claiming that the practices restrained by those paragraphs are in any event illegal under the Sherman Law. But since this has neither been admitted nor proven, and since ascertainment of illegality under the Sherman Law normally depends on the circumstances of a particular situation and the inferences they yield, the appellants have a right to insist that, so long as interdiction of these practices has not been decreed against General Motors, the Government be put to its proof. The lifting of the restraints imposed by the consent decree does not, of course, affect the liability of Ford for any violations of the Sherman Law that the Government may establish in court. Moreover, to the extent that such restraints may at some future date be imposed on General Motors, they will, by sub-paragraph 12a (3), equally fetter Ford.

[*Propriety of Extension of Ban Against Affiliation*]

There remains for consideration the question whether the District Court properly extended the prohibition against affiliation between Ford and a finance company. This was the sixth time that the Government had applied for extension. The equity suit begun more than six years earlier had not yet been brought to trial. The court was faced at the same time with a motion for suspension of the prohibition against affiliation which was made by appellants under the express provision of paragraph 12 reserving the right to such a motion. The court denied the appellant's motion and granted the Government's on the ground, (1) that the "time clause" of paragraph 12 was subsidiary to

and in the use of GMAC when it otherwise would not have been used.

"In other words, the Government has no right to complain, and it may not complain of the defendants' right to limit its sales of cars to persons whom it may select, its right to determine who it shall sell to, its rights to determine upon what terms it will sell, its right to pick its own dealers.

"It can only complain if the defendants do sufficient of these acts charged in the indictment as constitute duress upon the dealer to accomplish a result that would have otherwise not have been accomplished, and to make a dealer do something that he would not have done of his own free will.

"That, almost, is the question in this case—whether the dealer could act as a free man; whether he could act of his own free will.

"The defendants say:

" 'We never imposed any restrictions upon that freedom of action.'

"The Government says it did and there is that question. If it did—if the defendants did that sort of thing—and if it resulted in an unreasonable restriction and unreasonable restraint of interstate commerce, then you would have a right to find them guilty.

"If they did not do it, this lawsuit is at an end, and that is a question which you have got to decide.

"You know, you have heard of the terms:

"Exposition;

"Persuasion;

"Argument;

"Coercion.

"They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last.

"In Exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.

"By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.

"There is little advancement in his further progress, to argue.

"Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.

"All of these are proper.

"He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer.

. . . .

"You must remember that, after all, this coercion, if you find that coercion exists, then the ultimate question is: Has that resulted in unreasonable restraint of interstate commerce? And that is a question for you to determine from all of the evidence."

the "main purpose" of paragraph 12 which was "to provide that the test of the permanency of the bar against affiliation was to abide the outcome of the civil antitrust suit against General Motors Corporation," and (2) "That the purpose and intent of the decree will be carried out if Ford Motor Company is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Ford Motor Company from being placed at a competitive disadvantage. . . ."

The Government seeks to support these conclusions by insisting on a mechanical application of the decision in *Chrysler Corp. v. United States,* 316 U. S. 556, involving a parallel prohibition against Chrysler. The *Chrysler* case was decided on June 1, 1942. In the intervening years the factors of the problem have drastically changed. More than nine years have elapsed since the criminal prosecution against General Motors was concluded; what was at the time of the *Chrysler* decision a two-year delay in obtaining a civil decree against General Motors has now stretched into a ten-year delay. Even then, six and a half years ago, this Court characterized the District Court's finding that the Government had proceeded "diligently and expeditiously" as "markedly generous." 316 U. S. at 563. At that time the Court also found support for the District Court in the fact that "the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor." *Id.* at 564. But circumstances that were found extenuating on behalf of the Government two years after the entry of the decree are hardly compelling ten years afterward. While a showing that continuance of the bar against affiliation would cause competitive disadvantage may not, as a practical matter, unreasonably have been called for at a time when competition in the industry was completely suspended during the indeterminate period of war, the resumption of full-scale competition makes such a showing unnecessary. And this is unaffected by the fact that automobiles are still in short supply. The appellants agreed for a limited term to refrain from pursuing conduct which, in the absence of an adjudication that it was illegal, they were otherwise free to pursue and which General Motors has always been free to pursue. There has been no such adjudication and successive extensions of the term have expired. The crucial fact now is not the degree of actual disadvantage but the persistence of an inequality against which the appellants had secured the Government's protection. Yet the Government seeks a change in the express terms of the decree which would perpetuate that inequality. The Government has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated. If the Government seeks to outlaw possible arrangements by Ford with a finance corporation, it must establish its case in court against Ford as against General Motors and not draw on a consent which by its very terms is not available.

[*Judgment Reversed and Remanded*]

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of these cases.

[Dissenting Opinion]

Mr. Justice Black, dissenting.

The Court appears to accept the argument of petitioner that this consent decree must be treated as though it were a contract between private persons for purchase of an automobile. But a consent decree is not a contract. A consent decree in an antitrust proceeding like a decree entered after a contest must be treated as a judicial determination and order made in the public interest. *United States v. Swift & Co.,* 286 U. S. 106, 114-115. That means, I would suppose, that before the restraints in this decree are lifted, a showing should be made that such action would not tend to generate future violations of the antitrust laws. No such showing has been made here. As I see the case, modification of the decree under the circumstances shown will aid and encourage destruction of competition contrary to law. For so far as existing effective court restraints are concerned, modification will give Ford freedom to help the appellant finance companies crush their competitors.

Even though Ford and Commercial Investment Trust Corporation (C. I. T.) made no admission of the facts charged in the original complaint, the undenied allegations

of the bill were sufficient to support the decree's prohibition against future competition-destroying practices. *Swift & Co. v. United States,* 276 U. S. 311, 327. In very brief summary, those facts, so far as relevant to the view I take, are these:

Ford makes and sells about 25 per cent of all cars in the United States, Chrysler 25 per cent and General Motors 44 per cent. Ford and the others sell to dealers about four billion dollars' worth of cars yearly, requiring cash on delivery. The dealers then sell to retail customers. About 60 per cent of the retail sales are on credit. Dealers not permitted to sell other makes of cars are wholly dependent upon Ford's, G. M.'s or Chrysler's favorable treatment for their business lives. The dealer agencies are for one year, but the agency contracts can be canceled on short notice and without cause. The dealers are thus economic dependents of the company whose cars they sell. While there are about 375 independent finance companies, C. I. T. and its subsidiaries, appellants here, prior to entry of this court decree, furnished about 82 per cent of the money for Ford dealer purchases, and 70 per cent of that furnished for Ford retail purchases. The favored companies got this major percentage of Ford car loans because Ford supplied them with offices at its factories, kept them informed of sales, gave more liberal payment terms to its dealers who dealt with C. I. T., required dealers to keep their books and records open so that Ford could prevent transactions with other finance companies, sent Ford factory representatives with C. I. T. agents to help "persuade" dealers to do business with C. I. T., and required dealers who handled loans through others to make satisfactory explanations to Ford.

This Ford favored finance company, C. I. T., asks modification. One reason suggested for modification is that the C. I. T. group has lost a portion of Ford financing since the decree subjected them to competition with other finance companies. They complain of the decree not because it stifles competitive practice; quite the contrary, they complain because the decree infringes on C. I. T.'s monopolistic sanctuary.

In substance, the modifications requested are, (1) that Ford be permitted to acquire ownership, control, or an interest in a finance company; (2) that Ford be permitted to endorse, recommend, or advertise particular finance companies to its dealers; (3) that Ford be permitted to arrange with finance companies that its representatives go with agents of the favored company to dealers to "influence" those dealers to negotiate loans for themselves and retail purchasers only with the favored companies. Freedom to influence dealers would appear to offer a perfect opportunity for Ford and the favored finance companies to deprive Ford dealers and retail purchasers of all benefits in the way of low interest rates and liberal loan terms the dealers and retailers might otherwise obtain from competition among the hundreds of finance companies in the country. For it is sure, if the undenied allegations of the complaint be accepted, as they should be at this stage, that the economic power of Ford over its dealers is so great that dealers who desperately need Ford cars will be helpless to resist Ford's "influence" and "persuasion," whether legalistically called "coercion" or not. Due to Ford's power, what dealer could afford to draw nice distinctions between "persuasion" and "coercion"? I can hardly believe that the showing of an agreement between Ford and C. I. T. to return to their old methods of "persuasion" would fail to support a finding of unreasonable restraint of trade.

It must be remembered that Ford neither promised, nor is it required by this court's action, to refrain from using its overpowering influence to "persuade" its dealers in the same old way. Ford and C. I. T. rely here on no showing of an intent to abide by the antitrust law; they rely on the literal language of what they treat as a contract with government prosecutors. But government officers have no power, by contract or otherwise, to permit violations of the law, even should they attempt to do so, which in this case I do not think they did. Had General Motors been acquitted on the criminal charge of violating the antitrust laws, there would be merit in the contention of Ford that government officers should not insist on continuance of this injunction against Ford. General Motors was not acquitted, but was convicted under an indictment alleging the same type of economic pressure practices enjoined by this consent decree. And the trial judge charged the jury that they had "a right to find the Defendants guilty" if they found that the Government had "proved the acts beyond all reasonable doubt charged in this indictment."

True the court charged the jury that acts of mere "persuasion" were not enough, and that General Motors must have used its power "as a club to coerce." And the court explained dictionary differences in the abstract between "persuasion" and "coercion." But the jury was considering a concrete set of facts in which the language used by General Motors, in the abstract, might only amount to "persuasion," while the language plus General Motors' economic power might amount to "coercion." And the jury's verdict of guilty, viewed in the light of the court's charge, means to me that the persuasion plus economic power charged and proved in the *General Motors* case, which were in substance the identical acts and practices charged and enjoined in this case, showed "use of a club to coerce" in violation of the antitrust laws. I therefore agree with the finding of the District Court here in denying Ford's motion to modify, namely that the agreements, acts, and practices such as here enjoined constituted a proper basis for the general verdict of guilty in the *General Motors* case. Consequently, I think that the Government has fairly met the consent decree's condition with reference to the conviction of General Motors.

Nor do I believe that in the present state of the record this Court should lift the ban against Ford's acquisition of or affiliation with a finance company. The law prohibits acquisition by one corporation of the whole or any part of the stock of "another corporation . . . where the effect of such acquisition may be . . . to restrain . . . commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731-732, 15 U. S. C. § 18. There can be no doubt that affiliation between Ford and a certain group of finance companies will lessen the opportunity of other finance companies to compete for the automobile loan contracts both of dealers and retail purchasers. And where the volume of business as here involves 25 per cent of all automobile sales (and eventually 94 per cent) the tendency to monopoly is aggravated.

Ford relies upon allegations made in its motion to modify, to the effect that it will be competitively injured if denied an opportunity to affiliate with a finance company and to "persuade" its dealers to borrow from that company alone, so long as General Motors is allowed to "persuade" its dealers to borrow from a General Motors affiliate or subsidiary. But Ford has not proposed to the Court any legally allowable plan for affiliation, nor has it shown the Court that continuance of the decree will cause it to suffer a competitive disadvantage in the sale of cars. Failure of proof in these two respects was held an adequate ground for denying a motion of Chrysler Corporation to amend a decree precisely like this one. *Chrysler Corp. v. United States,* 316 U. S. 556, 564. We should take the same action in this case where the District Court specifically has found that Ford had failed to prove that continuance of the decree would subject Ford to a competitive disadvantage. Moreover, it is difficult to imagine how Ford could be suffering a competitive disadvantage in the sale of cars in today's famished car market. So far as this record shows, Ford would not lose the sale of a single car by leaving this decree as it is. And Ford does not rely on a desire to make a profit, secret or open, out of loans its dealers must obtain to pay Ford or loans retail purchasers must get to pay dealers. If Ford professed a desire to make loans as a finance company on open competition with other finance companies, that would be one thing. It is quite another to ask a court of equity to lift its ban in order that Ford may dictate loan terms for dealers and retail purchasers after Ford has sold the cars in the market. The only competitive disadvantage that this record reveals is that from which Ford dealers, Ford retail purchasers, and independent loan agencies will suffer when the modification of this decree gives Ford and C. I. T. the green light.

Furthermore, the Court's action here means that the *Chrysler* decree must be modified without the showing this Court required in the *Chrysler* case. And it means that future destruction of competition in automobile financing by Ford, Chrysler, and General Motors has the tacit approval of this Court. For if Ford should after today "affiliate" with C. I. T., or renew its "persuasion" of dealers, could it be expected that this Court would thereafter hold these other companies legally responsible, even if it should be thought that today's permitted conduct ran afoul of the antitrust law? Is it conceivable that if Ford now "affiliates" with C. I. T., Ford's "vested interest," acquired with this Court's tacit approval, would be taken from Ford by a federal court?

Much talk about refined distinctions in the court's charge in the *General Motors* case cannot create doubts as to the effect of the decision today. The result will be destruction of competition in automobile financing. Hereafter dealers and retail purchasers cannot depend on competition to keep interest rates at a fair level. Their sole hope for low interest rates and loans on liberal terms will be the spontaneous generosity of Ford, General Motors, and Chrysler. It may be that monopoly in automobile loans is a good thing, but the antitrust laws assume that competition is better.

I would affirm this judgment.

MR. JUSTICE RUTLEDGE concurs in this dissent.

MR. JUSTICE DOUGLAS joins in this opinion insofar as its protests against lifting the ban on Ford's acquisition of or affiliation with a finance company.

[¶ 62,326] B. B. Nelson v. George R. Reilly, et al.

In the California Appellate Court, Second District, Div. Three. Civil No. 16202. November 3, 1948.

Appeal from a judgment of the Superior Court of Los Angeles County.

Cartwright Antitrust Law

Conflict with Alcoholic Beverage Control Act—Later Legislation Controls.—If there is an irreconcilable conflict between the Cartwright Antitrust Law of 1907 and the provisions of the Alcoholic Beverage Control Act of 1935 which legalize fair trade contracts in the liquor industry, the later legislation must control. In a proceeding in mandamus to compel members of the State Board of Equalization to rescind a regulation of the board requiring liquor licensees to enter into fair trade contracts, a judgment dismissing the proceeding is affirmed. An issue as to the reasonableness and legality of the rule is held to have become moot on appeal from the judgment.

See the Cartwright Antitrust Law, Vol. 2, ¶ 8075, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7375.

For appellant: Leslie S. Bowden, Frank Mergenthaler.

For respondents: Fred N. Howser, Attorney General, Bayard Rhone, Deputy Attorney General.

SHINN, P. J.: Appellant, B. B. Nelson, filed his petition for a writ of mandate directed to the members of the State Board of Equalization, commanding them to rescind and set aside a certain regulation of the board, effective March 1, 1947, known as Amended Rule 99, which rule requires those licensed to sell whiskey or domestic brandy to enter into fair trade contracts for which provision is made by section 55.5 of the Alcoholic Beverage Control Act. (Stats. 1935, p. 1123; 2 Deering's Gen. Laws, Act 3796.) He alleged that he is duly licensed under the laws of the State of California to engage in the business of retailing intoxicating liquors and is so engaged, and that the said regulation is unreasonable, contrary to law and will, if enforced, cause him irreparable damage in that it will deprive him of the right to fix or establish the retail selling price of his merchandise. The general demurrer of the respondents to the petition was sustained without leave to amend and the proceeding was dismissed by judgment rendered June 23, 1947. Petitioner appeals.

[1] Appellant's attack upon the rule is based upon a state of the law which no longer exists. A premise from which his argument proceeds is that at the time the regulation was promulgated by the board, fair trade contracts of the type described in the rule were declared by section 55.5 of the control act to be lawful but were permissible only, whereas, by the rule they are made compulsory. Appellant contends that no authority had been or could be delegated to the board by the Legislature to enact regulations having the force of law which would require retail licensees to enter into and comply with fair trade contracts. The theory appears to be that such a regulation would not be within the policy

and purpose of the control act and that the Legislature alone had the power to require licensees to operate under fair trade contracts.

Section 55.5 declares that no contract relating to the sale or resale of any alcoholic beverage which bears the trademark, brand, or name of the producer or owner, and which is in fair and open competition with alcoholic beverages of the same general class produced by others, shall be deemed in violation of any law of the state by reason of provisions therein (1) that the buyer will not resell such alcoholic beverage except at the price stipulated by the vendor; (2) that the producer or vendee of the alcoholic beverage require, on the sale thereof to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee. Further provision is made respecting conditions under which alcoholic beverages may be resold without reference to the agreement, but such provisions are not here involved

Said amended rule 99 requires every manufacture, manufacturer's agent, wholesaler and rectifier, to file with the board copies of his fair trade contracts stating, as to whiskey and domestic brandy, the containers of which bear labels stating the brand or name of the owner or producer, (1) the minimum resale price to consumers; (2) the minimum retail price that any purchaser from the vendee shall charge at the retail to consumers; (3) any discounts offered. Sales are required to be made at not less than the stipulated prices. Other provisions of the rule are incidental to the foregoing provisions.

In 1947 (Stats. 1947, p. 1698) a new section numbered 55.6 was added to the control act, reading, in part, as follows: "All distilled spirits sold at retail shall be, and any other alcoholic beverage may be, sold pursuant to a contract executed under the provisions of Section 55.5 of this act. No licensee shall violate any of the provisions of said contract.

"Every distilled spirits manufacturer, brandy manufacturer, rectifier and wholesaler shall file and maintain with the board a price list showing the prices at which distilled spirits are sold to retailers by such licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier and wholesaler shall be made in compliance with the price list of such licensee on file with the board.

"The board may adopt such rules and regulations as it may determine to be necessary for the administration of this section."

Although prior to the enactment of section 55.6 appellant was conducting his business under fair trade contracts because of and pursuant to the rule in question, his duty now is derived from the statute. The fact that the rule imposes the same duty presents no question as to the powers of the board to adopt the rule. The objection that at the time his petition was filed it was not obligatory under the control act to operate under fair trade contracts raises only a moot question. Other provisions of the rule with relation to the statement of minimum resale prices to consumers, the prices to be fixed for resale to consumers, discounts offered, and the obtaining of permission for "close out" sales are not questioned by appellant and are obviously valid. They set up reasonable means for administration of the act and were properly adopted under the powers of the board to make rules and regulations such as it may deem necessary for that purpose.

[2] Although the principal question argued by appellant has become moot, and the appeal would be subject to dismissal on that ground, there is an additional point raised by him that should be disposed of. He argues that if rule 99 was otherwise valid, as the law stood prior to the enactment of section 55.6, the requirement for fair trade contracts would be invalid for the reason that it would be in conflict with the Cartwright Anti-Trust Law of 1907. (Stats. 1907, p. 984; 3 Deering's Gen. Laws, Act 8702.) It is claimed that price fixing agreements, such as those authorized by the control act, would be illegal under the Cartwright Law. We need not consider that question. If there is an irreconcilable conflict between the earlier legislation and the provisions of the control act which legalize fair trade contracts in the liquor industry, the later legislation must control.

The judgment is affirmed.

Wood, J., and Vallée, J., concurred.

[¶ 62,327] Tivoli Realty, Inc. v. Paramount Pictures, Inc., et al. I. B. Adelman v. Paramount Pictures, Inc., et al.

In the United States District Court for the District of Delaware. Civil Actions Nos. 1077, 1109. October 18, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Treble Damage Suit—Allegations of Violation of Prior Decree—Allegations of Injury to Public Interest.—In an action brought by a motion picture theatre owner against several major producers and distributors and certain theatre operating companies for treble damages for an alleged conspiracy to restrain trade and monopolize commerce in the distribution and exhibition of motion pictures with the intent and result of injuring plaintiff and the public interest, allegations that certain defendants by reason of their participation in the present alleged conspiracy are in violation of a decree entered in a prior antitrust suit must be stricken. A violation of a decree of another court is not, *per se,* a relevant issue in this proceeding, and such allegations could prejudice the defendants if they were compelled to answer. Allegations that defendants' acts have injured the public interest may not be stricken. A complaint under Sections 4 and 16 of the Clayton Act must not only allege damages occurring to the private party-plaintiff but also injuries resulting to public rights. Unless there are injuries to public rights, there can be no such violation of the antitrust laws as is necessary to sustain a private suit under Sections 4 and 16 of the Clayton Act. Allegations to the effect that defendants attempted to drive plaintiff out of business long before the period for which plaintiff claims damages may not be stricken. While there may be no causal connection between the acts described in the allegations and the injury resulting to plaintiff, yet the allegations serve to provide background material which is helpful to the court, and does not prejudice the defendants. Allegations to the effect that by reason of the unlawful conspiracy and course of action the plaintiff was compelled to enter into certain agreements with defendants with a resultant loss of profits may not be stricken, inasmuch as they raise a substantial question of law as to whether plaintiff by entering into the agreements is *in pari delicto,* or whether there was economic coercion against plaintiff.

See the Sherman Act annotations, Vol. 1, ¶ 1640.121, and the Clayton Act annotations, Vol. 1, ¶ 2024.19, 2036.76.

For plaintiffs: Clair J. Killoran, Killoran & Van Brunt, Wilmington, Delaware; Thurman Arnold, Arnold, Fortas & Porter, Washington, D. C.

For defendants: Caleb S. Layton, Richards, Layton & Finger; Ayres J. Stockley, Hastings, Stockley, Walz & Wise; Hugh M. Morris, S. Samuel Arsht, Morris, Steel, Nichols & Arsht; Clarence A. Southerland, Southerland, Berl & Potter, all of Wilmington, Delaware; Albert C. Bickford, Simpson Thacher & Bartlett, New York, New York.

[*Nature of Action*]

RODNEY, D. J.: These two actions are treble damage suits brought under the Sherman Anti-Trust Act and the Clayton Act[1] against several major motion picture producers and distributors, certain of their subsidiaries, and certain theatre operating companies in Texas and New Mexico and in which plaintiffs also seek injunctive relief. The defendants in each suit are identical and the plaintiff in C. A. 1109 is alleged to be the principal stockholder and president of the plaintiff in C. A. 1077.

[*Motions to Strike*]

The defendants in each action have moved under Rule 12 (f)[2] to strike certain allegations in the complaint upon the grounds of immateriality, impertinency and prejudice. Inasmuch as substantially identical questions are raised by the two motions and the parties in both actions are represented by the same counsel, the two actions were consolidated for argument upon the two 12 (f) motions.

Generally, each complaint alleges that the several defendants have been and are en-

[1] 15 U. S. C. A. Secs. 1, 2, 15, 22 and 26.

[2] Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723(c).

gaged in a nation-wide conspiracy to restrain trade and commerce in the distribution and exhibition of motion pictures and to monopolize such trade and commerce with the intent and result of injuring plaintiff and the public interest.

In C. A. 1077 the plaintiff complains more specifically of the conspiracy and unlawful course of action among the defendants in the distribution and exhibition of motion pictures in Dallas, Texas, all being a part of the alleged nation-wide conspiracy among the defendants. This alleged conspiracy and unlawful course of action in Dallas is averred to have resulted in illegal discriminations against plaintiff, which built and owns a theatre in Dallas, and in depriving plaintiff of its right to engage in the exhibition of motion pictures in Dallas free of illegal restraints.

In C. A. 1109 substantially the same allegations are made with respect to Houston, Texas and the plaintiff's theatre and business in that city. In C. A. 1109, however, there are additional questions raised by the motion to strike which are not raised in C. A. 1077, and these questions, and the facts giving rise to them, will be hereinafter considered.

Motions to strike are rather strictly considered and have often been denied even when literally within the provisions of Rule 12 (f) where there is no showing of prejudicial harm to the moving party. *Vernor's Ginger Ale Bottling Corp. v. Hire's-Ideal Bottling Co.*, D. C. Neb., 1948, 11 Fed Rules Serv. 12f.21, Case 4; *American Machine and Metals, Inc. v. De Bothezat Impeller Co., Inc.*, D. C. S. D. N. Y. 1948, 11 Fed. Rules Serv. 12f.12, Case 5; *Contogeorge v. Spyron*, D. C. N. Y., 1946, 7 F. R. D. 223, 229; *Klages v. Cohen et al.*, D. C. N. Y., 1947, 7 F. R. D. 216, 217; see cases cited in 2 Moore's Federal Practice (2d) Ed.) p. 2318. Nor have the courts been willing to determine disputed and substantial questions of law or the legal consequences of pleadings upon a motion to strike. *Klages v. Cohen et al., supra; O'Reilly v. Curtis Publishing Co.*, D. C. Mass. 1938, 22 F. Supp. 359, 361; *Burke v. Mesta Machine Co.*, D. C. Pa., 1946, 5 F. R. D. 134, 139.

[*Violation of Prior Decree*]

The defendants urge first that there should be stricken from both complaints certain allegations concerning the case of *Interstate Circuit, Inc. v. United States*, 1938, 306 U. S. 208, and the decree of the lower court entered therein. In C. A. 1077 these allegations are contained in paragraph 51 of the complaint; in C. A. 1109 they are found in paragraphs 20 and 67 of the complaint.

Paragraph 51 of the C. A. 1077 complaint alleges that certain of the defendants by participating in the conspiracy and course of action described in the complaint are in violation of a decree entered in the cited *Interstate* litigation. I am of the opinion that such paragraph must be stricken for the reason that a violation of a decree entered in some independent action seems immaterial to the suit at bar and could prejudice the defendants if they be compelled to answer such allegations. If the paragraph had merely alleged the entry of the decree against certain of the defendants and set out the conduct enjoined thereby, thus constituting merely the background or historical material of value in the consideration of the present controversy, then the allegation might have been good but a violation of a decree of another court is not, *per se*, a relevant issue in this proceeding.

Paragraphs 20 and 67 of the complaint in C. A. 1109 allege, respectively, the entry of a decree against the defendants in favor of the United States with a description of the conduct enjoined thereby and the violation of such decree by certain of the defendants. Paragraph 67, alleging a violation of the decree, must be stricken for the same reason that paragraph 51 of the complaint in C. A. 1077 will be stricken, as above indicated. The latter two paragraphs are substantially identical.

The defendants' motion with respect to paragraph 20 of the complaint in C. A. 1109, however, must be denied. That paragraph merely alleges the entry of the decree and the conduct enjoined thereby. While it may be true that the entry of the decree antedated the establishment of the plaintiff's business (as to which I express no opinion), yet the matter furnishes background material as to the nature, extent and character of the alleged conspiracy. While not concerning a similar action, see *Steckel v. Beeghly*, D. C. Ohio, 1948, 8 F. R. D. 116. This type of action usually requires some background or setting and it would seem that the "short and plain statement" of Rule 8 (a)[3] is hardly sufficient without some explanatory remarks.

[3] 28 U. S. C. A. following Sec. 723(c).

See *Perrott v. United States Banking Corp.*, D. C. Del., 1944, 53 F. Supp. 953, 956; 2 Moore's Federal Practice (2d Ed.), p. 2319; *Irving Berlin, Inc. v. Anziano*, D. C. N. Y., 1944, 4 F. R. D. 33, 34; *Camfield Mfg. Co. v. McGraw Elect. Co.*, D. C., Del., 1947, 70 F. Supp. 477, 481. The Circuit Court of Appeals for this (Third) circuit has well recognized the burden upon a plaintiff in presenting this type of case and the necessity for showing a concert of action among defendants. *William Goldman Theatres v. Loew's, Inc.*, 3 Cir., 1945, 150 F. 2d 738, 743. In order to understand fully the nature, character and extent of the action complained of, I think the presence of background or historical matter in these two complaints is not objectionable unless it is prejudicial to the adverse party.

I am of the opinion that the allegations in paragraph 20 of the complaint in C. A. 1109 are not prejudicial to the defendants and need not be stricken. Allowance of a motion to strike is within the discretion of the court under the permissive language of Rule 12 (f), *Sinkbeil v. Handler*, D. C. Neb., 1946, 7 F. R. D. 92, 98, and whether the allegations are immaterial or impertinent is a matter I do not determine at this time since I think they are not prejudicial.

Pleadings in this court are not given to juries and thus are in effect addressed only to the trial judge. If at the trial evidence of the allegations in question is deemed to be immaterial, it may be withheld from the jury, *Sinkbeil v. Handler, supra*, or if the allegations would be prejudicial before a jury they may likewise be withheld. *Sinaiko Bros. v. Ethyl Gasoline Corp.*, D. C. N. Y., 1942, 2 F. R. D. 305, 306; see *Minneapolis Gasoline & F. Co. v. Ethyl Gasoline Corp.*, D. C. N. Y., 1941, 2 F. R. D. 307.

Moreover, plaintiff may be entitled by Section 5 of the Clayton Act, 15 U. S. C. A. Sec. 16, to treat a final judgment or decree such as the one rendered in the *Interstate* litigation as *prima facie* evidence in this action against those defendants here who were defendants in such prior case, and it has been held that in order to plead such a *prima facie* case the plaintiff must plead the result of the prior litigation. *Sinaiko Bros. v. Ethyl Gasoline Corp., supra.*

The recent Supreme Court opinion in *Federal Trade Comm'n. v. Cement Institute et al.*, 1948, 333 U. S. 683, 703-706, lays down broad boundaries for the *admission of evidence* in a somewhat related field, but such case is no direct authority for determining which matters should or should not be stricken from a complaint. An even more recent decision has granted a motion to strike certain historical or background allegations of a complaint even though evidence of the matters stricken might be admissible at trial. *Knight v. B. & O. Ry. Co.*, D. C. N. Y., 1948, 11 Fed. Rules Serv. 12f.21, Case 3.

Defendants also move to strike paragraphs 52 and 61 of the complaint in C. A. 1077 and paragraph 77 of the complaint in C. A. 1109. Paragraph 52 alleges that the defendant Paramount has been and is acting in violation of a decree entered by a United States District Court in the case of *United States v. Paramount*, D. C. N. Y., 1947, 70 F. Supp. 53, and the latter two paragraphs allege that the producer-distributor defendants have engaged and are engaging in arbitrary, collusive and discriminatory practices described in the Opinion, Findings of Fact, Conclusions of Law and Decree of such court in the same case, reported at the above citation and also at 66 F. Supp. 323.

I believe that these three paragraphs are objectionable for the reasons indicated with respect to paragraphs 67 of the complaint in C. A. 1109 and 51 of the complaint in C. A. 1077, viz., immateriality and prejudice. The three paragraphs under consideration do not allege the entry of the decree and describe the conduct enjoined thereby, but rather they merely allege that defendants, or certain of defendants, have been and are acting in violation of and contrary to such decree. I believe this to be immaterial and prejudicial and therefore the paragraphs must be stricken.[4]

[*Injury to Public Interest*]

Defendants next object to certain allegations of both complaints which in general aver that defendants' acts have also injured the public interest and other unnamed independent exhibitors, not parties to these actions, and object to prayers which ask for injunctive relief in favor of such unnamed

[4] Whether the *Paramount* decree is final within the meaning of Section 5 of the Clayton Act, 15 U. S. C. A., Sec. 16, need not be determined in view of my holding that each of these three paragraphs is prejudicial. In any event it would seem that the question of finality in the *Paramount* decree is a disputed and substantial question of law which, under the authorities hereinbefore cited, this court will not determine upon a motion to strike.

exhibitors. Defendants contend that a private litigant has no right to sue primarily on behalf of the public or anyone other than himself and that the only relevant matter in such a suit is whether there is a violation of the antitrust laws and a causal connection between that violation and the plaintiffs' business or property, and the amount of damages, if any, resulting therefrom to the plaintiff. With such contention this court is in accord.

Section 4 of the Clayton Act[5] provides that any person "injured in his business or property *by reason of anything forbidden in the antitrust laws*"[6] may sue therefor and shall recover threefold the damages *sustained by him.* Section 16 of the Clayton Act[7] provides for equitable relief in the form of an injunction for any person upon substantially the same conditions.

It is well settled that a person suing under either of the two cited sections of the Clayton Act cannot have relief unless he pleads and proves a pecuniary loss or injury to his business or property.[8] The two sections are not for the benefit of the public as such and do not give a right to sue for injuries resulting solely to the public or to others.[9] A plaintiff recovers under either of the two sections only for his own injuries or losses. Consequently, that portion of the prayers for relief in each of the instant complaints which seeks relief for other independent exhibitors must be stricken for the reason that it is immaterial and prejudicial.

But, as the defendants contend, it is necessary to determine whether there is a violation of the antitrust laws. Such a violation is an express condition upon the right of a private person to sue under either section 4 or section 16 of the Clayton Act and it is well settled that such a violation is essential.[10] That the antitrust laws are a matter of public interest and were enacted as a matter of public policy to protect the public has long been recognized. *Standard Oil Co. v. United States,* 1911, 221 U. S. 1, 50-58; *Apex Hosiery Co. v. Leader,* 1940, 310 U S. 469, 492-500; see Hodges, *Antitrust Act and the Supreme Court* (1941), pp. 1-6. Obviously, therefore, a complaint stating a good claim under either section 4 or section 16 of the Clayton Act must not only allege damages occurring to the private party-plaintiff but also injuries resulting to public rights. *Abouaf v. J. D. & A. B. Spreckels Co.,* D. C. Calif. 1939, 26 F. Supp. 830, 832; *Neumann v. Bastian-Blessing Co.,* D. C. Ill. 1947, 70 F. Supp. 447, 449. Unless there is a violation of public rights, there can be no such violation of the antitrust laws as is necessary to sustain a private suit under sections 4 and 16 of the Clayton Act. For this reason, therefore, I deny the defendants' motions to strike those allegations of the complaint which aver injuries to the public and to other unnamed exhibitors.

With respect to C. A. 1109, the defendants move to strike certain other allegations in the complaint. Their motion is directed first toward allegations in paragraph 17 having reference to proceedings instituted in 1934 by the plaintiff before the Code Authority of the N. R. A. Defendants contend that such allegations are improper (1) because the N. R. A. was held unconstitutional and hence all proceedings under it are void, (2) because a decision by the said Code Authority is not the type of judgment or decree which plaintiff can take advantage of as *prima facie* evidence under section 5 of the Clayton Act[11] and (3) because such proceedings occurred long before the period for which plaintiff claims damages and are thus immaterial. While all that defendants contend in this connection may be true, I am of the opinion that the allegations should be retained for they furnish background and historical data by which the court can obtain a fuller understanding of the complaint. Of course, the proceedings and any decision rendered therein will not be treated as conclusive or as having any legal effect, but I do not perceive of any prejudice running against

[5] 15 U. S. C. A. Sec. 15.

[6] Italics supplied throughout unless otherwise indicated.

[7] 15 U. S. C. A. Sec. 26.

[8] *Northwestern Oil Co. v. Socony-Vacuum Oil Co.,* 7 Cir., 1943, 138 F. 2d 967, 970, cert. den. 321 U. S. 792; *Maltz v. Sax,* 7 Cir., 1943, 134 F. 2d 2, 5, cert. den. 319 U. S. 772; *Westmoreland Asbestos Co. v. Johns-Manville Corp.,* D. C. N. Y., 1939, 30 F. Supp. 389, 391, aff'd on rehearing 1940, 32 F. Supp. 731; *Mid-West Theatres Co. v. Co-operative Theatres,* D. C. Mich., 1941, 43 F. Supp. 216, 220; *Westor Theatres v. Warner Bros. Pictures,* D. C. N. J., 1941, 41 F. Supp. 757, 763.

[9] *Maltz v. Sax,* 7 Cir., 1943, 134 F. 2d 2, 5, cert. den. 319 U. S. 772; *Westor Theatres v. Warner Bros. Pictures,* D. C. N. J. 1941, 41 F. Supp. 757, 763.

[10] *Neumann v. Bastian-Blessing Co.,* D. C. Ill., 1946, 71 F. Supp. 803, 805; *Weinberg v. Sinclair Refining Co.,* D. C. N. Y., 1942, 48 F. Supp. 203, 205; *Westor Theatres v. Warner Bros. Pictures,* D. C. N. J., 1941, 41 F. Supp. 757, 763; *Virtue v. Creamery Package Co.,* 1913, 227 U. S. 8, 24.

[11] 15 U. S. C. A. Sec. 16.

the defendants by allowing the allegations to remain and therefore the defendants' motion to strike paragraph 17 is denied.

[*Causal Connection*]

The defendants also seek to have stricken certain allegations in the complaint in C. A. 1109 to the effect that defendants attempted to drive plaintiff out of business long before the period for which plaintiff claims damages. While it may be true that a causal connection between the wrongful acts of defendants and the injury to plaintiff for which he sues is necessary, and while there might be no such causal connection between the acts described in the allegations under consideration and the injury, if any, resulting to plaintiff, yet the allegations do serve to provide background material which is helpful in giving the court a fuller understanding of the complaint and they do not prejudice the defendants. It must be remembered that plaintiff must plead and prove a violation of the antitrust laws in order to recover and the matters contained in the allegations under consideration can be helpful in aiding the court to understand the complaint in this respect. The defendants' motion to strike such allegations in paragraphs 11 to 16, inclusive, 18 to 21, inclusive, and 24 to 27, inclusive, of the complaint in C. A. 1109 is denied.

The defendants finally object to paragraphs 22 to 31, inclusive, of the complaint in C. A. 1109 on the grounds that they do not state a good cause of action and are immaterial, impertinent and prejudicial. In substance, these paragraphs allege that by reason of defendants' unlawful conspiracy and course of action the plaintiff was compelled to lease his theatres in Houston and Fort Worth to defendant Interstate for 10 years under an agreement whereby Interstate jointly operated them with its own theatres in the same cities; that by the terms of the agreement plaintiff could obtain a one-half interest in any theatre acquired by Interstate within a certain radius of the leased theatres during the ten-year period upon payment of one-half the cost thereof; that three such theatres were acquired and plaintiff paid one-half the cost of each; that under the agreement plaintiff could, at his option, buy Interstate's interest in any such theatres or sell his own interest in such theatres at the termination of the agreement; that the total price fixed for either party's one-half interest in each of the three theatres was $529,207.00; that plaintiff was able to purchase Interstate's one-half interest at such price but knew that because of the alleged unlawful conspiracy and course of action among defendants he would not be able to operate the theatres profitably; and that for these reasons he elected to sell his one-half interest to Interstate rather than buy Interstate's one-half interest with a resultant loss of profits to plaintiff in the amount of $500,000.00.

Defendants contend that if Interstate was a party to the conspiracy and unlawful course of action as alleged, plaintiff by entering into the agreement with it is *in pari delicto* with all parties to such unlawful action and is therefore precluded from recovering any damages based upon such agreement and also cannot recover because an illegal contract cannot in any way be made the basis for a recovery. The defendants contend that if, on the other hand, there was no participation in a conspiracy by Interstate as alleged, the contract is valid and plaintiff is bound by its terms and has no complaint, since he freely exercised his election pursuant to the contract.

Plaintiff, of course, argues that under such circumstances as here existed, where there was allegedly economic coercion against the plaintiff, he could not be *in pari delicto,* and relies upon such cases as *Ring v. Spina,* 2 Cir., 1945, 148 F. 2d 647.

The contentions of the parties obviously raise a substantial question of law which I do not feel should be determined summarily upon a motion to strike. The authorities hereinbefore cited indicate that courts generally are unwilling to decide such questions upon a motion to strike, and the magnitude of the question herein raised illustrates the soundness of such reluctance.

Moreover, these allegations do provide background material for a better understanding of the complaint and I do not discern any prejudice that might run against the defendants by allowing them to remain in the complaint. The defendants' motion in this respect is therefore denied.

In summary, I grant the motions of defendants to strike paragraphs 51, 52 and 61 of the complaint in C. A. 1077, paragraphs 67 and 77 of the complaint in C. A. 1109 and that portion of the prayers for relief in each complaint which seeks relief for other unnamed independent exhibitors. The defendants' motions are denied in all other respects.

[¶ 62,328] Florence B. Bigelow, et al. v. RKO Radio Pictures, Inc.

In the United States Court of Appeals for the Seventh Circuit. No. 9690. November 23, 1948.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Sherman Antitrust Act

Violation of Decree—Contempt of Court—Ownership of Theatres.—A decree enjoining defendant motion picture distributor from delaying the exhibition of any motion picture in the Chicago exchange territory by creating dead or waiting time between the conclusion of the first run of a picture in any theatre owned, leased or operated by any defendant and the next succeeding run of the same picture was held violated by acts of the defendant herein. On appeal, the finding of the lower court that the defendant operated the theatre in question is held not clearly erroneous, and the contempt judgment is affirmed. The finding was properly made in reliance upon the testimony and judicial admissions made in the original case, which reflected the realities of that case, rather than the fictional corporate set-up produced for the first time in the contempt proceedings.

See the Sherman Act annotations, Vol. 1, ¶ 1620.101, and the Clayton Act Annotations, Vol. 1, ¶ 2036.15.

Affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, reported at ¶ 62,242.

Before SPARKS, Chief Judge, MINTON, Circuit Judge, and SWYGERT, District Judge.

MINTON, C. J.: In one aspect or another of this case, the parties to this appeal have been here twice before. The previous opinions are reported in 150 F. 2d 877, reversed and the District Court affirmed in 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652; and in 162 F. 2d 520, certiorari denied, 332 U. S. 817, 68 S. Ct. 158, 92 L. Ed. 79. In the latter case, known as the equity case, a decree was entered against the respondent-appellant. In the proceedings now before us, the respondent was charged with and found guilty of contempt of court for a violation of that decree. From a judgment for contempt, the respondent has appealed.

The pertinent part of Section VII of the decree in the equity case is as follows:

> "VII. That defendants * * * their respective officers, directors, agents, servants, employees and all persons acting or claiming to act on behalf of them or any of them, be and they are enjoined from delaying the exhibition of any motion picture in the Chicago Exchange territory by permitting a run of such picture longer than two weeks on a first run *in a theatre owned, leased or operated by any defendant* * * * or by creating dead or waiting time between the conclusion of the first run of a picture *in any such theatre* in such territory and the next succeeding run of said picture * * *." (Italics supplied.)

The respondent licensed the picture "Tycoon" to the Palace Theatre in the Chicago Exchange territory and refused to license it to anyone else for twenty-three days after its first run was concluded by the Palace Theatre. Dead or waiting time of twenty-three days was thus created by the respondent. This was a violation of the court's order if the respondent owned, leased, or operated the Palace Theatre. If the respondent did, as the District Court found, operate the Palace Theatre, it is conceded that the other elements necessary to a finding of contempt are present.

The original suit was for treble damages and an injunction against the respondent and others for a violation of the Sherman Anti-Trust Act. The defendant there and respondent here, RKO Radio Pictures, Inc., was the only corporation of the RKO hierarchy of corporations that was a party to that suit. In his opening statement to the jury at the time of the damage suit, counsel for the respondent said:

> "Here in Chicago they (respondent) do not have any theatres, except that RKO has two theatres in Downtown Chicago, the Palace Theatre and the Grand Theatre."

The District Manager of the respondent, testifying at that trial, said:

> "We have our own theatres in the Loop."
>
> "Q. You sold your first Loop release to your own theatres?"
>
> "A. The Palace Theatre."
>
> * * *

"A. All I know is that our Company that our District Manager for the Theatre Department is operating the theatre * * *."

The Western Division salesman for the respondent testified on the original hearing that the Palace Theatre was owned by RKO.

When the original case was appealed to the Supreme Court, the record there induced Chief Justice Stone to state in his opinion:

"Respondent RKO (the respondent here) also owns two large first-run theatres in the Chicago Loop."

This statement was never challenged.

When the second appeal was here, counsel for the respondent said in his brief, "RKO operates two first-run theatres in the Loop," and further that, "The evidence showed that at the time of the jury trial two of the defendants, B&K and RKO, operated all of the so-called first run theatres in the Loop." The Palace was one of them. In the injunction suit, the respondent's counsel also stated that RKO owned the Palace Theatre.

The branch manager of the respondent's Chicago office testified on the original hearing:

"We don't sell the Balaban & Katz theatres downtown. We have our own theatres."

"Q. All right. Where do you sell them first?"

"A. We sell them to the Palace and Grand Theatres; that is RKO theatres."

* * *

"Q. How many first run houses are there in the City of Chicago?"

"A. Well, we have the Palace, the RKO Palace, and then there is the RKO Grand, to whom we sell our products first run."

* * *

"Q. Well, the Palace and Grand are theatres which are owned by your company?"

"A. That is right, sir."

In the contempt proceedings he testified as follows:

"I do not know who the operator of those theatres is.

* * *

"Although I do not know who operates the RKO Palace and Grand Theatres, I do know that some company in the group of RKO companies operates these theatres. I do not know the name of the individual corporation, but I know it as RKO Theatres, Incorporated. I know nothing about the corporate relationship between that company and RKO Radio Pictures, Inc."

At the contempt hearing, it was stipulated that the respondent is a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation; that another wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, namely, RKO Theatres, Inc., owns all the stock of the Chicago Orpheum Company, and that the Chicago Orpheum Company leases the Palace Theatre from the Bismarck Hotel Company. The sum of this part of the stipulation is that RKO Radio Pictures, Inc. did not own or lease the Palace Theatre. The lease was to the Chicago Orpheum Company from the Bismarck Hotel Company. Operation of a theatre would seem to require actual possession thereof as well as exhibition of pictures to the public and collection therefor. Whether the respondent had a hand in these activities, that is, whether it operated the theatre, does not appear.

It was also stipulated who the officers of these corporations were. From an examination of this much of the stipulation, it is apparent that the officers and directors of these corporations interlocked to a very large extent. The control through stock ownership and interlocking officers and directors of these affiliates is in the hands of the same individuals.

From the above evidence the District Court found that the respondent operated the Palace Theatre and concluded that its operations were in violation of the District Court's decree.

It seems to us that it comes a little late for the respondent to say to the District Court that it did not operate the Palace Theatre. The admissions of record of counsel for the respondent and of witnesses in responsible positions with the respondent made no distinction between the corporate entities of the RKO hierarchy. The case was tried with only RKO Radio Pictures, Inc., the respondent here, as the only defendant from the corporate group. The court at all times understood that the respondent alone was referred to by the witnesses and counsel when they referred to RKO; and the case was tried upon the theory that the respondent was the only RKO corporation involved, and that the respondent was operating the Palace Theatre.

The respondent now for the first time drags from the closet the bare bone skeleton of an elaborate corporate structure to show to the court that not the respondent but another wholly-owned subsidiary of the corporation, of which the respondent is also a wholly-owned subsidiary, operates the Palace Theatre, nothwithstanding common control of the entire corporate pyramid through stock ownership and interlocking officers and directorates. The contention that under such circumstances the right hand does not know what the left hand is doing is a bit specious. The District Court, which was thoroughly familiar with the respondent's appearance in the other proceedings, very properly looked past this ghostlike corporate figure, and, viewing the matter realistically, recognized that after all one and the same group was in control and operation of the Palace Theatre.

The respondent was the old familiar face the court had in mind when it drafted its decree in which it intended to cover the respondent as an operator of the Palace Theatre. Just as the court believed when it entered its decree, "It would be to subordinate reality to legal form" to hold that the respondent did not operate the Palace Theatre. See *United States v. Reading Co.*, 253 U. S. 26, 61, 40 S. Ct. 422, 64 L. Ed. 760.

It was the District Court's right and duty to protect its decree and to attend to its enforcement against the parties in the guise in which they appeared to contest the entry of the decree. Relying, as the court did, upon the testimony and judicial admissions made in the original case which reflected the realities of that case, rather than the fictional corporate set-up produced for the first time in the contempt proceedings which at best proved merely that the defendant did not own or lease the Palace Theatre, the court's finding that the respondent operated the Palace Theatre was not clearly erroneous. The judgment of the District Court is affirmed.

[¶ 62,329] United States v. Abrasive Grain Association, Norton Company, American Abrasive Company, The Carborundum Company, The Exolon Company, General Abrasive Company, Inc.

In the United States District Court for the Western District of New York. Civil No. 3672. November 16, 1948.

Sherman Antitrust Act

Consent Judgment—Combinations in Restraint of Trade—Acts Enjoined.—A consent judgment entered in an action against an abrasive grain manufacturer and five corporate members charging a combination and conspiracy to fix prices in restraint of trade and commerce enjoins the defendants from entering into combinations or agreements with manufacturers of artificial abrasive grain to fix periods of time for which offers and obligations to buy and sell shall be made or entered into, to fix or maintain prices or other terms of sale, to establish or adhere to price lists, and to classify purchasers or distributors with the purpose or effect of affecting prices paid by them or of discrimination in respect to them. When grain is sold on a uniform delivered price basis, each defendant manufacturer is ordered to grant to the purchaser the option of taking delivery at the place either of manufacture or storage of said grain at its delivered price less the actual cost of the mode of transportation which such manufacturer would normally use from the actual shipping point if such option were not exercised. The defendant association is ordered to abolish its code of fair competition, and the manufacturer defendants are ordered to issue individual price lists on the basis of independent review of costs and prices.

See the Sherman Act annnotations, Vol. 1, ¶ 1530.10.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; George L. Grobe, United States Attorney; Sigmund Timberg, Manuel M. Gorman, Gerald J. McCarthy, Richard B. O'Donnell, Special Assistants to the Attorney General.

For defendants: Thomas Penney, Jr., Penney, Penney, Buerger & Siemer, Buffalo, N. Y.; Hale & Dorr, Lawrence E. Green, Joseph N. Webb, E. Shayn, Boston Mass.; Francis T. Findlay, Findlay, Argy & Hackett, Niagara Falls, N. Y.; Edward A. Montgomery, Niagara Falls, N. Y.; Webster, Sheffield & Horan, New York, N. Y.; Charles W.

Schol, Buffalo, N. Y.; Stobbs, Stockwell & Tilton, George R. Stobbs, Worcester, Mass.

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on December 15, 1947, and all the defendants having appeared and filed their answers to such complaint denying the substantive allegations thereof; and all parties hereto by their attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without adjudication of any issue of fact or law herein, and upon the consent of all the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

[*Jurisdiction*]

I

The Court has jurisdiction of the parties to this judgment; and for the purposes of this judgment and proceedings for the enforcement thereof, the Court has jurisdiction of the subject matter hereof; and the complaint states a cause of action against defendants and each of them under Section 1 of the Sherman Act (15 U. S. C. § 1).

[*Terms Defined*]

II

When used in this judgment the following terms have the meaning assigned respectively to them below:

A. "Artificial abrasive grain" means grain manufactured from silicon carbide or aluminum oxide, and any variety, type, or grade of such grain.

B. "Subsidiary" means a company in excess of 50% of the voting stock of which is held by another company.

C. "Parent" means any company owning in excess of 50% of the voting stock of any other company.

[*Applicability*]

III

The provisions of this judgment applicable to the defendants apply to their successors, officers, directors, agents, employees, and to any other persons acting under, through, or for such defendants.

[*Acts Enjoined*]

IV

Each of the defendants is hereby perpetually enjoined and restricted from entering into, adhering to, maintaining, or furthering any combination, conspiracy, agreement or understanding with any manufacturer of artificial abrasive grain:

A. To fix, determine, designate, or adhere to periods of time during which or for which offers, sales, contracts for sales, and obligations to buy and sell artificial abrasive grain shall be made or entered into with, or required of, others.

B. To fix, determine, establish or maintain prices, pricing, systems, discounts, or other terms or conditions of sale for artificial abrasive grain.

C. To establish, maintain, or adhere to any price lists or price quotations, or any other means of determining or fixing price lists or price quotations, or any other terms or conditions of sale or purchase of artificial abrasive grain to be quoted to or by, or required of or by, others.

D. To circulate or exchange, directly or indirectly, any price lists, or price quotations, with or among any manufacturer of artificial abrasive grain in advance of the publication, circulation, or communication of such price lists or price quotations to its purchasers and distributors.

E. To classify purchasers or distributors with the purpose or effect of affecting prices paid by them or of discrimination in respect to them; or to maintain or adhere to any such classsification of purchasers or distributors, or to any lists, formulae or other means for such classification.

V

Each defendant herein is hereby enjoined from circulating or exchanging, directly or indirectly, any price lists, or price quotations, with or among any manufacturer of artificial abrasive grain in advance of the publication, circulation, or communication of such price lists or price quotations to its purchasers and distributors.

[*Delivered Price*]

VI

Each defendant manufacturer is hereby ordered:

Whenever such manufacturer sells artificial abrasive grain on a uniform delivered price basis, to grant the purchaser the option of taking delivery at the place either of manufacture or storage of said grain at its delivered price less the actual cost of the mode of transportation which such manufacturer would normally use from the actual shipping point if such option were not exercised.

[*Code Ordered Abolished*]

VII

The defendant Association is hereby ordered to abolish its code of fair competition at its next regular meeting which shall in no event be later than February 1, 1949; and defendant manufacturers are hereby enjoined and restrained from renewing or reviving said code of fair competition.

[*Issuance of Price Lists*]

VIII

When, for the first time following the entry of this judgment, the third printing of the Bureau of Labor Statistics Monthly Wholesale Price Index for All Commodities Other than Farm Products or Foods for a given month is lower than the corresponding index published six months preceding and there has been a decline in said Monthly Wholesale Price Index for each of three consecutive months, each defendant manufacturer shall individually review its selling prices of artificial abrasive grain on the basis of its individual cost figures and individual judgment as to profits, and issue a new price list (or, where no price list has in the past been issued, issue new prices) on the basis of such independent review.

[*Relationship Not Affected*]

IX

Nothing contained herein shall be deemed to adjudicate, determine, or affect the legality or illegality of any agreement involving solely relationships between:

A. A defendant manufacturer and its subsidiaries.

B. A defendant manufacturer or its subsidiaries and a parent.

C. Subsidiaries of any such manufacturer or their subsidiaries.

X

Nothing in this judgment shall prevent any defendant from availing itself of the benefits of (a) The Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or (b) The Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

[*Inspection for Compliance Purposes*]

XI

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or any Assistant Attorney General, and on reasonable notice to any defendant manufacturer, be permitted, subject to any legally recognized privilege, (a) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this judgment, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment. No information obtained by means permitted in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings for the purpose of securing compliance with this judgment in which the United States is a party or as otherwise required by law.

[*Jurisdiction Retained*]

XII

Jurisdiction of this action is retained for the purpose of enabling any of the parties

to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 62,330] United States v. Allegheny Ludlum Steel Corporation, et al.

In the United States District Court for the District of New Jersey. Civil No. 4583. October 25, 1948.

Sherman Antitrust Act

Consent Judgment—Agreements in Restraint of Trade—Acts Enjoined.—A consent judgment entered in a civil suit charging 18 stainless steel companies with entering into a combination in restraint of trade in violation of the Sherman Act enjoins defendants from: entering into agreements to fix, maintain, determine or adhere to prices or other terms of sale; printing, publishing, circulating, quoting or using any prices, price lists, discounts, differentials of any other term or condition of sale to be required of others in connection with the purchase or sale of stainless steel products pursuant to or resulting from any agreement or plan among defendants; conferring as to prices or extras to be quoted or charged to others for stainless steel products; preparing, circulating, exchanging or using "advance information" or any other information concerning prices and conditions of sale; publishing, quoting or charging prices on any basis other than (1) F.O.B. at the actual place of manufacture or origin of shipment, or (2) on a basis which at destination at no time shall be higher than the F.O.B. price at the actual place of manufacture or origin of shipment, plus actual transportation and other delivery charges, with every purchaser having an option to purchase F.O.B. at the actual place of manufacture or origin of shipment. A defendant is ordered to grant to any applicant a non-exclusive license under certain patents at reasonable and non-discriminatory royalties, and a non-exclusive grant of immunity from suit under any foreign patents owned or controlled by that defendant corresponding to the domestic patents.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; Isaiah Matlack, United States Attorney; Manuel M. Gorman, Sigmund Timberg, J. Francis Hayden, Samuel Flatow, Special Assistants to the Attorney General.

For defendants: Carpenter, Gilmour & Dwyer, James S. Carpenter, Jr.; Stryker, & Horner, Stryker; John A. Hartpence; Pitney Hardin Ward & Brennan, Charles B. Hardin; C. Laud; Riker, Marsh & Scherer, Riker, Emery & Danzig; Cravath, Swaine & Moore, Hoyt A. Moore; Minton & Dinsmore, V. Lane.

Final Judgment

The complainant, the United States of America, having filed a complaint herein on January 19, 1945; the defendants having appeared and filed their answers to such complaint, denying the substantive allegations thereof; plaintiff and the defendants, by their attorneys herein, having severally consented to the entry of this final judgment herein, without any trial or adjudication of any issue of fact or law herein, and without an admission by any party in respect of any such issue;

Now, therefore, before any testimony has been taken herein and without trial or adjudication of any issue of fact or law herein, and upon the consent of plaintiff and each of the defendants, it is hereby

ORDERED, ADJUDGED and *DECREED* as follows:

[*Jurisdiction*]

I

That this Court has jurisdiction of the subject matter herein and of all the parties hereto; that the complaint states a cause of action against each of the defendants herein under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended.

II

Definitions

As used in this judgment the term:

(a) "Stainless steel" means a steel with high corrosion or heat resistant qualities, or both such qualities, which consists of an alloy of iron and chromium (known as straight chrome stainless steel), or of an alloy of iron and both chromium and nickel (known as chrome nickel stainless steel), with or without the addition of supplementary alloying agents, such as molybdenum, columbium, titanium, selenium, and others;

(b) "Stainless steel products" means bars, double bevels, single bevels, ingots, wire, structurals, plates, sheets, hot rolled strip, cold rolled strip, billets and similar products made of stainless steel;

(c) "Free machining patents" means United States Letters Patent Nos. 1,835,960, 1,846.140, 1,961,777, 2,009,713, and any division, continuation, reissue or extension thereof and any additional patents or patent rights covering or pertaining to improvements upon the inventions, processes, methods or apparatus covered by the aforementioned patents, or any division, continuation, reissue or extension thereof.

III

Reference to any defendant herein shall be deemed in each case to include the directors, officers, employees, agents, successors and assigns of that defendant, and any wholly owned or controlled subsidiary thereof, and any person acting or claiming to act under, through, or for them or any of them.

[*Acts Enjoined*]

IV

Each of the defendants is individually restrained and enjoined from:

(a) Entering into, creating, performing or giving effect to any contract, agreement, understanding, plan or program among or with any of the defendants (1) to fix, maintain, determine or adhere to prices, discounts, charges, differentials, including freight rate factors or applicators, or terms or conditions of sale to be quoted or charged to or required of others in the purchase or sale of any stainless steel products; (2) to establish, enforce, provide or use any price list, extra list, base price list or any classification of stainless steel products into base prices and extras, or activities in connection therewith; or (3) to use, enforce, or adhere to any formula or any designated means or source for determining prices, charges, discounts, classifications as base price or extras, or any other element or term, condition or differential, including freight rate factors or applicators, in connection with the sale or pricing of stainless steel products to others;

(b) Printing, publishing, circulating, quoting or using any prices, price lists, or extra lists, cash or courtesy discounts, transportation charges, differentials, including freight rate factors or applicators, or any other term or condition of sale to be quoted or charged to, or required of, others for or in connection with, the purchase or sale of stainless steel products pursuant to or resulting from any agreement or understanding, plan or program among or with any of the defendants;

(c) Conferring or consulting as to or discussing prices or extras to be quoted or charged to others for stainless steel products or any terms or conditions of sale thereof at any meeting of representatives of any of the defendants, or by any correspondence or communications among or with any of the defendants and from exchanging among or with any of the defendants any information as to prices, extras, or differentials including freight rate factors or applicators to be quoted or charged to, or required of, others for stainless steel products or any proposed terms or conditions for sale to others of such products;

(d) Preparing, circulating, exchanging or using so-called A. I.s, or Advance Information, or any other information concerning the prices and terms or conditions of sale which any defendant proposes or intends to quote on a bid to any prospective purchaser, or has quoted or charged to any purchaser on a bid, for any sale of stainless steel products, or to disclose to any competitor bids or quotations made to others for stainless steel products;

(e) Compiling, printing, publishing or circulating as defendant's list of prices for stainless steel products, or as defendant's list of extras, or as terms and conditions of sale, for stainless steel products any prices, extras, or terms or conditions of sale applicable to any type or grade of stainless steel or stainless steel products not now or are hereafter being manufactured, sold or of-

ered for sale by such defendant or any affiliated company;

(f) Publishing, printing, quoting or charging prices for stainless steel products on any basis other than (1) F. O. B. at the actual place of manufacture or origin of shipment of said products, or (2) on a basis, which at destination at no time shall be higher than the F. O. B. price at the actual place of manufacture or origin of shipment of said products plus actual transportation and other delivery charges, with every purchaser having an option to purchase F. O. B. at the actual place of manufacture or origin of the shipment of said products;

(g) Instituting or threatening to institute, or maintaining any suit, counterclaim or proceeding, judicial or administrative, for infringement of any free machining patent, alleged to have occurred prior to the date of the entry of this judgment.

[*Patent Licensing*]

V

Defendant, The Carpenter Steel Company, its officers, directors, agents, employees, successors and assigns, are hereby ordered and directed:

(a) To grant to any applicant upon each written request therefore a non-exclusive license to manufacture, use and sell under any one or more free machining patents without any condition or restriction whatsoever except (1) a reasonable and non-discriminatory royalty may be charged and collected, and (2) where such royalty is charged, provision may be made for inspection of the books and records of the licensee by an independent auditor who may report to the defendant licensor only the amount of royalty due and payable and no other information;

(b) To grant to any applicant making written request therefore to the extent that the defendant, The Carpenter Steel Company has or acquires the power to do so, a nonexclusive grant of immunity from suit under any foreign patents owned or controlled by defendant, The Carpenter Steel Company, corresponding to free machining patents, to import into and sell or use and to have imported, sold or used in any country, products made in the United States, without any condition or restriction whatsoever, except that a reasonable and non-discriminatory royalty may be charged and collected, and where such royalty is charged, provision may be made for inspection of the books and records of the licensee by an independent auditor who may report to the defendant licensor only the amount of royalty due and payable and no other information;

(c) To include in each license issued pursuant to this Section V, a provision under which the licensee may cancel such license any time after one year from the date of issuance of such license.

[*Webb-Pomerene Act*]

VI

Nothing in this judgment shall have any effect with respect to activities or operations, authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act.

[*Practices, Proceedings Not Affected*]

VII

Nothing contained herein shall be deemed to adjudicate the legality of any act or practice not prohibited herein, nor to bar or affect any proceeding under any law of the United States involving or relating to any act or practice not prohibited herein.

[*Inspection for Compliance Purposes*]

VIII

For the purpose of securing compliance with this judgment authorized representatives of the Department of Justice shall, on written request of the Attorney General, or an Assistant Attorney General, be permitted, subject to any legally recognized privilege, (1) upon reasonable notice to any defendant corporation made to its principal office, reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of the defendants and without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters, and (3) upon any such request said defendants shall submit such reports with respect to the licensing of

stainless steel patents as may from time to time be appropriate for the purpose of enforcement of this judgment; Provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representatives of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceeding for the purpose of securing compliance with this judgment in which the United States is a party or as otherwise required by law.

[*Jurisdiction Retained*]

IX

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification of any of the provisions thereof or the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 62,331] Suni-Citrus Products Company v. Daniel Boscawen Vincent, et al.

In the United States Court of Appeals for the Fifth Circuit. No. 12309. November 19, 1948.

Appeal from the United States District Court for the Southern District of Florida.

Sherman Antitrust Act

Pooling of Patents—Licensing Agreement—Suit to Enjoin Execution of Agreement Premature.—In an action brought by a manufacturer of stock feed from waste citrus products under two patents, the District Court refused to enjoin the execution by defendants, the State of Florida, certain of its boards and officials, and manufacturers of stock feed from citrus waste, of a patent pooling and licensing agreement which would suppress competition and fix prices in violation of the antitrust laws. On appeal, it is held that the suit was premature, inasmuch as the agreement which plaintiff alleges constitutes *per se* the conspiracy charge has not yet been fully signed and made effective, and the patent under which prices are to be fixed has not as yet been issued. No controversy exists, and there is no actual threatened injury to be redressed. The judgment is reversed and the cause is remanded with directions to dismiss it without prejudice.

See the Sherman Act annotations, Vol. 1, ¶ 1270.151, 1270.160, 1270.251.

Reversing and remanding the decision of the United States District Court for the Southern District of Florida, reported in 1946-1947 Trade Cases, at ¶ 57,632.

For appellant: Harry Aubrey Toulmin, Jr., Dayton, Ohio; LeRoy Allen, Tampa, Florida; Max F. Goldstein, Atlanta, Georgia.

For appellees: Charles F. Miller, Jr., John J. Darby, both of Washington, D. C.; Lewis H. Hill, Jr., Paull E. Dixon, both of Tampa, Florida; J. Tom Watson, Attorney General, Frank J. Heints, Sumter Leitner, Assistant Attorneys General, all of Tallahassee, Florida.

Before HUTCHESON, SIBLEY, and WALLER, Circuit Judges.

HUTCHESON, C. J.: Brought for injunction and for treble damages, the suit was to restrain, as violative of the anti-trust laws [1] of the United States, the completion and putting into effect of a partially completed trust agreement [2] for pooling conflict-

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[1] The Sherman Act, as amended, 15 U. S. C. A. Secs. 1 & 2. The Clayton Act, 15 U. S. C. A., Secs. 15 & 16.

[2] The trust agreement, between Vincent, the State and the Trustee, purported to pool certain patents by assigning them to the trustee, and to create a trust committee under whose directions the trustee would act. The powers of the committee included: the right to fix royalties; the right to include, in licenses, price fixing limitations upon the licensed products covered by the Neal patent when the prices had been fixed by members of the committee appointed by the State or other state representatives acting by virtue of legal authority in the State of Florida; and the right to include, in the licenses, price restrictions on products manufactured and sold in the State of Florida if and when these prices are fixed by virtue of legal authority in the State of Florida. The trust agreement also fixed the percentage of royalties to be paid to the persons entitled.

ing patents, granting licenses,[3] and fixing minimum prices in the citrus feed industry.

Alleging: that plaintiff is a manufacturer of a citrus waste product suitable and desirable as a cattle feed; that, prior to the complained of agreements of defendants, the market price for plaintiff's products, as well as for that of other manufacturers in competition with plaintiff had been established by free competition; that defendants, owning and claiming to be the owners of, letters patent and an application for letters patent by one Wayne M. Neal, had entered into an agreement for the purpose of combining and pooling their patents and patent claims, of fixing royalties, and of fixing prices of products manufactured under the Neal application and the patent to be granted on it; plaintiff's claim was that the complained of agreements are in violation of the anti-trust laws and their effect will be to injure and harass plaintiff and other citrus waste processors. There was a further claim that the subject matter of the Neal application was public property and not patentable because the payment of Neal's salary, while working for the State of Florida, had been made out of Purnell Act funds.

The State of Florida admitted that it is the owner of the Neal application for letters patent, and that the application was filed by Neal while an employee of the State of Florida and while the State was the recipient of the Purnell funds. It denied that the subject matter of the application was thereby made a part of the public domain. Denying that it and the other defendants were joined in an agreement or combination in restraint of trade, it alleged that it had conducted negotiations with Vincent and the other defendants, with the result that a tentative trust agreement had been formulated but not yet signed by the trustee for the purpose of protecting processors of citrus waste against destructive patent suits, and when and if minimum prices are established by the State, to insure that products covered by patent claims resulting from the Neal application are not sold below cost of the product.

The defendant Vincent made substantially the same answer and also filed a counterclaim, in which, setting out that he had been charged with conspiracy to restrain trade, he denied that this was so. Pleading his patents and the contests over them, he further alleged that in an effort to settle these patent conflicts and bring peace to the citrus waste industry, he had entered into negotiations with the State of Florida looking to the settlement proposed in the tentative trust and license agreements, Exhibits A and B. Alleging that they are not in violation of the anti-trust acts, he sought a declaratory judgment to that effect.

There was a reply by plaintiff to both counter-claims, a pre-trial conference at which a long statement, afterward made a part of the record, was made by defendant Vincent, an amendment to Vincent's answer showing that since the filing of the suit and the pre-trial conference, Vincent's patent had been reissued and that it would be assigned to the trustee in substitution of the original Vincent patent.

Thereafter, plaintiff filed a motion for judgment on the pleadings, stipulations, the report of proceedings, and the statement of counsel for the defendants at the pre-trial conference,[4] and argument was joined on

[3] The license agreement contained an agreement recognizing the authority of the State of Florida to fix prices for the sale of products manufactured or sold within the State of Florida when authorized by the laws of the State and on any products wherever in the United States manufactured or sold if they are embraced in the claims of any United States patents issued on the Neal application. There was also a provision that if 50 per cent of the persons engaged in the processing of citrus pulp in any season refused to obtain a license or pay royalties, then the royalties payable under this license shall abate.

[4] The stipulations, statements, etc. show: that the defendants would furnish witnesses to testify, and the plaintiff would not controvert them, that in negotiating for and preparing the tentative trust and license agreements, the parties had not intended to oppress or harass plaintiff, or anybody else, but had intended merely to bring order and prosperity to the citrus business, which was harassed by conflicting patents.

In the same way they showed that the royalty intended to be exacted if the agreement should be put into effect would not exceed $1.00 per ton; that licenses would be available without discrimination to all responsible persons in the United States; that the price of citrus feed in Florida has increased since Jan., 1944, from $32.50 to $42.50 per ton; that the cost of manufacturing citrus feed under Vincent's patent would be approximately $18.00 or less per ton.

In his statement, Vincent said that the original and other copies of the trust agreement had been duly executed by the Board of Commissioners and by Vincent, although the arrangement had not been completed through acceptance by the trustee and assignment of the patents. "However, it is admitted that unless restrained by the court it is the purpose and intent of all parties to complete the arrange-

two questions [5] of law: (1) the primary question, whether the entering into the trust agreement was *per se* a violation of the anti-trust laws; and (2), the subsidiary one, whether the Neal invention had been dedicated to the public.

The district judge, of the opinion that the pooling of the various patents and the Neal application, for the purpose set forth in the trust and license agreements was not illegal, cited in support: *Standard Oil v. U. S.*, 283 U. S. 163; *Westinghouse v. Formica*, 266 U. S. 342; *Mumm v. Decker*, 301 U. S. 170; *U. S. v. General Electric Co.*, 272 U. S. 476; and *State v. Neal*, 152 Florida 582, 12 So. (2) 590. He, therefore, held that: "Upon the uncontradicted evidence in this case, plaintiff has not carried the burden of showing that the proposed trust and license agreements if finally approved and executed in their present forms would constitute a violation of the anti-trust laws of the United States, and plaintiff's prayer to enjoin and prohibit their execution and putting into effect is denied".

As to the cross-complaints of the State and Vincent for declaratory judgments, declaring the trust and license agreements valid and not in violation of the anti-trust laws of the United States, the court held: "Their prayer for a declaratory judgment is premature, the trust agreement has not yet been executed by all parties and for this reason has not yet matured to a point where this court has the authority to pass upon its legality. Moreover, the court entertains grave doubt as to the applicability of the declaratory judgment act to this case. The prayer, therefore, for a declaratory judgment declaring proposed agreements valid is denied".

Upon the basis of these views thus announced, there was a judgment: (1) "That the complaint should be and hereby is dismissed on the merits"; (2) that the defendants recover costs; and (3) "that defendant's prayer for declaratory judgment be, and it is hereby denied"; and plaintiff has appealed.

Here appellant, upon the authority of *U. S. v. Line Material Co.*, 333 U. S. 287; *U. S. v. Gypsum Co.*, 333 U. S. 364; *U. S. v. Griffith*, 324 U. S. 100; *Fed. Trade Comm. v. Morton Salt*, 332 U. S. 850; *International Salt Co. v. U. S.*, 332 U. S. 392; *U. S. v. Paramount Pictures*, 324 U. S. 131; insisting that the judgment was wrong, seeks its reversal.

Appellees, upon the basis of the authorities relied on by the court below, insist that the judgment was right and should be affirmed.

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ment. In view of plaintiff's suit no further proceedings were taken or would be taken by any of the parties until the suit was determined, since it was felt only proper to await the decision." Vincent further stated: "We believe and desire that the court at this time pass upon the anti-trust features of this complaint 1163, and on the question presented concerning the Purnell Act. I am authorized to state on behalf of all parties to the proposed trust agreement that if the court agrees with our contention that there is nothing illegal about such proposed trust agreement and that no free use attaches to any patent issued in the Neal application, then it is the purpose of these defendants to proceed as expeditiously as possible to conclude the trust arrangement."

Mr. Toulmin, for defendant, stated, "We propose to rest our case on the pleadings in this case". Again he stated, "The issue fundamental is whether or not the proposed trust agreement and the proposed license agreement, which have been partially executed and which the defendants say they will execute and carry out if they are not restrained by the court, constitute violations of the anti-trust laws of the United States."

Mr. Darby, for the defendants, stated: "First of all, as far as the State and Vincent are concerned, the trust agreement is a completed agreement. All that is necessary is for the trustee to accept the trust, the license is a typical form of license which has been agreed upon, as the pleadings show, contrary to the suggestion that this is a request for an advisory opinion, that is not correct. We completed it, we have said we are going through with it unless the court holds that we should not do so".

In the course of these discussions, the district judge said:

> "But you gentlemen must remember that in submitting this case to me that I cannot acquiesce in you gentlemen making a moot Court case issue before me in passing upon the legal questions involved in a moot case. In passing upon the legal questions involved in a moot case, the Supreme Court and all of the Courts say we can not lend ourselves to that kind of practice, * * *."

[5] This is the way appellant, plaintiff below, states them:

> "(1) The execution of the trust agreement by the State and Vincent and the agreement and concerted action by all defendants in combining to bring about the execution of the trust agreement and approval of the form of the licensing agreement constitute a violation of the Anti-trust Laws of the United States, as being an unreasonable restraint of interstate trade and commerce.
>
> (2) The payment of the salary of Dr. Wayne M. Neal, the inventor of the process for which patent application has been made by the State, from Purnell Act funds and the contribution of those funds to the support of the State Agricultural Experiment Stations through whose facilities the Neal invention was perfected constitute a dedication of the State's invention to the public at large."

Interesting as these contentions are, we find it unnecessary to resolve, or even to consider, them. We agree with the district judge's view that defendants' prayer for a declaratory judgment was premature for the reason he gave, that the trust agreement had not yet been executed by all parties and for that reason had not yet matured to a point where the court had authority to pass upon its legality.

For the same reason plaintiff's suit was premature, and should have been dismissed as such. But it was premature for other reasons. The agreement, which plaintiff alleges constitutes *per se* the conspiracy charge, provides in terms for the appointment of a committee to act with the trustee in carrying out the trust. It is undisputed that the trustee has not accepted the trust and that no committee has been formed. The trust agreement provides for fixing prices interstate only in respect of licensed products covered by claims under a Neal patent issued upon the Neal application, and then only if the price "is determined solely by those members of the committee appointed by the state or by other duly appointed state representatives acting by virtue of legal authority in the State of Florida". It is admitted that no Neal patent has issued and that until one does issue, no price fixing will be attempted, and no authority in this respect exercised. It is admitted that no members of the committee have been appointed by the state, and that no other duly appointed state representatives acting by virtue of legal authority in the State of Florida have appeared to exercise the power.

Matters standing thus, what the plaintiff has presented to the court is not an actual controversy for decision or an actual threatened injury for redress. It is a request for an advisory opinion on a purely hypothetical situation, which has not arisen, and which may or may not arise according to whether the trust instrument is or is not fully signed and made effective by the appointment of the committee under it and the obtaining of legal authority from the State of Florida with respect to fixing prices, and whether a Neal patent containing product claims is granted.

In these circumstances, instead of declining merely to entertain defendants' counterclaim, the district judge should also have declined to take cognizance of plaintiff's complaint and dismissed it without prejudice.

The judgment is reversed and the cause is remanded with directions to dismiss it without prejudice.

[¶ 62,332] Rene Douglas d. b. a. Douglas Laboratories v. Wisconsin Alumni Research Foundation, Standard Brands, Incorporated, Gelatin Products Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 46 C 1535. October 25, 1948.

Sherman Antitrust Act

Treble Damage Suit—Compulsory Counterclaim—Motions to Amend and for Summary Judgment.—In an action for damages for a conspiracy to monopolize trade in vitamins and vitamin products, a motion by a defendant to amend its answer so as to allege that an action had been previously brought by it against the plaintiff for patent infringement, that the answer filed in that suit was substantially the same as the present complaint, and that plaintiff, therefore, had a compulsory counterclaim in the former action and is estopped from maintaining the present suit against the moving defendant, is denied. It is held that under the rule announced by the United States Supreme Court in *Mercoid Corp. v. Mid-Continent Co.,* the fact that a right of action may have been asserted as a counterclaim in the prior suit by reason of Rule 13 (b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it. Additional reasons for denial of the motion are the facts that (1) in the prior suit the complaint was dismissed as to the present plaintiff before a trial on the merits, so that at the time of the dismissal it would have been still possible for him to have aserted a counterclaim by way of amendment, but in view of the dismissal order, such action became unnecessary, and (2) even if the complaint were now dismissed as to the moving defendant, a trial must be conducted as to the remaining defendants, at which the moving defendant would be a necessary or indispensable party. A motion for summary judgment on the same ground is denied.

See the Sherman Act annotations, Vol. 1, ¶ 1640.636, and prior opinions reported in 1944-1945 Trade Cases, ¶ 57,312, 57,433, and in 1946-1947 Trade Cases, at ¶ 57,565, 57,585.

For plaintiff: Johnson & Wiles, Chicago, Illinois.

For defendants: Weymouth Kirkland, Howard Ellis, A. L. Hodson & John C. Butler; George I. Height; Lee J. Gary; all of Chicago, Illinois; Paul Marco, Detroit, Michigan.

Memorandum

CAMPBELL, D. J.:—Plaintiff brought this action under the Anti-Trust laws of the United States (15 U. S. C. Sections 1 to 27 inclusive), seeking to recover treble damages for the alleged conspiracy existing between the three defendants to monopolize trade in the field of vitamins and vitamin products. The defendants filed separate answers to the complaint, denying such a conspiracy. Subsequently, defendant Wisconsin Research moved to amend its answer so as to allege that an action had been previously brought by it against this plaintiff for patent infringement; that the answer filed in that suit by plaintiff was substantially the same as the present complaint; that plaintiff, therefore, had a compulsory counterclaim in the former action under Rule 13 (a) of the Federal Rules of Civil Procedure and is estopped from maintaining the present suit against Wisconsin Research. Simultaneously, Wisconsin filed a motion for summary judgment based on the same theory as its motion to amend. It appears from the briefs of the parties that the former action was dismissed as to Douglas, with prejudice, by stipulation before a trial of the cause was had upon its merits.

An anlaysis of the applicable law reveals that certain modifications to the fundamental concept of compulsory counterclaims have been introduced by means of judicial decision. The case of *Moore v. New York Cotton Exchange,* 270 U. S. 593 (1925) sets forth the basic rules for determining whether or not a compulsory counterclaim exists:

"Two classes of counterclaims are thus provided for: (a) One 'arising out of the transaction which is the subject matter of the suit,' which must be pleaded, and (b) another 'which might be the subject of an independent suit in equity' and which may be brought forward at the option of the defendant. We are of the opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, federal jurisdiction independent of the original bill must appear.

"The bill sets forth the contract with the Western Union and the refusal of the New York Exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, the appellant is purloining or otherwise illegally obtaining them, and asks that this practice be enjoined. 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by the appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaims embrace additional allegations, as, for example, that the appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

"So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion."

The case of *Hancock Oil Co. v. Universal Oil Prod. Co.,* 115 F. 2nd 45 (1940), coincides directly with the present action, in that the plaintiff brought suit for patent infringement and the defendant counterclaimed under the Clayton Act, alleging an unlawful conspiracy to create a monopoly.

"Since the counterclaim arises out of the 'transaction or occurrence that is the subject matter of the opposite party's

claim,' *i. e.*, the ownership and introduction to the public of the plaintiff's patents, and since the counterclaim's allegations would warrant the relief against the plaintiff without the presence of the other parties to the conspiracy, the counterclaim is 'compulsory' in character and 'shall' be stated in the answer or the right to recover thereon is lost."

Normally, the *Hancock* case would be sufficient authority for dismissing the plaintiff's action as against Wisconsin here. However, a more recent decision of the Supreme Court would appear to establish a contrary rule. In *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661 (1943), plaintiff sued defendant for contributory infringement of a patent, and defendant counterclaimed, alleging violation of the anti-trust laws by plaintiff. In a previous suit plaintiff had sued one Smith for patent infringement, and the present defendant, although not made a party to the action, had provided the defense.

"'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved'. *Virginia Ry. Co. v. System Federation*, 300 U. S. 515. 'Where an important public interest would be prejudiced', the reasons for denying injunctive relief 'may be compelling'. (Citing cases.) That is the principle which has led this court in the past to withhold aid from a patentee in suits for either direct or indirect infringement where the patent was being misused. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488. That principle is controlling here. The parties cannot foreclose the courts from the exercise of that discretion by the failure to interpose the same defense in an earlier litigation.

"What we have just said does not, of course, dispose of Mercoid's counterclaim for damages. That was based on Sect. 4 of the Clayton Act which provides ' . . . ' Though Mercoid were barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. The claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13 (b) [Permissive counterclaims] of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *'res judicata'* as respects it. (Citing cases.) The case is then governed by the principle that where the second cause of action between the parties is on a different claim the prior judgment is *'res judicata'* not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' It was held in *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27, that the statutory liability in question may be enforced only through the verdict of a jury in a court of common law. But there is no rule under the Rules of Civil Procedure why that may not be done under this counterclaim. Rules 12 (h), 13, 38, and 42 (b). Whether the evidence will show damages within the rule of *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, is of course a distinct question on which we intimate no opinion.

"We have mentioned the statutory claim for damages because both the District Court and the Circuit Court of Appeals denied that relief. But since the cause must be remanded to the District Court we think the question whether *'res judicata'* bars any other part of the relief sought by the counterclaim may appropriately be reserved for it."

A consideration of the nature of a compulsory counterclaim would appear to indicate certain inherent weaknesses in the rationale of the *Mercoid* decision. A compulsory counterclaim, by definition, is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim". In an action for patent infringement, the subject matter is the patent, its use, and its infringement. And since it is recognized as a valid affirmative defense, misuse by the patentee must also be included as a necessary ingredient of the subject matter. It is logically related to, and intimately interwoven with, the other elements so as to render it indispensable to the whole. Nor does the mere fact that a separate right of action is granted by statute for misuse by the patentee, alter its character. More than one right of action can be created by a single transaction, but the method of enforcing these rights can be restricted or qualified. Rule 13 (a) is an example of this type of restriction. A defendant has a right to defend on the ground of misuse, and he also has a right to maintain a counterclaim for damages for that same misuse; but he is restricted insofar as he must assert the one while asserting the other.

Although this Court may not concur with the conclusion reached by the Supreme Court, it is, nevertheless, bound by the rule declared therein. The statement contained in the *Mercoid* case that "The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13 (b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it", appears almost too casually interjected; but its presence still results in the establishment of a rule of law. Apparently, it was the intention of the Supreme Court to remove this particular type of counterclaim from the dictates of Rule 13 (a) in the interest of public policy.

In the case at bar there are additional reasons for refusing to permit Wisconsin Research to assert the plea of a former compulsory counterclaim. In the prior suit the complaint was dismissed as to Douglas before a trial of the cause was had upon its merits. At the time of the dismissal, it would have been still possible for Douglas to have asserted a counterclaim by way of amendment; but, in view of the dismissal order, such action became unnecessary. Furthermore, even if the complaint were now dismissed as to Wisconsin, a trial, nevertheless, must be conducted as to the other two defendants, at which Wisconsin would at least be a necessary, if not an indispensable, party.

The motions of the Wisconsin Research Foundation to amend its answer and for summary judgment are, therefore, denied.

[¶ 62,333] United States v. Yellow Cab Company; Chicago Yellow Cab Company, Inc.; Parmelee Transportation Company; Cab Sales and Parts Corporation; Checker Taxi Company; Checker Cab Manufacturing Corporation; and Morris Markin.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 46 C 1339. November 1, 1948.

Sherman Antitrust Act

Conspiracy to Restrain and Monopolize Trade—Transportation of Railroad Passengers Between Stations—Taxicab Companies.—An amended complaint alleging a conspiracy to restrain and monopolize interstate commerce in (1) the sale of motor vehicles for use as cabs to the principal cab operating companies in four cities, and (2) the transportation of railroad passengers and their luggage between railroad stations in Chicago pursuant to contractual arrangements with railroads is held not supported by the evidence. It is found that a cab operating company defendant did not acquire the stock of another cab operating company defendant in order to control commerce in the sale of cabs in Chicago or elsewhere; that the differences in equipment, personnel and services between two local cab operating companies and a company engaged in transporting railroad passengers between stations under contracts with railroads are such that competition with the transfer company for such contracts would be impractical and unlikely; that the cab operating companies have never agreed not to compete with the transfer company, or not to engage in such inter-station transfer business; and that none of the defendants has ever forbidden the cab operating companies to compete with the transfer company or to engage in such inter-station transfer business. Since on the proof, the stock relationships of the defendants did not arise as a result of a "deliberate, calculated purchase, for control" over commerce in the sales of cabs, the affiliation of the defendants does not constitute a violation of the Sherman Act. Nor does the proof show that the purchases of the manufacturing company's purpose-built cabs were made in violation of the Act.

See the Sherman Act annotations, Vol. 1, ¶ 1021.161, 1021.271, 1021.581, 1210.337.

Opinion

LaBuy, D. J.: The amended complaint in this action alleges that the defendants, commencing in early 1929, conspired in violation of Sections 1 and 2 of the Sherman Anti-Trust Act (26 Stat. 209, as amended) to restrain and monopolize interstate commerce in (1) the sale of motor vehicles for use as cabs to the principal cab operating companies in Chicago, New York City, Pittsburgh and Minneapolis, and (2) the transportation of railroad passengers and their luggage be-

tween railroad stations in Chicago pursuant to contractual arrangements with railroads and railroad associations.

The original complaint additionally alleged that such conspiracy extended to the business of furnishing taxicab services for hire in Chicago, but this was deleted after decision by the Supreme Court that such taxicab services were local and not interstate commerce and that in this respect the original complaint failed as a matter of pleading to state a claim for relief. *United States v. Yellow Cab Co.,* 332 U. S. 218.

The defendant Checker Cab Manufacturing Corporation (CCM) manufactures taxicabs in Michigan and sells them to purchasers in various states. The defendant Yellow Cab Company (Yellow), all of whose stock is owned by the defendant Chicago Yellow Cab Company, Inc. (Chicago Yellow), operates taxicabs in Chicago. The defendant Cab Sales and Parts Corporation (Cab Sales) also operates taxicabs in Chicago under licenses leased from Checker Taxi Company (Checker). The defendant Parmelee Transportation Company (Parmelee) owns all the stock of three subsidiaries which respectively operate taxicabs in New York City, Pittsburgh and Minneapolis. Parmelee also has contractual arrangements with railroads and railroad associations under which it transports railroad passengers and their luggage between railroad stations in Chicago. The defendant Morris Markin (Markin) is the president and general manager of CCM.

CCM was first incorporated in 1922 and has ever since manufactured a purpose-built cab. In 1923 its stock was publicly issued and in 1928 a second public issue was effected through the underwriting firm of J. A. Sisto & Co. Markin, in 1928, was the general manager and president of CCM, and CCM, in 1928, produced its Model K cab which received widespread acclaim.

In 1928 Ernest H. Miller, president of Yellow Taxi Corporation, New York, which operated "Yellow" cabs in New York City, initiated negotiations which led to Parmelee's formation. These nogtiations, commencing in 1925, took place against a background of voluntary withdrawal by substantial interests of the "Yellow" organization in Chicago.

The Yellow organization in Chicago traces back to 1910. In 1925 its components included Yellow, Chicago Yellow and Yellow Cab Manufacturing Company, the last of which manufactured the "Yellow" purpose-built cab and supplied Yellow's cab requirements. In 1925, Yellow Cab Manufacturing Company was sold to General Motors Corporation, and shortly afterwards its name was changed, its plant was transferred, and it began to engage principally in the business of bus and truck manufacture.

In 1928 Miller informed Markin that persons owning substantial interests in Yellow Taxi Corporation, New York and Chicago Yellow desired to sell those interests. Miller asked Markin whether Markin could aid in arranging financing for such purpose. Markin consulted J. A. Sisto & Co., the underwriters through whom CCM earlier in 1928 had effected its public issue of stock. Negotiations ensued among Miller, Charles A. McCulloch, vice-president of Chicago Yellow and chairman of the board of The Parmelee Company, Markin, and J. A. Sisto & Co. in connection with which McCulloch also offered for sale stock of The Parmelee Company. J. A. Sisto & Co. investigated the proposed purchase, arranged for its financing and evolved the financial and operating structure of Parmelee.

Parmelee was formed April 12, 1929, with a capitalization of $10,600,000 consisting of $5,000,000 of debentures, $1,000,000 of preferred shares, and 250,000 common shares of the value of $4,600,000. Only the common shares possessed voting power. The $5,000,000 of debentures and the 250,000 common shares were publicly issued through J. A. Sisto & Co. and White Weld & Co. as underwriters. The $1,000,000 of preferred shares were purchased by CCM.

Shortly after its formation, Parmelee acquired 26 per cent of the stock of Chicago Yellow, 68 per cent of the stock of Yellow Taxi Corporation, New York, and 96 per cent of the stock of The Parmelee Company.

In connection with Parmelee's formation and the preceding negotiations, Markin, aside from discussions concerning CCM's purchase of Parmelee's preferred shares, acted in his personal capacity. Markin personally bought for himself and an associate 6 per cent of Parmelee's common shares. He also entered into an employment contract with Transportation Management Corporation, a newly formed and wholly owned subsidiary of Parmelee, to act as an adviser to Miller, president of Transportation Management Corporation. Markin's salary as such adviser was $25,000 per year and Miller's salary as such president was $50,000 per year.

Prior to his subscription to Parmelee's common shares and to his employment contract with Transportation Management Corporation, Markin disclosed his personal negotiations to CCM, both at director and stockholder meetings, and requested a modification of his employment contract with CCM, under which he was required to devote his whole time to CCM's business, so that he might enter into this employment contract with Transportation Management Corporation. CCM recognized that Markin was acting in his personal capacity, and modified Markin's employment contract with itself to permit Markin to enter into this employment contract with Transportation Management Corporation.

In purchasing the $1,000,000 of Parmelee preferred shares, CCM hoped to receive, in addition to a profitable investment, the continuing good will of Parmelee as a potential customer for cabs. CCM declined, however, a prior offer to purchase common voting shares of Parmelee rather than the non-voting preferred shares because CCM desired the safer investment.

At Parmelee's formation, Markin was neither an officer nor a director of Parmelee or any of its affiliates; nor did Markin or CCM possess any control over Parmelee or its affiliates or any of their officers or directors.

During 1929 after Parmelee's formation both Yellow and Yellow Taxi Corporation, New York, purchased Model K cabs from CCM. No agreements, express or implied, were made, however, between CCM and Parmelee or any of Parmelee's affiliates for the exclusive or continuous purchase of CCM cabs; the 1929 purchases by Yellow and Yellow Taxi Corporation, New York, were limited to a specified number delivered that year.

Subsequent to Parmelee's acquisition of stock of Yellow Taxi Corporation, New York, and Chicago Yellow, Parmelee acquired the stock of two Pittsburgh taxicab operating companies, and later organized as a wholly owned subsidiary a Minneapolis taxicab operating company. These Pittsburgh acquisitions occurred in 1929 and neither Markin nor CCM participated in them. The organization of the Minneapolis taxicab operating company occurred in 1931 and followed the receivership of a prior Minneapolis taxicab operating company owned by a local street railway company. Parmelee supplied $16,305 to purchase the receivership assets which subsequently were transferred to the Minneapolis corporation organized by Parmelee.

From the evidence the court finds that in 1929 neither CCM nor Markin possessed the power to compel Parmelee or any of its affiliates to purchase only CCM cabs; that in 1929 neither CCM, Markin nor any of the defendants formed an intent or plan to compel Parmelee or any of its cab operating affiliates to purchase only CCM cabs; and that in 1929 neither CCM, Markin nor any of the defendants formed an intent or plan to control commerce in the sales of cabs in any city or place.

At the time of Parmelee's formation Markin owned 12 per cent of CCM's stock and possessed no control over CCM's directorate. By mid-1930 Markin's ownership of CCM stock declined to 5 per cent, and of Parmelee's common stock to less than 1 per cent. At that time, CCM's largest stockholder was a group represented by John J. Raskob and Pierre duPont which owned more than 34 per cent of CCM's stock. This group and later duPont interests continued until mid-1933 to be CCM's largest stockholders. For several years thereafter representatives of Cord Corporation constituted the majority of CCM's directors. During none of this period was Markin in control of CCM.

In 1930 the following events occurred. J. A. Sisto & Co. was in financial difficulties as a result of the stock market crash of October 1929 and subsequent depression, and continued to hold without likelihood of public sale, $1,442,000 of the Parmelee debentures plus some Parmelee common shares and warrants. It sold these securities to CCM. Parmelee was incurring substantial losses, partly because of business conditions and partly because of a severe strike in Pittsburgh. Markin personally owned substantially all the stock of Motor Cab Transportation Corporation which he had previously formed and whose subsidiaries operated a large fleet of CCM cabs in New York City. The Raskob-duPont group requested that Markin dispose of his Motor Cab stock so that he would not be, through this corporation, in competition with other New York City customers of CCM. Parmelee suggested that its financial strain would be eased if the $1,442,000 of debentures and the $1,000,000 of preferred shares of Parmelee then owned by CCM, carrying a current burden of interest charges, sinking

fund requirements and cumulative preferred dividends aggregating over $330,000 yearly, were exchanged for Parmelee common shares. As a result of ensuing negotiations Markin, on the insistence of the Raskob-duPont group, transferred his Motor Cab stock to CCM in exchange for shares of CCM, and CCM transferred this Motor Cab stock plus all CCM's holdings of Parmelee debentures and preferred stock plus some incidental securities, to Parmelee in exchange for 422,787 Parmelee common stock. In consequence of this transaction, CCM in the latter part of 1930 became the owner of a majority of Parmelee's common stock. This transaction, however, was not related to any sales of CCM cabs to Parmelee or any of its taxicab operating affiliates and no accompanying intent or plan connected with any control over commerce in the sales of cabs existed on the part of any of the defendants.

At the present time, CCM owns 61.75 per cent of the stock of Parmelee, and Parmelee owns 29.5 per cent of the stock of Chicago Yellow and all the stock of three subsidiaries which respectively operate cabs in New York City, Pittsburgh and Minneapolis. Yellow, whose parent is Chicago Yellow, presently operates 1,595 licensed cabs out of 3,000 licensed and 950 temporarily licensed cabs in Chicago, or 1,595 out of an aggregate of 3,950. One of Parmelee's cab operating subsidiaries presently operates 1,932 licensed cabs out of 11,814 licensed cabs in New York City; another presently operates 485 licensed cabs out of 690 licensed cabs in Pittsburgh; and the third presently operates 125 licensed cabs out of 214 licensed cabs in Minneapolis.

Checker was formed in 1919 by a group of taxicab drivers who became its stockholders and operated their cabs under its common name. Checker performed services for these driver-stockholders, including telephone, cab stand, garage, repairs, insurance and the like, for which it received service payments. Orders from Checker for CCM cabs were among CCM's first orders in 1922. In 1925 a five year contract was made between CCM and Checker for the exclusive supply by CCM of Checker's requirements of cabs. Disputes occurred, however, with respect to this contract. These disputes were finally settled in 1930, after findings by a Special Master in CCM's favor, by the substitution of a new five year exclusive contract expiring in 1935.

Cab Sales was formed in 1930 as a method of compensating Paul C. L'Amoreaux, CCM's attorney in the CCM-Checker litigation. He became Cab Sales' sole stockholder and Cab Sales became entitled to receive a commission on CCM sales to Checker during the substituted five year contract. In 1931 Checker's president desired to withdraw from Checker and suggested the sale to Cab Sales of the majority of Checker's stock. Cab Sales thought this a good purchase and obtained for this purpose a substantial sum from Markin personally and loans from subsidiaries of Yellow. Numerous business factors unrelated to sales of cabs and turbulent cab operating conditions in Chicago motivated this investment by Markin and these loans by subsidiaries of Yellow. Between 1931 and 1935 Checker continued its previous form of individual-driver operation. During this period, however, large arrearages accumulated in the service charges owing by the drivers and the drivers also defaulted on purchase installments of their cabs with the result that cabs were abandoned or Cab Sales was required to repossess them. In 1935 Cab Sales commenced fleet operation of 500 cabs within Checker. This was a minority of the total number of cabs operated within Checker but Cab Sales operated these 500 cabs as a fleet while the individual drivers of Checker operated their cabs individually. Between 1935 and 1941 the individual drivers gradually dropped out as a result of their difficulties of operation and their inability or unwillingness to pay their service charges and purchase installments on cabs, so that by 1941 all "Checker" cabs were operated as a fleet by Cab Sales.

L'Amoreaux died in 1933 and since 1934 Markin has been the owner of substantially all the stock of Cab Sales. Since 1942 substantially all the stock of Checker has been owned by associates of Markin.

From the evidence, the court finds that Cab Sales did not acquire Checker's stock to compel the purchase of CCM cabs by Checker drivers or to control commerce in the sales of cabs to Chicago or elsewhere; and that the transition in Checker to a fleet operation was in adaptation to the difficulties confronting its individual-driver operation, and was not part of any intent or plan of any of the defendants to compel purchases of CCM cabs or to control commerce in the sales of cabs to Chicago or elsewhere.

At the present time Cab Sales operates 1,000 licensed cabs out of the aggregate of 3,950 licensed and temporarily licensed cabs in Chicago.

During the period 1929 through 1942 the cab operating companies affiliated with Parmelee, and Cab Sales have generally purchased only CCM cabs; between 1942 and 1947 CCM was engaged in war production and reconversion from war production and sold no cabs. In 1947 all the Parmelee cab operating affiliates, except in New York City, and Cab Sales replaced their fleets with pleasure cars manufactured by General Motors Corporation, Ford or Chrysler Corporation.

During the period 1922 through 1928 CCM manufactured and sold an aggregate of 8,019 cabs or an average of 1,336 cabs per year. During the period 1929 through 1942 CCM manufactured and sold an aggregate of 29,260 cabs or an average of 2,090 cabs per year. CCM's pre-1929 customers included all present cab operating companies under consideration in this action or one or more of their predecessors, except Yellow. Of the 29,260 cabs manufactured and sold between 1929 and 1942, 16,996 were sold to cab operating companies named in this action and 12,264 were sold to others.

The annual average number of taxicabs operated in the United States since 1928 is estimated at approximately 85,000. The bulk of these are manufactured by General Motors Corporation, Ford and Chrysler Corporation. The CCM cab has always been a purpose-built cab. The vehicles used as cabs which are produced by the large automotive manufacturers have generally been pleasure cars converted or adapted to use as taxicabs. A purpose-built cab is a vehicle built for the purpose of use as a taxicab; its essential characteristics are safety, assembly of parts in such manner as to afford low maintenance cost, driver appeal, and passenger appeal. During the period 1928 through 1942 CCM was the only manufacturer continuously engaged in the production of purpose-built cabs. The business judgment of Checker, Yellow and the cab operating subsidiaries of Parmelee has been that the CCM purpose-built cab better served their large city needs than converted pleasure cars.

Municipal regulation of taxicabs prevails throughout most of the large cities of the United States. In most of these large cities cab operations are conducted through fleets rather than as individual driver operations and in most a large proportion of the cab licenses are held by one or two operating companies. These fleet operations generally utilize a uniform cab and replacements are commonly obtained from the same manufacturer.

In Chicago taxicabs are regulated by ordinances of the City of Chicago. These ordinances control the physical requirements of the taxicabs and also establish and control the rates. Municipal regulations likewise control taxicabs and rates in the cities of New York, Pittsburgh and Minneapolis.

On May 9, 1853 Frank Parmelee formed the firm of Frank Parmelee & Company to specialize in the transfer by coaches of railroad passengers and their luggage between railroad stations in Chicago; in 1919 this firm became known as The Parmelee Company. Arrangements for such transfer service have existed continuously since 1853 between Parmelee or its predecessors and the railroads or railroad associations.

In the conduct of this inter-station transfer business Parmelee operates limousine coaches for passengers, trucks for luggage, and collects its compensation from the railroads. Passengers surrender to Parmelee coupons attached to their railroad tickets and furnished to them when they buy such railroad tickets. Their checked luggage is transported separately by Parmelee on trucks. Parmelee's routes between Chicago railroad stations are fixed. Its limousine coaches cannot be hired separately by any one person and passengers can travel only between railroad stations. Parmelee has offices at the several stations and its personnel is established and trained. Parmelee does not operate taxicabs for the general public in Chicago and is not subject to the taxicab ordinances of the City of Chicago.

Yellow, Checker and Cab Sales, however, have engaged only in the business of furnishing taxicab services for hire to the general Chicago public and their operations are subject to the ordinances of the City of Chicago. As part of their taxicab services for the general Chicago public, Yellow and Cab Sales furnish cab services to and from Chicago railroad stations. None of them has or has ever had limousine coaches or trucks or the type of personnel used by Parmelee and has never engaged in the kind of service rendered by Parmelee under its contractual arrangement with railroads and railroad associations.

On the evidence the court finds that the differences between these cab operating companies and Parmelee in equipment, personnel and services are such that competition with Parmelee for such contractual arrangements with railroads or railroad associations would be impractical and unlikely; that neither Yellow, Checker nor Cab Sales has ever agreed, expressly or impliedly, not to compete with Parmelee or not to engage in such inter-station transfer business; and that none of the defendants has ever, expressly or impliedly, forbidden Yellow, Checker or Cab Sales to compete with Parmelee or to engage in such inter-station transfer business.

In respect of sales of taxicabs the theory of the Government is that the defendants deliberately and calculatedly purchased control of taxicab operating companies in four cities in order to monopolize and restrain interstate sales of cabs to those cities. In considering the complaint as a matter of pleading the Supreme Court, *United States v. Yellow Cab Co.,* 332 U. S. 218, 227, thus stated this theory:

> "The theory of the complaint, to borrow language from *United States v. Reading Co.,* 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred."

Later, in *United States v. Columbia Steel Co.,* 334 U. S. 495, 522, the Supreme Court said in reference to its decision in the *Yellow Cab* case:

> "In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true."

The evidence adduced at the trial consisted of voluminous documents as well as oral testimony. On consideration of the evidence as a whole it appears to the court that the Government's theory is not borne out by the proof.

From the evidence it appears to the court that the stock relationships which developed among the defendants were not part of a design to compel the purchase of CCM cabs and were not accompanied by an intent to control commerce in the sales of cabs to any of the four cities under consideration. The affiliations which occurred were occasioned by other business factors. Thus, without reviewing each instance, the status of Parmelee, which is the pivot of the Government's theory, may be considered. At Parmelee's formation in April 1929, CCM not only was without any control over Parmelee but actually refused the opportunity to take common shares of Parmelee which possessed voting power, and took instead non-voting preferred shares of Parmelee. CCM's later acquisition, in the latter part of 1930, of a majority of Parmelee's common shares was the result of a series of supervening factors consequent on the stock market crash of October 1929, none of which could reasonably have been foreseen at Parmelee's formation and none of which was connected with sales of cabs by CCM to cab operating affiliates of Parmelee. During the entire depression period conditions of financial stress continuously beset cab operating companies in general and Parmelee in particular. cf. *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291, 301. Nor did Markin possess any control over Parmelee or CCM. In the latter part of 1930 Markin's ownership of Parmelee shares declined to less than 1 per cent and his ownership of CCM shares to 5 per cent, which contrasts with an ownership of CCM shares of more than 34 per cent by the Raskob-duPont group. Raskob and duPont interests in CCM continued until 1933 and commencing in 1933 and continuing for several years afterwards Cord Corporation controlled CCM's management.

Since, on the proof, the relationships of the defendants did not arise as a result of a "deliberate, calculated purchase for control" over commerce in the sales of cabs, the affiliation of the defendants does not constitute a violation of the Sherman Act. *United States v. Yellow Cab Co., supra,* 227; *United States v. Paramount Pictures, Inc.; United States v. Columbia Steel Co., supra.*

Nor, on the evidence as a whole, does the proof show that the purchases of CCM's purpose-built cabs were made under compulsion or, except for the five year and substituted five year agreements between CCM and Checker expiring in 1935, under exclusive contracts. Included in the proof to the

contrary are the sale to General Motors Corporation in 1925 of Yellow Cab Manufacturing Co. which manufactured the "Yellow" purpose-built cab, and the subsequent devotion of that company principally to the production of trucks and busses; the acclaim accorded in 1928 and 1929 to CCM's Model K cab; the practice even before 1929 of many of the cab operating companies under consideration or their predecessors of buying only purpose-built cabs; the status of CCM during the period since 1929 as the only manufacturer which continuously produced purpose-built cabs; and the tendency of cab operating companies usually to replace their fleets with cabs of the same manufacture. The government has suggested that pleasure cars, rather than purpose-built cabs should, perhaps, have been bought by the cab operating companies under consideration. This, however, is within the area of business judgment and, on the evidence it appears that the business judgment of these cab operating companies was that the CCM purpose-built cabs better served their large city needs than converted pleasure cars. In *Yellow Cab Co. v. City of Chicago,* 396 Ill. 388, the Illinois Supreme Court thus referred to some of the advantages of operation in the City of Chicago of purpose-built cabs: (page 395)

> "It further appears that there are certain advantages to the operation of taxicabs of special construction since they have many specially designed features for the safety, convenience and enjoyment of the passengers, and for easier operation on the public streets. Certain of these features are extra heavy frames, especially constructed bodies, specially designed brakes and steering mechanism, finger guards on door hinges, specially padded partitions, specially designed wheels, tires, ventilators and other features. Their weight is approximately 1000 pounds more than the average passenger car."

The evidence in the present case amply sustains the right of the cab operating companies under consideration to determine, as a matter of business judgment, that the CCM purpose-built cab best suits their large city needs. This business judgment should not, on the evidence, be disturbed by the court. Under these business circumstances, it appears both reasonable and natural for these cab operating companies to buy the purpose-built cab produced by its affiliate.

In *United States v. Columbia Steel Co., supra,* 523, the Supreme Court said:

> "Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal per se.
>
> "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid."

The evidence does not disclose any unreasonable restraint. An additional factor affecting any question of unreasonable restraint is the control by the four cities concerned through existing municipal regulations over the issuance of taxicab licenses, the physical specifications of taxicabs, and the rates of fare.

In respect of Parmelee's contractual arrangements with the railroads and railroad associations for inter-station transfer of railroad passengers and their luggage, the Government alleges that the defendants agreed with Yellow, Checker and Cab Sales would not compete with Parmelee for such contracts. No adequate proof supports this charge nor is it shown that the defendants ever forbade Yellow, Checker or Cab Sales, expressly or impliedly, from competing with Parmelee. Nor, in view of the evidence to the contrary, does any inference of an agreement of non-competition arise from Parmelee's continued contractual arrangements with the railroads and railroad associations after 1929. The historical relationship and the contractual arrangements of Parmelee and its predecessors with the railroads and railroad associations have been continuous for nearly a century. Exclusive contract arrangements have been sustained as valid. *Donovan v. Pennsylvania Company,* 199 U. S. 279; *United States v. Yellow Cab Company, supra,* 229. For years prior to 1929 the year of the commencement of the alleged conspiracy, Yellow and Checker operated taxicabs in Chicago without attempting to compete for such contracts with the railroads or railroad associations. Yellow and Cab Sales furnish taxicab services for hire to the general Chicago public. Their equipment, personnel and services adapted to this business differ from Parmelee's to such an extent that it would be "impractical and unlikely" for them to compete with Parmelee for its inter-station transfer business. *United States v. Yellow Cab Co. supra,* 229.

In arriving at the findings of fact made above this court has considered the various matters of proof presented: those not specifically mentioned in the findings have been deemed intermediate in the process of ascertaining the ultimate facts. Included in this

category, for example, is the 1937 ordinance of the City of Chicago, under which the number of outstanding taxicab licenses in Chicago was reduced to 3,000. This ordinance, as its preamble recites, was plainly the result of a determination of public convenience and necessity and the surrenders of licenses by Yellow and Checker in pursuance of this ordinance have, under the proof, no relation to any problems of sales of CCM cabs or inter-station transfer by Parmelee.

The court finds that the defendants have not combined or conspired to restrain or monopolize, and no unreasonable restraint or any monopolization was effected by any of them, and that they have not restrained or monopolized interstate commerce either in the sale of motor vehicles for use as cabs to the principal cab operating companies in Chicago, New York City, Pittsburgh or Minneapolis or in the transportation of railroad passengers and their luggage between railroad stations in Chicago pursuant to contractual arrangements with railroads or railroad associations.

Counsel will submit an order in accordance herewith.

[¶ 62,334] United States and Tom C. Clark, Attorney General, as successor to the Alien Property Custodian v. Rohm & Haas Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil No. 9068. Filed November 18, 1948.

Sherman Antitrust Act

Consent Judgment—Restrictive Practices in Acrylic and Plastics Industry—Acts enjoined.—A consent judgment entered in an action charging a domestic manufacturer of acrylic products with having participated in a world-wide cartel with its German subsidiary and two other foreign manufacturers of such products to divide sales territories and suppress competition in the manufacture and sale of plastics, cancels agreements among the manufacturers, directs the defendant to issue to any applicant a non-exclusive license under certain domestic patents, and immunity under foreign patents, and enjoins defendant: from instituting infringment suits based upon certain patents; from filing any suit against the Attorney General to recover any patent rights or assets vested in him as successor to the Alien Property Custodian; from conditioning the sale or distribution of any acrylic product to any person on such person's refraining from reselling or exporting for resale such product in competition with the foreign manufacturers at any place in the world; from entering into or maintaining any combination or agreement to refrain from competing in any market in the manufacture, sale, distribution, importation or exportation of any acrylic product, or to allocate markets, territories or customers, to establish terms and conditions to be imposed in licensing patents or in the sale of acrylic products, to fix prices to be charged or quoted by or to any other person, to restrict the production, distribution or sale of acrylic products, or to limit research in that field; from discriminating in price, terms or conditions of sale against purchasers on the basis of the use of such product or on the basis of the type of product manufactured, used or sold by such manufacturer; and from entering into any patent or general marketing arrangement with any of the foreign manufacturers without filing a copy thereof with the Attorney General. The defendant is also directed to make available certain products to dental companies on non-discriminatory terms, and to furnish technical assistance to licensees on request.

See the Sherman Act annotations, Vol. 1, ¶ 1530.70.

For plaintiffs: Herbert A. Bergson, Assistant Attorney General, Sigmund Timberg, Special Assistant to the Attorney General; David L. Bazelon, Assistant Attorney General, Director, Office of Alien Property, Harold I. Baynton, Deputy Director, Office of Alien Property, Gerald A. Gleeson, United States Attorney, Manuel M. Gorman, Stanley E. Disney, Special Assistants to the Attorney General, Malcolm S. Mason, Chief, Legal Branch, Office of Alien Property, W. Perry Epes, Special Attorney, Walter T. Nolte, Chief Trial Attorney, Office of Alien Property.

For defendant: John F. Bergin.

Final Judgment

The plaintiff, United States of America, having filed its complaint herein on November 18, 1948; the defendant, Rohm & Haas Company, having appeared and filed its answer to such complaint denying the substantive allegations thereof; the plaintiff, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, having intervened and filed its complaint herein on November 18, 1948; the defendant, Rohm & Haas Company, having filed its answer to such complaint denying the substantive allegations thereof; all parties hereto by their attorneys herein having severally consented to the entry of this final judgment herein without trial of any issue of fact or law herein and without admission by the defendant in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without trial of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

[*Jurisdiction*]

I

The Court has jurisdiction of the subject matter herein and of all the parties hereto; the complaint of the United States of America states a cause of action against the defendant under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopoly;" and the complaint of the Attorney General states a cause of action against the defendant Rohm & Haas Company under Title 28, United States Code, Sections 1345, 2201 and 2202, and Section 17 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 425; Title 50, Appendix, U. S. C., Section 17).

[*Terms Defined*]

II

As used in this judgment:

1. "Defendant" means Rohm & Haas Company, a corporation organized and existing under the laws of the State of Delaware with offices and principal place of business at Philadelphia, Pennsylvania, and each of its officers, directors, agents, employees, subsidiaries, successors and assigns, and all persons acting or claiming to act under, through or for it; provided that, for purposes of this judgment, the Attorney General shall not, by reason of his or the Alien Property Custodian having vested some of the United States letters patent and applications for United States letters patent to which this judgment relates or for any other reason, be deemed to be a successor or assignee of Rohm & Haas Company.

2. "I. G. Farben" means I. G. Farbenindustrie Aktiengesellschaft, a corporation or association organized and existing under the laws of Germany with offices and principal place of business at Frankfurt am Main, Germany; provided that, for purposes of this judgment, the Attorney General shall not, by reason of his or the Alien Property Custodian having vested some of the United States letters patent and applications for United States letters patent to which this judgment relates or for any other reason, be deemed to be a successor or assignee of I. G. Farbenindustrie Aktiengesellschaft.

3. "Rohm & Haas, Darmstadt" means Rohm & Haas G.m.b.H., a corporation organized and existing under the laws of Germany with offices and principal place of business at Darmstadt, Germany, provided that, for purposes of this judgment, the Attorney General shall not, by reason of his or the Alien Property Custodian having vested some of the United States letters patent and applications for United States letters patent to which this judgment relates or for any other reason, be deemed to be a successor or assignee of Rohm & Haas G.m.b.H.

4. "I. C. I." means Imperial Chemical Industries, Limited, a corporation organized and existing under the laws of Great Britain and with offices and principal place of business at London, England.

5. "Acrylic products" means products consisting of monomeric or polymeric acrylic acid or methacrylic acid or a salt, ester, nitrile, or amide thereof including monomers or polymers of methyl methacrylate and any polymer, copolymer, or interpolymer made in whole or principal part therefrom, including, but not limited to, cast sheets, rods, tubes, finishes, molding powders, denture materials, laminated glass, adhesives, and synthetic rubber intermediates but as used in Section VIII does not include products intended for use as additives to petroleum products.

6. The term "person" as used in this judgment includes individuals, partnerships, associations, firms, corporations and other companies and for the purposes of this judgment persons associated directly or indirectly as subsidiaries, affiliates, partners or otherwise through a substantial common ownership other than through the Attorney General are to be considered the same person.

7. "Patent" or "patent application" shall include continuations, reissues, divisions and extensions of any such patent or patent application.

8. "I. G. Farben Agreements" means the written agreements, copies of which are attached hereto and made a part hereof, dated October 30, 1934, as amended on April 4, 1935 and on June 14, 1940, between I. G. Farben and the defendant.

9. "Darmstadt Agreements" means the written agreements, copies of which are attached hereto and made a part hereof, dated October 14, 1927 and dated January 30, 1935, as amended on July 5, 1939, between the defendant and Rohm & Haas, Darmstadt.

10. "I. C. I. Agreement" means a written agreement, dated October 30, 1936, between ICI and Rohm & Haas, Darmstadt.

11. "Agreement" or "Agreements" shall include all amendments, renewals and extensions of any of the agreements defined in subpargaraphs 8, 9, and 10 of Paragraph II hereof.

[*Agreements Cancelled*]

III

1. The I. G. Farben Agreements and the Darmstadt Agreements are hereby cancelled and the defendant is hereby enjoined and restrained from the further performance of any of the provisions of the I. G. Farben Agreements or the Darmstadt Agreements, and from adopting or following any course of conduct for the purpose or with the effect of reviving or reinstating any of the provisions of said I. G. Farben or Darmstadt Agreements. This paragraph shall not be deemed to terminate any patent license or immunity, as a non-exclusive, royalty-free patent license or immunity, held by defendant on the date of this decree to manufacture, use or sell under any existing patent, application, process, or invention, nor to prevent defendant from enforcing or asserting such rights or immunities as it may possess for the use in its business of the trade names and tradmarks it has adopted.

2. The defendant is hereby enjoined and restrained from carrying out, abiding by, adhering to or enforcing any of the provisions of the I. C. I. Agreement.

[*Patent Licensing Required*]

IV

The defendant is hereby ordered and directed to issue to any applicant making written request therefor a non-exclusive, non-assignable license in the form annexed hereto and marked Exhibit A under any one or more of the United States letters patent and patents issued under applications for United States letters patent, the patent numbers and application numbers of which are listed in Exhibit B, attached hereto and made a part thereof, [omitted herein] without any restriction or condition whatsoever, and without royalty or charge of any kind therefor to make, use and sell the inventions claimed by the patents and patent applications listed in said Exhibit B, for the lives of said patents.

[*Immunity Under Foreign Patents*]

The defendant is hereby ordered and directed to issue to any applicant making written request therefor, to the extent that the defendant has or acquires the power do so, and unrestricted and unconditional grant of immunity under foreign patents or applications for foreign patents corresponding to the United States letters patent and applications for United States letters patent listed in Exhibit B, attached hereto, [omitted herein] to import into, to use, or to sell and to have imported, sold or used in any country and product made in the United States.

[*Acts Enjoined*]

VI

The defendant is hereby enjoined and restrained from:

(A) Instituting or threatening to institute or maintaining any suit or proceeding for patent infringement, or to collect royalties:

(1) Based upon any of the United States letters patent or applications for United States letters patent listed in Exhibits B, C, and D, attached hereto, or

(2) Based upon any foreign patent or application for a foreign patent corresponding to the United States letters patent or application for United States letters patent listed in Exhibits B, C, and D, attached hereto, on account of the importation, sale or use in any country of any product made in the United States.

(B) Filing, prosecuting, or threatening to file, prosecute, any suit, claim or proceeding against the Attorney General, his successors or assigns, for the purpose of

(1) claiming or recovering any right, title or interest in, to or under any United States letters patent or application for United States letters patent or application for United States letters patent listed in Exhibits C and D, or any interest therein or thereunder, or any of the proceeds therefrom derived from any source, except insofar as the defendant may have acquired non-exclusive rights thereunder by virtue of its undated agreement, entered into on or about October 26, 1934, with I. G. Farben, and its agreement of May 12, 1939 with I. G. Farben, copies of which are attached hereto and made a part hereof, and except insofar as non-exclusive, royalty-free patent license or immunity is preserved to the defendant by the provisions of the last sentence of Paragraph III, 1 of this judgment;

(2) recovering from the Attorney General or from any funds or assets now in the United States, its territories or possessions, vested by or in the custody of the Attorney General, any sums or damages, including royalties under patent licenses, on account of any claim or cause of action asserted by defendant against Rohm & Haas, Darmstadt, or against I. G. Farben under the Darmstadt Agreements and I. G. Farben Agreements, respectively.

(C) Reserving or undertaking to reserve for Rohm & Haas, Darmstadt, or I. G. Farben or any person or persons designated by Rohm & Haas, Darmstadt or I. G. Farben any right or immunity to use, or to control the use of, in any market or country, any trademark, trade name, or other designation adopted by the defendant for any acrylic product.

(D) Vesting in Rohm & Haas, Darmstadt or I. G. Farben control of any of the business or any business policy of the defendant.

(E) Claiming or asserting as exclusive any right or immunity relating to an acrylic product received from Rohm & Haas, Darmstadt or I. G. Farben prior to the date of the entry of this judgment under any patent or patent application or as to any process or invention.

(F) Conditioning in any way the sale or distribution or availability for sale or distribution of any acrylic product to or by any person, upon such person refraining from reselling or distributing or refraining from exporting for resale or distribution such product in competition with Rohm & Haas, Darmstadt, I. G. Farben or I. C. I. at any place in the world.

(G) Entering into, adhering to, maintaining or furthering directly or indirectly any combination, conspiracy, contract, agreement, understanding, plan or program with any person:

(1) To refrain from competing in any market or country in the manufacture, sale distribution, importation or exportation of any acrylic product, or to allocate markets, territories, or customers for the sale or distribution of any acrylic product;

(2) To establish, adopt or agree upon terms and conditions to be imposed, observed, or required in the licensing or granting of immunities to or by others under patents, patent applications, inventions or processes relating to any acrylic product, or in the sale or distribution by or to others of acrylic products;

(3) To fix, maintain or determine prices to be quoted or charged by or to, or impose upon, any other person for any acrylic product;

(4) To restrict, determine or limit the production, distribution or sale of acrylic products;

(5) To limit research in the field of acrylic products; provided, however, that the provisions of this subparagraph (G) shall not be deemed to prohibit defendant from appointing territorial distributors of its acrylic products.

(H) Discriminating in price, terms, or conditions of sale against purchasers or prospective purchasers of an acrylic product on the basis of the use of such product by such purchaser or on the basis of the type of product manufactured, used or sold by such purchasers.

(I) Entering into or adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any distributor or purchaser to control the resale price or terms of resale of any acrylic products.

(J) Entering into any patent or general marketing arrangement, contract, or agreement relating to an acrylic product with

I. G. Farben, I. C. I. or Rohm & Haas, Darmstadt, or any of their successors, or affiliates, without filing within Thirty days after the execution thereof copies with the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. The failure of the Attorney General of the United States or the Assistant Attorney General in charge of the Antitrust Division to take any action following receipt of any information pursuant to this Paragraph VI (J) shall not be construed as an approval of any action taken by the defendant and shall not operate as a bar to any action or proceeding, civil or criminal, which may later be instituted or then be pending.

[*Products To Be Made Available*]

VII

The defendant is hereby directed to make avaiable to dental companies on non-discriminatory prices, terms and conditions of sale unmixed powder and liquid methyl methacrylate as long as such a product is sold to any purchaser.

[*Furnishing of Technical Information*]

VIII

The defendant is hereby directed during the period ending three years after the date of the entry of this judgment to furnish for a reasonable charge to any licensee under any of the patents, or of the patents issued upon the patent applications, listed in Exhibits B, C, and D, who requests assistance in producing an acrylic product pursuant to such patent or patents, a written description of commercial practice under the patent known to the defendant on the date of the entry of this judgment. Where defendant is producing an acrylic product similar to one intended to be produced by the licensee, such description shall be sufficiently full to enable a person with technical competence to produce an acrylic product that is competitive with such similar acrylic product of the defendant.

[*Inspection for Compliance Purposes*]

IX

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, be permitted (1) access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession of or under the control of said defendant, relating to any of the matters contained in this judgment; (2) without restraint or interference from the defendant, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and the defendant, on such request, shall submit such reports on applications for licenses and licensing under Paragraph IV of this judgment, or with respect to any relationship with Rohm & Haas, Darmstadt, I. C. I., or I. G. Farben, or on exports or sales for exports by the defendant, as may from time to time be reasonably necessary for the enforcement of this judgment; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States of America is a party or as otherwise required by law.

[*Juridiction Retained*]

X

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification, or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[*Patent Rights*]

XI

(A) With the exception of any non-exclusive rights which defendant may have acquired with respect to United States Letters Patent Nos. 2,123,599, 2,140,048 and 2,086,506, by virtue of its undated agreement, entered into on or about October 26, 1934, with I. G. Farben, and its agreement of May 12, 1939, with I. G. Farben, copies of which are attached hereto and made

a part thereof, and subject to the provisions of the last sentence of paragraph III 1, of this judgment, it is adjudged and decreed that all right, title and interest in and to the United States Letters Patent and application for United States Letters Patent listed in Exhibit C, is in the Attorney General.

(B) Subject to the provisions of subsection (C) of this paragraph XI, this judgment shall not be deemed to affect any right of the Attorney General or his successors and assigns with respect to his ownership of, or to issue licenses or immunities under, any patent, patent application, process, or invention now or hereafter vested in him, or to sell or otherwise dispose of any such patent, patent application, process, or invention, pursuant to the provisions of the Trading with the Enemy Act, as amended, and in accordance with his policy in the administration thereof, or the right of the Attorney General to royalties or payments accrued prior to the date of this judgment. Subject likewise to the provisions of subsection (C) of this paragraph XI, this judgment shall not be deemed to prohibit or restrict in any way the Attorney General or his successors or assigns for instituting or maintaining any suit or proceeding for patent infringement with respect to patents now or hereafter vested in him or from taking such action with respect to any vested patents, patent applications, process, or inventions as the national interest may require.

(C) A royalty-free, non-exclusive, unconditional and unrestricted license under any one or more of the United States Letters Patent, the patent numbers of which are listed in the aformentioned Exhibit C shall be granted by the Attorney General, his successors and assigns to any applicant making written request therefor; provided, that the department, agency or officer of the United States duly authorized to administer them may, upon a determination that the national interest so requires, withhold, and upon sale or other disposition of any such patents require any subsequent owner thereof to withhold, licenses thereunder from any corporation or other business organization organized under the laws of or having its principal place of business in Germany or Japan, or individuals who are subjects, citizens, or residents thereof, or any corporation, business organization, or individual acting for or on behalf of any such German or Japanese corporation, business or organization, or subject, citizen or resident of Germany or Japan or from any person who was or is named in "The Proclaimed List of Certain Blocked Nationals", or any similar list; and provided further, that any license issued by a duly authorized department, agency, or officer, of the United States may contain the terms and conditions set forth in the form annexed hereto and marked Exhibit E.

(D) A royalty-free, non-exclusive license but only for the field specified in Exhibit D under any one or more of the United States Letters Patent, the patent numbers of which are listed in the aforementioned Exhibit D, shall be granted by the Attorney General, his successors and assigns to any applicant making written request therefor; provided, that any license issued by a duly authorized department, agency, or officer of the United States may contain the terms and conditions set forth in the form annexed hereto and marked Exhibit F; and provided further, that in all other respects the provisions of subsection (C) shall be applicable to this subsection (D).

[¶ 62,335] United States v. Paramount Pictures, et al.

In the United States District Court for the Southern District of New York. Equity No. 87-273. November 8, 1948.

Sherman Antitrust Act

Consent Judgment—Divorcement of Motion Picture Distributor from Theatre Operating Affiliates.—A consent judgment entered against one of the major defendants in an antitrust suit charging the eight largest motion picture production and distribution companies with violations of the Sherman Act, which judgment is contingent upon approval by the stockholders of that defendant within 90 days of a plan of reorganization, requires the defendant to be reorganized into two new companies, one to hold its production and distribution assets, and the other to hold its theatres, the two new companies to be

controlled and managed independently of each other. The defendant's theatre circuit is required to dispose of its interest in 241 theatres jointly owned with independent exhibitors within one year by a sale to independents, and must terminate similar ownerships in 30 additional theatres within a year, but may do so by a purchase of the independent's interest if such disposition is agreeable to the independent. The defendant's controlling stockholder agrees to dispose of his interest in one of the new companies not later than one year after the entry of the judgment.

See the Sherman Act annotations, Vol. 1, ¶ 1530.90, 1590.

For plaintiff: Herbert A. Bergson, Robert L. Wright, Sigmund Timberg, George H. Davis, Jr.

For defendants: William J. Donovan, Ralstone R. Irvine, Gordon E. Youngman; Roy W. McDonald, Donovan Leisure Newton Lumbard & Irvine, of counsel.

Consent Decree as to the RKO Defendants

The plaintiff, United States of America, having filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, including Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation (hereinafter sometimes referred to as the "RKO defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the RKO defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this Court; and

The RKO defendants having represented to the plaintiff and to this Court that they propose to put into effect within ninety days of the date hereof a plan of reorganization which will have as its object and effect the divorcement of RKO's production-distribution assets from RKO's theatre assets; that pursuant to such plan two new holding companies will be formed, one of which (hereafter called the New Picture Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the production and distribution of motion pictures, and the other of which (hereafter called the New Theatre Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the exhibition of motion pictures; and that thereafter Radio-Keith-Orpheum Corporation will be dissolved and its stockholders will own all of the capital stock of the New Picture Company and of the New Theatre Company; and that on October 9, 1948, Howard R. Hughes was the owner of record of approximately 24 per cent of the common stock of Radio-Keith-Orpheum Corporation and that on such date no other person or corporation was the beneficial owner of record of as much as 1 per cent of such stock;

The RKO defendants having consented to the entry of this decree before the taking of any testimony upon the issues and matters open upon the remand of this cause, and without any findings of fact upon such issues and matters, and upon condition that neither such consent, nor this decree, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being an admission or adjudication or evidence that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true in so far as they relate to the issues and matters so open, or that the RKO defendants, or any one or more of them, have or has violated or are or is violating any statute or law with respect to the issues and matters so open; and The United States of America by its counsel having consented to the entry of this decree and to each and every provision thereof; and the Court having considered the matter,

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

[*Complaint Dismissed as to RKO*]

I.

The Complaint is dismissed as to all claims made against the RKO defendants

based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

[*Acts Enjoined*]

II.

A. The defendants, Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustained the legality thereof.

5. From further performing any existing franchise to which it is a party from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

B. Upon the dissolution of Radio-Keith-Orpheum Corporation in accordance with the plan of reorganization outlined in the recitals of this decree, and upon the New Picture Company succeeding to the production-distribution assets, the RKO defendants shall cause the New Picture Company to file with the Court its consent to be bound by the terms of sections II, IV, V, VII and VIII of this decree, and thereafter the New Picture Company shall be in all respects bound by the terms of such sections.

C. At any time after the entry of a final decree in this cause as to the defendants Universal Corporation and Columbia Pictures Corporation, or either of them, Radio-Keith-Orpheum Corporation and the New Picture Company, and RKO Radio Pictures, Inc., or either, or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with this decree and to comply with the provisions of such decree against said defendants Universal Corporation or Columbia Pictures Corporation or either of them, as it shall elect; and thereupon an order or supplemental decree shall be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the provisions of this section of this decree. The New Picture Company further agrees that this decree may be amended at any time after the entry of such other decree to include such new provisions against film

licensing discriminations as may be included in such other decree.

III.

A. The defendants Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation (herein referred to as "the RKO exhibitor-defendants"), their officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant. The existing relationships which violate this provision shall be terminated by December 31, 1948. In dissolving such relationships one defendant may acquire the interest of another defendant if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

6. (a) From acquiring a beneficial interest in any theatre, other than those named in paragraph 9 hereof, unless the acquiring defendant shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

(b) At any time after the entry of a final decree in this cause in which Paramount Pictures, Inc., Loew's, Incorporated, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, or National Theatres, Inc., or either of them, are bound by any provisions relating to the acquisition of beneficial interests in theatres other than acquisition in conjunction with other exhibitors, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation and the New Theatre Company, or any of them, or their successor or successors, may file herein a written notice of election to be relieved from further compliance with subparagraph (a) of this paragraph 6 and to comply with such provisions; and thereupon an order or supplemental decree shall be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree relating to the acquisition of beneficial interests in theatres, and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the terms of subparagraph (a) of this paragraph of this decree.

7. From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making or enforcing any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The theatres in which such ownership now exist are the following:

Theatre	*Location*
Academy	New York, New York
Ace	Ozone Park, New York
Alba	Brooklyn, New York
Albany	New Brunswick, New Jersey
Alden	Jamaica, New York
Alhambra	Brooklyn, New York
Ambassador	Brooklyn, New York
Appollo	Jersey City, New Jersey
Astoria	Queens, New York
Bay	Bay City, Michigan
Bayside	Bayside, New York

Theatre	*Location*
Benson	Brooklyn, New York
Beverly	Brooklyn, New York
Big Rapids	Big Rapids, Michigan
Bijou	Battle Creek, Michigan
Biltmore	Brooklyn, New York
Boulevard	Jackson Heights, New York
Broad	Trenton, New Jersey
Broadway	Astoria, Queens, New York
Broadway	Haverstraw, New York
Broadway	Nyack, New York
Bronxville	Bronxville, New York
Brook	Bound Brook, New Jersey
Brunswick	Trenton, New Jersey
Caldwell	St. Joseph, Michigan
Cameo	Ossining, New York
Capitol	Brooklyn, New York
Capitol	Flint, Michigan
Capitol	Jackson, Michigan
Capitol	Jersey City, New Jersey
Capitol	Kalamazoo, Michigan
Capitol	Lansing, Michigan
Capitol	Owosso, Michigan
Capitol	Portchester, New York
Capitol	Trenton, New Jersey
Carroll	Brooklyn, New York
Casino	Ozone Park, New York
Castle Hill	Bronx, New York
Center	Bay City, Michigan
Center	Cadillac, Michigan
Center	Grand Rapids, Michigan
Center	Holland, Michigan
Center	Ionia, Michigan
Center	Ludington, Michigan
Center	Owosso, Michigan
Center	Saginaw, Michigan
Center	Willow Run, Michigan
Centre	South Haven, Michigan
Claridge	Brooklyn, New York
Clinton	Brooklyn, New York
Colonial	Brooklyn, New York
Colonial	Holland, Michigan
Colony	Brooklyn, New York
Commodore	Brooklyn, New York
Congress	Brooklyn, New York
Corona	Corona, New York
Cove	Glen Cove, New York
Crescent	Astoria, Queens, New York
Cross Bay	Ozone Park, New York
Crosswell	Adrian, Michigan
Crotona	Bronx, New York
Culver	Brooklyn, New York
Dawn	Hillsdale, Michigan
Della	Flint, Michigan
Desmond	Port Huron, Michigan
Duffield	Brooklyn, New York
Dumont	Dumont, New Jersey
Eagle	Pontiac, Michigan
Eastern Parkway	Brooklyn, New York
Eastown	Grand Rapids, Michigan

Theatre	*Location*
Elm	Brooklyn, New York
Embassy	Brooklyn, New York
Embassy	Portchester, New York
Englewood	Englewood, New Jersey
Family	Adrian, Michigan
Family	Monroe, Michigan
Family	Port Huron, Michigan
Folly	Brooklyn, New York
Forest Hills	Forest Hills, New York
Four Star	Grand Rapids, Michigan
Franklin	Saginaw, Michigan
Fuller	Kalamazoo, Michigan
Fulton	Jersey City, New Jersey
Garden	Flint, Michigan
Garden	Ozone Park, New York
Gem	Brooklyn, New York
Gibson	Greenville, Michigan
Gladmer	Lansing, Michigan
Glen	Glen Cove, New York
Glenwood	Brooklyn, New York
Granada	Corona, New York
Grand	Astoria, Queens, New York
Grand	Chicago, Illinois
Grand	Grand Haven, Michigan
Hackensack	Hackensack, New Jersey
Halsey	Brooklyn, New York
Hamilton	Hamilton Township, New Jersey
Hempstead	Hempstead, New York
Highway	Brooklyn, New York
Hill	Hillsdale, Michigan
Hillstreet	Los Angeles, California
Holland	Holland, Michigan
Interboro	Bronx, New York
Ionia	Ionia, Michigan
Jackson	Jackson Heights, New York
Jamaica	Jamaica, New York
Jerome	Ozone Park, New York
Keith-Albee	Huntington, West Virginia
Kent	Grand Rapids, Michigan
Kew Gardens	Kew Gardens, New York
Kinema	Brooklyn, New York
Lafayette	Suffern, New York
Lake	Benton Harbor, Michigan
Lansing	Lansing, Michigan
Lefferts	Richmond Hill, New York
Liberty	Benton Harbor, Michigan
Liberty	Elizabeth, New Jersey
Lincoln	Kearny, New Jersey
Lincoln	Trenton, New Jersey
Lynbrook	Lynbrook, New York
Lyric	Alpena, Michigan
Lyric	Cadillac, Michigan
Lyric	Ludington, Michigan
Lyric	Manistee, Michigan
Lyric	Traverse City, Michigan

Theatre	Location
Majestic	Columbus, Ohio
Majestic	Grand Rapids, Michigan
Majestic	Jackson, Michigan
Majestic	Jersey City, New Jersey
Majestic	Port Huron, Michigan
Maltz	Alpena, Michigan
Manhasset	Manhasset, New York
Marble Hill	Bronx, New York
Marboro	Brooklyn, New York
Marcy	Brooklyn, New York
Martha Washington	Ypsilanti, Michigan
Maspeth	Maspeth, New York
Mecca	Saginaw, Michigan
Meserole	Brooklyn, New York
Michigan	Ann Arbor, Michigan
Michigan	Battle Creek, Michigan
Michigan	Jackson, Michigan
Michigan	Kalamazoo, Michigan
Michigan	Lansing, Michigan
Michigan	Muskegon, Michigan
Michigan	Saginaw, Michigan
Michigan	South Haven, Michigan
Michigan	Traverse, Michigan
Midway	Forest Hills, New York
Model	South Haven, Michigan
Monroe	Monroe, Michigan
Monticello	Jersey City, New Jersey
Nemo	New York, New York
Northtown	Lansing, Michigan
Oakland	Pontiac, Michigan
Oasis	Ridgewood, New York
Ogden	Bronx, New York
Orpheum	Ann Arbor, Michigan
Orpheum	Huntington, West Virginia
Orpheum	Kalamazoo, Michigan
Orpheum	Pontiac, Michigan
Our	Grand Rapids, Michigan
Palace	Bergenfield, New Jersey
Palace	Flint, Michigan
Palace	Trenton, New Jersey
Pantages	Hollywood, California
Parkhill	New York, New York
Park Plaza	Bronx, New York
Parthenon	Brooklyn, New York
Pascack	Westwood, New Jersey
Pelham	Bronx, New York
Pilgrim	Bronx, New York
Playhouse	Great Neck, New York
Plaza	Englewood, New Jersey
Post	Battle Creek, Michigan
Rainbow	Brooklyn, New York
Ramsdell	Manistee, Michigan
Reade	Highland Park, New Jersey
Reade's Trent	Trenton, New Jersey
Ready	Niles, Michigan
Regent	Allegan, Michigan
Regent	Battle Creek, Michigan
Regent	Bay City, Michigan
Regent	Flint, Michigan
Regent	Jackson, Michigan
Regent	Kearny, New Jersey
Regent	Muskegon, Michigan
Republic	Brooklyn, New York
Rex	East Rutherford, New Jersey
Rex	Jackson, Michigan
Rialto	Jersey City, New Jersey
Rialto	Pontiac, Michigan
Rialto	Three Rivers, Michigan
Ridgewood	Brooklyn, New York
Rivera	Brooklyn, New York
Riverside	New York, New York
Riviera	New York, New York
Riviera	Niles, Michigan
Riviera	Three Rivers, Michigan
Rivoli	Hempstead, New York
Rivoli	New Brunswick, New Jersey
Rivoli	Rutherford, New Jersey
RKO Proctor's	Newark, New Jersey
Robinhood	Grand Haven, Michigan
Rockland	Nyack, New York
Roosevelt	Flushing, New York
Roosevelt	Woodhaven, New York
Roxy	Flint, Michigan
Roxy	Sturgis, Michigan
Royal	Grand Rapids, Michigan
Savoy	Brooklyn, New York
Scarsdale	Scarsdale, New York
Senate	Brooklyn, New York
Silver	Greenville, Michigan
Southtown	Lansing, Michigan
Square	Bronx, New York
Squire	Great Neck, New York
Stadium	Brooklyn, New York
State	Ann Arbor, Michigan
State	East Lansing, Michigan
State	Flint, Michigan
State	Huntington, West Virginia
State	Jersey City, New Jersey
State	Kalamazoo, Michigan
State	Muskegon, Michigan
State	New Brunswick, New Jersey
State	Pontiac, Michigan
State	Trenton, New Jersey
Steinway	Astoria, Queens, New York
Stoddard	New York, New York
Stone	Brooklyn, New York
Strand	Battle Creek, Michigan
Strand	Flint, Michigan
Strand	Jersey City, New Jersey
Strand	Niles, Michigan
Strand	Owosso, Michigan
Strand	Pontiac, Michigan
Strand	Rockville Center, New York
Strand	Saginaw, Michigan
Strand	Sturgis, Michigan
Sunnyside	Woodside, New York
Supreme	Brooklyn, New York
Surf	Brooklyn, New York

Theatre	*Location*
Teaneck	Teaneck, New Jersey
Temple	Saginaw, Michigan
Times	Cincinnati, Ohio
Tipton	Huntington, West Virginia
Tivoli	Jersey City, New Jersey
Trabay	Traverse, Michigan
Triboro	Astoria, Queens, New York
Tuxedo	Bronx, New York
Uptown	Kalamazoo, Michigan
Utica	Brooklyn, New York
Valentine	Bronx, New York
Valley Stream	Valley Stream, New York
Victoria	Ossining, New York
Victory	Bayside West, New York
Vogue	Manistee, Michigan
Waldorf	Brooklyn, New York
Walker	Brooklyn, New York
Ward	Bronx, New York
Wealthy	Grand Rapids, Michigan
Westown	Bay City, Michigan
Westwood	Westwood, New Jersey
Whitney	Ann Arbor, Michigan
Wilson	Brooklyn, New York
Wolverine	Saginaw, Michigan
Wuerth	Ann Arbor, Michigan
Wuerth	Ypsilanti, Michigan
43rd Street	Long Island City, New York
77th Street	New York, New York

The existing joint ownership in the above enumerated theatres shall be terminated within one year from the date hereof in accordance with the following provisions:

(a) As to not to exceed thirty theatres from the above list, the RKO exhibitor-defendants or the New Theatre Company may elect to terminate such ownership either by acquiring the interest of the co-owner or co-owners therein, or by sale of the interest of RKO therein in accordance with paragraph (b) hereof. Such thirty theatres may include the Alden Theatre, Jamaica, N. Y.; the Midway Theatre, Forest Hills, N. Y.; and two of the following theatres: Castle Hill, Marble Hill, and Pelham Theatres, Bronx, New York. Except for such four theatres, none of such thirty theatres shall be located in New York City. In the event that the existing joint interest in the RKO Proctor's Theatre at Newark, N. J., is not terminated within one year in accordance with the provisions of this paragraph, such joint interest may continue, provided that one of the joint owners shall have the sole management of the theatre and the other shall exercise no control of any kind over the theatre, except to receive fixed payments during the balance of the agreements, which shall not be determined by the net earnings of the theatre.

(b) As to the remainder of the theatres above listed, including all other of such listed theatres located in New York City, the RKO exhibitor-defendants shall terminate such relation by a sale or other disposition of the interest of RKO therein, which may be either (i) to a co-owner or co-owners; or (ii) to a party not a defendant and not owned or controlled by or affiliated with a defendant in this cause.

B. In the event that the RKO exhibitor-defendants shall, pursuant to the provisions of section III-A-9(a), acquire the interest of their co-owners in all the theatres now owned, leased, or operated by Trenton-New Brunswick Theatres Company in Trenton, New Jersey, the RKO exhibitor-defendants shall dispose of all of their interest in one first-run theatre in Trenton. The RKO exhibitor-defendants shall effect such disposition within one year from the date of their acquisition of such theatres, and shall effectuate this provision by a sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

C. Within one year of the date hereof, the RKO exhibitor-defendants shall dispose of all their interest in two of the theatres now operated by them on first-run in the central business district of Cincinnati, Ohio. The RKO exhibitor-defendants shall effectuate this provision by a sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

D. For the purpose of any application or applications for approval of any proposed acquisition, the plaintiff and the RKO exhibitor-defendants hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application, after reasonable notice of hearing has been given to the Attorney General, may be determined by any judge of the District Court for the Southern District of New York.

E. Upon the dissolution of Radio-Keith-Orpheum Corporation pursuant to the plan of reorganization outlined in the recitals of this decree, and upon the New Theatre Company succeeding to the theatre assets,

the RKO defendants shall cause the New Theatre Company to file with the Court its consent to be bound by sections III, IV, V, VII and VIII of this decree, and thereupon the New Theatre Company shall become and thereafter be in all respects bound by the terms of such sections of this decree.

IV.

Commencing one year after the entry of this decree the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents, or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever.

V.

Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of one year from the date hereof, Howard R. Hughes shall either:

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees.

VI.

A. Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of RKO Radio Pictures, Inc., during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Radio-Keith-Orpheum Corporation has or may acquire pursuant to the terms of this decree a proprietary interest of ninety-five percent or more either directly or through subsidiaries.

B. From and after the effective date of the reorganization of the RKO defendants, the provisions of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or RKO Radio Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this decree.

VII.

A. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) sub-

ject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VIII.

[*Contingent Upon Approval*]

A. This decree is rendered and entered in lieu of and in substitution for the decree of this court dated December 31, 1946. This decree shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the RKO defendants shall not have been approved by the stockholders of Radio-Keith-Orpheum Corporation within 90 days from the entry of this decree.

[*Jurisdiction Retained*]

B. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

[¶ 62,336] United States v. District Court for the Southern District of New York.

In the United States Court of Appeals for the Second Circuit. Docket No. 19396. December 1, 1948.

Sherman Antitrust Act

Petition for Writ of Mandamus—Deletion of Clause Reserving Jurisdiction, Dismissal of Petition Denied.—An action brought by the government to terminate an alleged monopoly in the manufacture and sale of aluminum was dismissed by the District Court; on appeal to the Supreme Court, that body disqualified itself, and certified the question to a special court of three circuit judges, which reversed and remanded the case. A petition by plaintiff for a writ of mandamus directing the district judge to execute the mandate of the special court to vacate so much of its judgment on the mandate as reserves jurisdiction to enable the defendant to apply for a determination whether it still has a monopoly was denied by the special court, which held that its jurisdiction had expired. The Supreme Court reversed this ruling, and on remand for decision of the petition on the merits it is held that the clause which gives leave to defendant to seek a determination of the question as to whether it still has a monopoly is not equivalent to making that issue determine the question of dissolution; that the continuance of the monopoly in ingot aluminum may in the Court's judgment be enough to justify dissolution, but its absence will forbid neither dissolution nor any other remedy. The prayer to vacate the clause is denied. The prayer to dismiss defendant's petition filed in accordance with the mandate is denied. The Court recognizes no principle that a defendant may not bring on any proceeding in an action for determination, when the plaintiff unreasonably delays doing so.

See the Sherman Act annotations, Vol. 1, ¶ 1610.612, and prior opinions reported in 1946-1947 Trade Cases, ¶ 57,642, and at ¶ 62,256.

For plaintiff: Leonard J. Emmerglick.

For defendant: William Watson Smith.

Before L. Hand, Swan and A. N. Hand, Circuit Judges.

On petition for a writ of mandamus (1) to direct the district court to vacate a clause of Article XII of the judgment of the district court in the *United States v. Aluminum Company of America, et al.*, entered on April 23d, 1946, which reserved jurisdiction in that court to decide whether the defendant still retained a monopoly of the ingot market; and (2) to direct the court to dismiss the defendant's petition filed on March 31st, 1947, under the same clause.

[*Nature of Action*]

PER CURIAM: We dismissed the plaintiff's petition on October 28th, 1947, because we thought that it was properly a part of a second possible appeal in the action, over which we should have no jurisdiction.* The Supreme Court granted certiorari, and reversed our order,** holding that, regardless of whether it would have jurisdiction over a second appeal—a question as to which it reserved judgment—the petition raised only the question whether the district court had acted in accordance with our mandate; and that this was not so inextricably enmeshed in a second appeal that we should not decide it, even though we shall not have jurisdiction over a second appeal itself. It remitted the case without any expression of opinion, for us to decide the petition on the merits.

[*Deletion of Clause*]

The prayer for relief is twofold: (1) that we direct the district court to strike out from Article XII of the judgment a clause, which gives leave to "Alcoa" to apply to the district court "for a determination of the question whether it still has a monopoly of the aluminum ingot market in the United States"; and (2) that we direct the court to dismiss "Alcoa's" petition, filed in accordance with the leave so granted. The purport of the article as a whole may be compressed as follows: after the Surplus Property Administrator shall have propounded an overall plan for the disposal of government owned aluminum plants, the Attorney General may ask the district court (1) to dissolve "Alcoa" in whole or in part; (2) to enforce the plan, "if the same shall establish competitive conditions" in the industry; (3) for such other relief as will "establish" such conditions, if the plan does not; and, on its part "Alcoa" may ask the court to decide "whether it still has a monopoly of the aluminum ingot market." The plaintiff's position, as we understand it, is that the clause which gives leave to "Alcoa" to ask the court to decide whether it still has a monopoly, is equivalent to making that issue determine the question of dissolution. We do not so interpret it; it must be read in harmony with the leave given to the Attorney General which we have just quoted, and, when it is so read, the article as a whole conforms with our mandate, in which we tried to make it plain that the final judgment must secure the establishment of those "competitive conditions" which the Anti-Trust Acts demand. Dissolution is one remedy which may be necessary to that end; and in any event it will not depend upon the single issue whether "Alcoa" at the time of the judgment shall have a monopoly of the ingot market. On the contrary, it will depend upon what is "Alcoa's" position in the industry at that time: *i. e.,* whether it must be divided into competing units in order to conform with the law. The continuance of the monopoly in ingot aluminum may in the court's judgment be enough to justify dissolution; but its absence will forbid neither dissolution, nor any other remedy. We, therefore, deny the prayer for the deletion of the challenged clause in Article XII.

[*Dismissal of Petition*]

We also deny the prayer to direct a dismissal of "Alcoa's" petition. The plaintiff apparently wishes the initiative to rest in its hands alone; but we know of no principle, either at law or in equity, that a defendant may not bring on an action or any proceeding in an action, for determination, when the plaintiff unreasonably delays doing so. If it be the plaintiff's understanding that it stands in this respect upon a footing different from that of a private suitor, we cannot agree. Only by virtue of the challenged passage in Article XII does "Alcoa" retain any power to stir the plaintiff to action; and it was within its rights to avail itself of that power as it did. Now that the Attorney General has also made use of the leave given him to move under Article XII, there is no reason why the court should not proceed to decide the two petitions together.

[*Petition Denied*]

The petition is denied.

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* 164 Fed. (2) 159.

** 334 U. S. 258.

[¶ 62,337] Suckow Borax Mines Consolidated, Inc.; Mojave Borax Company, Ltd.; Paul O. Tobeler, Executor of the Last Will and Testament of John K. Suckow, deceased; and Ruth E. Suckow v. Borax Consolidated, Ltd.; Pacific Coast Borax Company; United States Borax Company, et al.

In the United States District Court for the Northern District of California, Southern Division. No. 27646-R. November 22, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Treble Damage Suit—Failure to State Cause of Action—Statute of Limitations.— An action at law based upon a continuing conspiracy, which originated in 1929, to violate the antitrust laws, with overt acts shown only for the purpose of demonstrating such conspiracy, is barred by the California statute of limitations. The only cause of action available to private parties under the antitrust laws is that for damage suffered, not the mere existence of a conspiracy in violation of such statutes. In order to obtain treble damages for an alleged conspiracy and combination in restraint of trade, the complaint must affirmatively show injuries to plaintiff's business or property and it is insufficient merely to allege violations of the antitrust laws and to claim damages resulting therefrom. The instant case fails affirmatively to allege any injuries suffered by reason of the defendants' alleged violation of the antitrust laws. Defendants' motion to dismiss the action is granted.

See the Sherman Act annotations, Vol. 1, ¶ 1640.435, and the Clayton Act annotations, Vol. 1, ¶ 2024.19.

For plaintiffs: Thurman W. Arnold, Washington, D. C.; Sterling Carr, San Francisco, California.

For defendants: Ray J. Coleman, Coleman & McDonald, Los Angeles, California; Maurice E. Harrison, Moses Lasky and Brobeck, Phleger & Harrison, San Francisco, California; Vincent H. O'Donnell, San Francisco, California; John L. Reith, Oakland, California; Oliver & Donnally, Fulton, Walter & Halley, New York, New York; Charles A. Beardsley, Oakland, California.

Memorandum Opinion

[*Nature of Action*]

ROCHE, D. J.: Plaintiffs bring this treble damage action under the Federal Anti-Trust Laws, 15 U. S. C. A. § 15 and 15 U. S. C. A. §§ 1 and 2, to recover $15,000,000.00 for damages alleged to have been sustained by them as a result of a general conspiracy on the part of the defendants, unlawfully and in violation of the Sherman and Clayton Acts, to monopolize and restrain trade in the borax industry.

[*Allegations*]

Plaintiffs allege that this said conspiracy came into existence in 1929 and continued in force up to and through the date of the commencement of this action, September 11, 1947. Plaintiffs complain that this conspiracy was a fraud upon them which resulted in the destruction of their businesses and that they, the plaintiffs, only acquired knowledge of the existence of such conspiracy in 1944 as a result of an action brought at that date by the United States against certain of the defendants for alleged violations of the Federal Anti-Trust Laws.

The complaint further alleges that certain overt acts in furtherance of the conspiracy took place from 1913 to 1942, with the following results.

In 1913, John K. Suckow, whose estate is a party plaintiff, sold to the defendant United States Borax Company (hereafter referred to as U. S. B. C.), for $4,500.00, all of his interest in a certain piece of California property containing a deposit of colemanite, which is a source of borax. In 1917, John K. Suckow (hereafter referred to as Suckow) sold a 75% interest in a similar piece of property to defendant Stauffer Chemical Company for the sum of $60,000.00 and in consideration of the holding by him of the position of manager in the operating company that was to work the mineral deposit. In 1918, Suckow, the Stauffer Chemical Company and defendant Pacific Coast Borax Company (hereafter referred to as P. C. B. C.) entered into an agreement creating the Suckow Chemical Company, with Suckow controlling the company and owning certain shares of its stock. Plaintiffs allege that Suckow was prevented from ever carrying on or operating the Suckow Chemi-

cal Company as had been contemplated and that for this reason, Suckow, in 1925, sold all of his stock in the Suckow Chemical Company to defendant P. C. B. C. for $150,000.00 Suckow paid $10,000.00 as commission for such sale to one Victor C. Emden, in ignorance of the alleged fact that Emden was acting as agent for P. C. B. C. at the time of the sale.

In 1918, an agreement was entered into between Suckow and U. S. B. C. providing that each should have a full one half interest in certain mining locations (for which claims had been filed by Suckow in 1916) to which patents were to be acquired by U. S. B. C. (whose interest was derived from a third party who had made adverse claims to certain of the locations in 1917). This agreement of 1918 was performed in part, but subsequent events led to the declaration by each that the other was failing to perform according to the agreement. This led to an action which was instituted by the Borax Consolidated, Ltd. (hereafter referred to as B. C. L.) in 1927 in the Superior Courts of California, whereby an injunction was sought against mining operations by Suckow on certain of the property involved in the 1918 agreement, an accounting by Suckow to the plaintiff B. C. L. and a determination of the rights of B. C. L. This action was dismissed by B. C. L. in 1930. In 1929 Suckow brought action against U. S. B. C. and certain of the other defendants herein to compel the transfer to him of an interest in certain mining properties according to the 1918 agreement. This action ended in a consent judgment being entered according to an agreement of 1934 as hereafter described.

In 1929 the Suckow Borax Mines Consolidated, Inc. was created and John K. Suckow transferred all of his mining properties to such company (hereafter referred to as the Suckow Company).

In 1930 B. C. L. brought an action in the United States District Court, seeking an injunction restraining the Suckow Company from further mining operations, damages and an accounting from the Suckow Company. The injunction was denied but the plaintiffs allege that the Suckow Company was forced to cease its mining operations because of the allegedly exorbitant value placed upon the ore as a result of the trial upon this action in 1932. In 1931 P. C. B. C. and others of the defendants caused an involuntary petition in bankruptcy to be filed against the Suckow Company, causing the Suckow Company to be duly adjudged a bankrupt in 1933, with a trustee appointed to manage it. The Suckow Company made an appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, but dismissed such appeal as a part of the agreement of 1934. In 1934, P. C. B. C. secured a lease of the mining properties of the bankrupt company for a period of five years. Plaintiffs then proceeded upon further litigation to contest this lease. In 1932, P. C. B. C. brought a patent infringement action against the Suckow Company and an injunction was issued by the U. S. District Court restraining the Suckow Company from using a particular method for calcining borax. An appeal was likewise taken from this order.

In 1934, an agreement was entered into between the plaintiffs and P. C. B. C. providing for the transfer of certain parcels of real property to P. C. B. C., the payment of $150,000.00 to Suckow, the release of all possible claims against any of the defendants, the mutual dismissal of all legal actions by each of the parties against any of the others and the granting of another lease from the trustee of the bankrupt company's property. In 1938, the bankruptcy proceedings were terminated and the property restored to the Suckow Company, subject to the terms of the lease mentioned. In 1942, the plaintiffs sold to the defendants all of the mining property that had been involved in the prior transactions, receiving therefor the sum of $350.000.00.

The plaintiffs further allege that the defendants caused a destruction of some of their mining properties during the period defendants were in possession under the lease and that the defendants also caused the destruction of the business possessed by the plaintiffs with certain European companies, which offered the only outlet for plaintiff's product.

Plaintiffs claim that all of these events were caused or entered into by them only because of harassments, persecutions and threats on the part of the defendants and that plaintiffs were unaware of the general conspiracy among the defendants to monopolize the borax industry.

[*Plaintiffs' Contentions*]

It is plaintiffs' position that this action is brought upon the existence of the general conspiracy and the damages suffered there-

from. The above described affairs are presented by plaintiffs not as the basis of the cause of action for damages, but as evidence of overt acts on the part of the defendants for the purpose of proving the existence of such conspiracy.

To summarize, plaintiffs present their case according to the following points. This is an action in equity upon the continuing conspiracy, which originated in 1929, with overt acts shown only for the purpose of demonstrating such conspiracy. The statutes of limitation are not controlling, since this is not an action at law, but if they were controlling, they would be tolled by reason of a Federal moratorium statute running from 1942 to 1946. In addition, an action by the United States under the Anti-Trust Laws against certain of the defendants, commenced in 1944 and terminating in 1945, suspended any statutes of limitations for that period by reason of the provisions of 15 U. S. C. A. 16. Fraud on the part of the defendants in denying their violations of the Anti-Trust Laws prevents, under the applicable California law, the statute of limitations from beginning to operate until discovery by the plaintiffs of their cause of action.

[*Defendants' Arguments*]

Defendants answer with the following arguments. This is a legal action to which the statutes of limitation are applicable. The only cause of action available to private parties under the Anti-Trust Laws is that for damages suffered, not the mere existence of a conspiracy in violation of such statutes. The California statute of limitations has run on all of plaintiffs' possible causes of action as established by the pleadings, except for any injuries or damages that might have been suffered in 1942. The statute has not been tolled by reason of fraud on the part of the defendants, since a denial of a violation of law does not constitute fraud. The Federal moratorium statute is not applicable to suits by private parties. There is a failure on the part of the plaintiffs to state a cause of action for any damages alleged to have been suffered in 1942. There were releases made by the plaintiffs of all existing or possible causes of action in agreements contracted by them with the defendants. The defendants move to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the statute of limitations and for a summary judgment.

[*Issues*]

The questions immediately presented are: (1) is this an action at law or an action in equity; (2) if this be an action at law, does the California statute of limitations bar any of the plaintiffs' possible causes of action; and (3) is there any cause of action pleaded by the plaintiffs upon which relief may be granted?

[*Ruling*]

This is an action at law, *Burnham Chemical Company v. Borax Consolidated, Ltd., et al.* (C. C. A. 9), — F. (2d) —, decided October 27, 1948; *Meeker v. Lehigh Valley Railroad Co.*, 162 F. 354; *Hartford-Empire Co. v. Glenshaw Glass Co.*, 3 F. R. D. 50; and not a suit in equity, *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27; *Burnham Chemical Company v. Borax Consolidated, Ltd., supra; Meyer v. Kansas City Southern Ry. Co.*, 84 F. (2d) 411; to which the state statute of limitations applies. *Chattanooga Foundry etc. v. Atlanta*, 203 U. S. 390; *Barnes Coal Corp. v. Retail Coal Merchants Assn.*, 128 F. (2d) 645; *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, cert. den. 299 U. S. 390; *Momand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568.

California Civil Code § 338, subd. 1, provides a three years statute of limitations for liabilities created by statute other than for a penalty or forfeiture.

The cause of action in a suit brought under 15 U. S. C. A. § 15 is for injuries suffered as a result of a conspiracy in violation of the Anti-Trust Laws and not the existence of the conspiracy itself. *Burnham Chemical Company v. Borax Consolidated, Ltd., supra; Foster & Kleiser Co. v. Special Site Sign Co., supra.* The Fourth Circuit Court of Appeals has expressed the law in *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, at page 887:

> "In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization . . . , but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages."

All of the cases cited by the plaintiffs as upholding their contention that the existence

of a conspiracy is in itself sufficient basis for a cause of action are cases of criminal prosecution by the government. A private action for damages is not an action for the common good, *Shurtz v. Foster & Kleiser Co.*, 29 F. Supp. 162; and the fact that a criminal action may be instituted by the government by reason of the existence of a conspiracy to violate the Anti-Trust Laws does not add to the right given to private individuals to sue for damages caused by such a conspiracy. *Burnham Chemical Company v. Borax Consolidated, Ltd., supra.*

The statute of limitations in California runs from the date when the injury was inflicted and the damage was suffered. *Rose v. Dunk-Harrison Co.*, 7 Cal. App. (2d) 502; *Lathing v. Gillette,* 95 Cal. 317. While the existence of fraud may create an exception to this rule, *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal. (2d) 226; such fraud needs, as appears from the cases cited by the plaintiffs themselves, to be a positive concealment of the facts giving rise to the cause of action despite a duty to disclose such facts. In none of the cited cases is there any rule to the effect that a mere denial of a violation of law constitutes a fraud upon the injured party so that the statute is tolled by reason of the exception to the general rule. Too, the record seems to firmly establish the fact that the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-trust Laws. Such fact precludes plaintiffs from availing themselves of this exception which would toll the statute of limitations until the alleged date of discovery in 1944.

The complaint recites at length a series of events taking place between 1913 and 1934 and culminating finally in the sale of property by the plaintiffs to the defendants in 1942. Allegedly, these events were caused by the conspiracy which is the basis of this action. It is these events themselves however, which form the basis of any causes of action under the Anti-Trust Laws. As the above discussion shows, the California statute of limitations is a bar for any of the plaintiffs' possible causes of action arising from 1913 to 1934. Apart from such bar however, no cause of action is stated by any of the claims made by the plaintiffs, including any claim with respect to the transaction of 1942.

In order to obtain treble damages for an alleged conspiracy and combination in restraint of trade, the complaint must affirmatively show injuries to plaintiffs' business or property and it is insufficient merely to allege violations of the Anti-Trust Laws and to claim damages resulting therefrom. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389. The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-Trust Laws. In every transaction with the defendants the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction.

The 1942 sale well illustrates this failure common to all of the plaintiffs' possible causes of action as stated in the complaint. Plaintiffs allege a sale of property to the defendants in consideration of receiving $350,000.00 and further allege that such sale was caused by the conspiracy of the defendants. There is no allegation of damages suffered or injuries received by the plaintiffs. On the face of the complaint, the price received by the plaintiffs does not appear to be inadequate consideration. In a like manner, the complaint fails to affirmatively show injuries to plaintiffs' business or property for any of the transactions or events delineated. Simply stated, the complaint alleges damages by reason of the alleged existence of the conspiracy. A mere claim of damages by reason of the existence of a conspiracy is not sufficient to state a cause of action, for a plaintiff must have received some injury in order to be able to sue under the Anti-Trust Laws. *Gibbs v. McNeeley,* 102 F. 594; *Noyes v. Parson,* 245 F. 689.

[*Complaint Dismissed*]

In accordance with the foregoing and in answer to the questions raised at the beginning of this discussion, this Court holds that this is an action at law, in which no cause of action lies by reason of the bar of the applicable California statute of limitations, and by reason of the failure of the complaint to state a claim upon which relief may be granted. Therefore, it is hereby ordered that the motion of the defendants to dismiss the complaint for failure to state a claim upon which relief may be granted be and the same hereby is granted and said complaint is hereby dismissed.

[¶ 62,338] United States v. Technicolor, Inc., Technicolor Motion Picture Corporation, and Eastman Kodak Company.

In the United States District Court for the Southern District of California, Central Division. Civil Action No. 7507-WM. November 24, 1948.

Sherman Antitrust Act

Consent Judgment—Color Cinematography—Acts Enjoined.—A consent judgment entered in an action charging three corporations with entering into a conspiracy in restraint of trade in the business of professional color cinematography requires one of the defendants, a film manufacturer, to license all of its current patents to any applicant on a royalty-free basis, and to license all patents which it may acquire in this field during the next five years on a reasonable royalty basis. Defendant is also required to furnish technical information to all licensees and to sell professional color motion picture film to all applicants without discrimination. Defendant is enjoined from selling, licensing, processing, conducting research, disclosing inventions and technical information, or providing personnel or laboratory facilities in connection with professional color cinematography, on condition that the person with whom defendant is dealing purchase professional color motion picture film exclusively from defendant, resell such film at a price or on terms fixed by defendant, refrain from selling or manufacturing such film, or have such film processed by certain specified persons.

See the Sherman Act annotations, Vol. 1, ¶ 1530.90, 1590.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; William C. Dixon, Sigmund Timberg, Manuel M. Gorman, Special Assistants to the Attorney General; James M. McGrath, W. Perry Epes, Nora B. Padway, Special Attorneys.

For defendant: Donovan, Leisure, Newton, Lumbard & Irvine, James R. Withrow, Jr.; Nixon, Hargrave, Middleton & Devans, Arthur L. Stern; McCutchen, Thomas, Matthew, Griffiths & Greene, George Harnagel, Jr.

Final Judgment Against Defendant Eastman Kodak Company

Plaintiff, United States of America, having filed its complaint herein on August 18, 1947, and defendant Eastman Kodak Company, by its attorneys, having appeared and filed its answer to such complaint denying the substantive allegations thereof, and having consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein and without admission by said defendant in respect to any such issue;

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the plaintiff, United States of America, and defendant Eastman Kodak Company, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

I. That this Court has jurisdiction of the subject matter hereof and of defendant Eastman Kodak Company; that the complaint states a cause of action against said defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, and acts amendatory thereof.

II. As used in this judgment:

A. "Kodak" refers to the Eastman Kodak Company, a corporation organized and existing under the laws of the State of New Jersey.

B. "Person" means any individual, partnership, firm, corporation, association, trustee, or any other business or legal entity.

C. "To process" or "processing" means to develop, duplicate, finish or print positive or negative film or prints but does not include any step or operation in connection with the manufacture of raw or unexposed film.

D. "Professional color cinematography" means:

(1) the selling and distributing of negative or positive film for use in the production of motion pictures in color, or

(2) the processing of such film, or

(3) the printing, processing, selling, and distributing of motion-picture color film prints

for exhibition in theatres and for industrial, scientific, advertising, educational, and other similar purposes, but does not include any step or operation in connection with the manufacture of raw or unexposed film.

E. "Professional color motion-picture film" means negative and positive film made for and to be used in professional color cinematography.

F. "Technicolor Agreements" means the following contracts and agreements:

The agreement dated June 25, 1934, between Technicolor Motion Picture Corporation, Technicolor, Inc., and Kodak, attached to the complaint herein as Exhibit "A";

The agreement dated December 14, 1945, between Technicolor Motion Picture Corporation, Technicolor, Inc., and Kodak, attached to the complaint herein as Exhibit "B";

The agreement dated April 5, 1938, between Technicolor Motion Picture Corporation and Kodak, attached to the complaint herein as Exhibit "C";

The agreement dated January 2, 1942, between Technicolor Motion Picture Corporation and Kodak, attached to the complaint herein as Exhibit "D";

The agreement dated October 22, 1936, between Technicolor Motion Picture Corporation, Technicolor, Inc., and Kodak, attached to the complaint herein as Exhibit "E".

III. Whenever reference is made in this judgment to defendant Kodak, such reference shall also include its successors and assigns, each of its officers, directors and employees, and each of its subsidiaries. The provisions in this judgment shall apply to defendant Kodak and also to each person acting or claiming to act under the direction or for or on behalf of Kodak.

IV. A. Kodak is hereby ordered and directed to grant to each applicant making written request therefor a nonexclusive and unrestricted license, for which Kodak may receive no royalty or other compensation, conveying full rights under any, some, or all of the claims of the following United States patents relating to professional color cinematography, and all divisions, continuations, reissues, or extensions of said patents:

1,897,866	1,969,479
1,900,869	2,019,718
1,954,346	2,059,884
1,969,469	2,108,602
2,258,976	2,295,013
2,271,238	2,362,598
	2,417,060

B. Kodak is hereby ordered and directed to grant to each applicant making written request therefor a nonexclusive and unrestricted license for which Kodak may charge a nondiscriminatory royalty equal to but not in excess of any royalty it may be obligated to pay on account of the granting of such license, provided such obligation on the part of Kodak existed prior to July 1, 1947, conveying full rights under any, some, or all of the claims of the following United States patents relating to professional color cinematography and all reissues, divisions, continuations, or extensions of said patents:

1,954,452	2,008,989
1,980,941	2,039,691
1,997,493	2,047,282
2,143,762	2,095,826
2,191,038	2,382,604
1,976,300	2,058,409
1,912,661	1,997,325

V. Kodak is hereby ordered and directed to grant to each domestic applicant making written request therefor a nonexclusive and unrestricted license, for which Kodak may charge a reasonable nondiscriminatory royalty, conveying full rights for processing, selling or distributing professional color motion-picture film under any, some or all of the claims of United States patents, applied for by or issued to Kodak within five (5) years from the date of this judgment; any, some, or all claims of all such patents or patent applications which Kodak acquires within such five years; and any, some or all claims of all such patents or patent applications of which Kodak becomes a licensee within such five years with power to sublicense.

VI. A. Kodak is hereby enjoined and restrained from

(1) making any assignment, sale or other disposition of any of the patents referred to in Sections IV and V of this judgment which would deprive it of the power or authority to grant the licenses referred to in said Sections, unless it requires, as a condition of such assignment, sale, or other disposition, that the purchaser, transferee, or assignee, shall observe the requirements of Sections IV, V, VII, X and XI of this judgment and the purchaser, transferee, or assignee shall file with this Court, prior to consummation of

said transaction, an undertaking to be bound by the provisions of said Sections of this judgment; or

(2) becoming, within five years from the date of this judgment, an exclusive licensee under any patents or patent applications for professional color cinematography, unless the license gives Kodak the power to grant sublicenses under said patents.

B. Any license granted by Kodak pursuant to the provisions of Sections IV or V of this judgment:

(1) Must refer to and identify this judgment;

(2) May provide that the license be nontransferable;

(3) Must provide that the licensee shall have the benefit of any more favorable terms granted other licensees licensed under this judgment under the same claims effective as of the time such more favorable terms are granted;

(4) Must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty (30) days' notice in writing to the licensor;

(5) Where a royalty is charged, as permitted in subsection B of Section IV and Section V,

a. may make reasonable provision for inspection of the books and records of the licensee by an independent auditor or any person acceptable to both the licensor and licensee, who shall report to the licensor only the amount of the royalty due and payable, and

b. may make reasonable provision for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided.

C. Upon receipt of written request for a license under the provisions of Section V, Kodak shall advise the license applicant in writing of the royalty which it deems reasonable for the claim or claims of the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by Kodak, the license applicant may forthwith apply to this Court for the determination of a reasonable royalty, and Kodak shall, upon receipt of notice of the filing of such court application, promptly give notice thereof to the Attorney General. In any such court proceeding, the burden of proof shall be on Kodak to establish the reasonableness of the royalty requested by it and the reasonable royalty rates, if any, determined by the Court shall apply to the license applicant and to all other licensees under this judgment under the same claim or claims of the same patent or patents. For said sixty (60) day period, and pending the completion of any such court proceeding, the applicant shall have full rights under the said patent claim or claims to which his application under Section V pertains without payment of royalty, but subject to the final judgment and order of the court in such proceeding, and further subject to the following provision: Kodak may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, Kodak shall then issue and the court applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such court application by the applicant. If the court applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application and for the rescission of any and all of the applicant's rights under this subsection. Where an interim license or sublicense has been issued pursuant to this subsection, or where the applicant has exercised any right under any patent hereunder, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under this judgment under the same claim or claims of the same patent or patents, to the date the applicant files his application with the Court.

D. Nothing herein shall prevent any applicant from attacking at any time the validity or scope of any of said patents nor shall this judgment be construed as imputing any validity or value to any of said patents.

VII. Defendant Kodak is enjoined and restrained from instituting or threatening to institute, or maintaining, or continuing any action, suit, or proceeding for acts of infringement of any patent referred to in Section IV of this judgment occurring prior to the date of said judgment.

VIII. Kodak is hereby ordered and directed to furnish within a reasonable time,

to each licensee who has been licensed pursuant to Sections IV and V of this judgment and who has made a written application therefor, during the term of its license:

A. A written manual without charge describing the methods known to and used by Kodak at the date of the entry of this judgment in its practice of processing for professional color cinematography;

B. Supplements to said manual without charge describing any changes in such methods, respectively, on January 1, 1950, and January 1, 1951;

C. On request, by any such licensee at any time during a period of five years after January 1, 1951, supplements to said manual describing any changes in such methods applicable to the licensed patent or patents, for which supplements Kodak may charge the separate cost to Kodak directly allocable to preparing the same.

IX. A. Kodak is hereby ordered and directed, as long as it shall manufacture, sell, or deal in professional color motion picture film, to the extent that any type of such film is available, to make quantities of such type available to any domestic user requiring such type, without discrimination among such users and in accordance with his bona fide requirements and on regularly offered prices, terms and conditions of sale.

B. In making such film available, whenever, during a period of five (5) years from the date of this judgment, Kodak is unable, for a period of four (4) successive weeks, to make deliveries to all domestic users in good faith requiring any type of such film, Kodak shall cause such type to be distributed among such users on the basis of their bona fide requirements. For the purposes of this subsection B of this Section IX, bona fide requirements shall be based on current needs rather than past purchases of professional color motion-picture film

C. Nothing contained in this Section IX shall be construed to create in any one other than the plaintiff, United States of America, rights or claims against Kodak that do not otherwise exist.

X. Except as otherwise provided for in this judgment, defendant Kodak is hereby enjoined and restrained from (a) selling or offering to sell any professional color motion-picture film; (b) licensing any patent or patents for professional color cinematography; (c) processing professional color motion-picture film; (d) under taking or conducting research and development work in professional color cinematography; (e) disclosing inventions, improvements, "know-how", and technical information and advice used and useful in professional color cinematography; or (f) providing personnel or laboratory facilities in connection with professional color cinematography, on condition that the other person or persons with whom defendant Kodak is dealing do any of the following things:

A. Purchase professional color motion-picture film exclusively or in any determinant amount or quotas from one or more specified sellers thereof, or refrain from purchasing such film from one or more specified sellers thereof;

B. Resell professional color motion-picture film at a price or on other terms or conditions fixed by defendant Kodak;

C. Refrain from selling or renting professional color motion-picture film;

D. Restrict the use of professional color motion-picture film;

E. Refrain from manufacturing or processing professional color motion-picture film;

F. Have professional color motion-picture film processed by any one or more specified persons.

XI. Except as otherwise provided for in this judgment, defendant Kodak is hereby enjoined and restrained from entering into, adhering to, maintaining, performing, enforcing or furthering, directly or indirectly, any contract, agreement, undertaking, arrangement, or understanding with any manufacturer or processor of professional color motion-picture film whereby:

A. Defendant Kodak or any other person or persons refrains from engaging in the manufacturing, processing, use, sale, or distribution of professional color motion-picture film or leaves any person (including defendant Kodak) free from competition in any territory, field or market in the manufacturing, processing, use, sale or distribution of such film; provided, however, that this section shall not be deemed to determine, adjudicate or affect the legality or illegality of any grant of preferential sales or distribution rights;

B. Defendant Kodak or any other person or persons refuses to sell to any user professional color motion-picture film to be manufactured according to technical specifications supplied by such user;

C. Defendant Kodak or Technicolor, Inc., or Technicolor Motion Picture Corporation, within five years after the date of this judgment, is given the exclusive right to process professional color motion-picture film for professional color cinematography utilizing methods or materials evolved as a result of joint research in professional color cinematography unless defendant Kodak has the unlimited right to sublicense thereunder.

XII. Should this Court adjudicate the illegality of any of the provisions of any of the Technicolor agreements, as defined in this judgment, in a final judgment entered against defendants Technicolor, Inc., and Technicolor Motion Picture Corporation, defendant Kodak is hereby enjoined and restrained to the same extent and in like manner, beginning on the date of entry of such a final judgment against Technicolor, Inc., and Technicolor Motion Picture Corporation,

A. From the further performance of such adjudged illegal provisions of any of said agreements or of any agreements amendatory thereof or supplemental thereto;

B. From entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan, program, or course of conduct with any person or persons for the purpose or with the effect of continuing, reviving or renewing any of such illegal provisions in any of said agreements.

XIII. A. Nothing contained in this judgment shall prevent defendant Kodak from availing itself of the benefits of the following acts and laws, and any amendments thereto: (1) the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act; or (2) the Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

B. The provisions of this judgment shall be limited to transactions in or affecting commerce as defined in Section 1 of the Clayton Act.

XIV. For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or the Assistant Attorney General in Charge of the Anti-Trust Division, and on reasonable notice to Kodak be permitted:

A. Access, during office hours of Kodak, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of Kodak relating to any of the subject matter of this judgment;

B. Subject to the reasonable convenience of Kodak and without restraint or interference from it, to interview officers or employees of Kodak, who may have counsel present, regarding any such matters; and upon such written request of the Attorney General or the Assistant Attorney General in Charge of the Anti-Trust Division, Kodak shall submit such reports concerning matters directly related to compliance with this judgment as may from time to time be reasonably necessary to check compliance with the provisions of this judgment or which otherwise may be directly related to matters prohibited or required to be done under the terms of this judgment, provided, however, that information obtained by the means permitted in this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

XV. Jurisdiction of this cause is retained by this Court for the purpose of enabling either of the parties to this judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification, or termination of any provisions thereof, the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 62,339] **Commercial Laundry Inc. and The Judge Linen Supply Co., Inc. v. Linen Supply Association of Greater New York, Inc., et al.**

In the United States District Court for the Southern District of New York. Civil 47-100. December 1, 1948.

Sherman Antitrust Act, Robinson-Patman Act, Donnelly Act

Treble Damage Suit—Conspiracy to Violate Antitrust Laws—Motion to Sever or Amend Complaint.—A complaint alleging that on or about certain dates, and continuing thereafter to the date of the commencement of the action, defendants engaged continuously in a conspiracy to monopolize the business of furnishing linens and flatwork to consumers thereof and to restrain competition, in violation of the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Donnelly Act, as a result of which plaintiffs have been damaged, is held sufficient as against a motion to sever or amend. It is held immaterial that one of the plaintiffs entered the field after the conspiracy had been instituted and put into operation; it is sufficient that such plaintiff has been in existence during a part of the period, that the conspiracy had operated upon it as it has upon the other plaintiff, and that it has been damaged by the conspiracy and the acts done in effectuation thereof. There is sufficient identity in occurrences and transactions, and in the question of fact and law which will be involved, to entitle the plaintiffs to join in bringing the action, and they are not required to allege their claims separately. However, a cause of action alleging that the acts therein complained of were committed by "the defendants, or some of them" is required to be amended, inasmuch as it appears that there is no allegation against any identifiable defendant. Although any defendant as to whom the allegations of this cause of action are untrue could deny them, no defendant should be required to plead to allegations which are not made against him, and until it appears which of the defendants are claimed to have committed the acts referred to, none of them may be called upon to plead to it.

See the Sherman Act annotations, Vol. 1, ¶ 1640.605, the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.600, and the Donnelly Act annotations, Vol. 2, ¶ 8615.14.

Memorandum

KAUFMAN, J.: Plaintiffs sue to recover treble damages and for an injunction, alleging conspiracy by defendants to violate, and violations by them, of the Sherman Anti-Trust Act, the Clayton Act, the Robinson-Patman Act, and the New York State General Business Law. Three of the defendants—Standard Coat, Apron & Linen Service, Inc. (a New York corporation), Standard Coat, Apron & Linen Service, Inc. (a New Jersey corporation) and Charles Maslow—move for an order requiring plaintiffs either to sever from the complaint the claims of one of the plaintiffs or to state their claims separately in an amended complaint.

The complaint contains three separately numbered causes of action. The first cause of action alleges (par. 29) that on or about February 1933, June 1937 and December 1939, respectively, the exact dates being unknown to plaintiffs, and continuing thereafter to the date of the commencement of the action in August 1948, defendants engaged continuously in a conspiracy to commit specified acts, which conspiracy was in violation of the Sherman Act, and (par. 31) that the defendants, by agreement and concerted action, have done the things which they so conspired to do. Various overt acts are alleged to have been committed by the defendants (par. 36) as steps in the conspiracy (par. 38), as a result of which, it is alleged (pars. 32, 39), plaintiffs have been damaged in the sum of $200,000 for which they are entitled to recover threefold under the Act and to an injunction against continuance of the acts complained of.

The complaint alleges that plaintiff Commercial Laundry Inc. is now and at all the times mentioned in the complaint was, engaged in competition with certain of the defendants, and that plaintiff The Judge Linen Supply Co. Inc. is presently so engaged.

The second cause of action repeats all the allegations of the first cause of action and alleges that the aforesaid conduct of the defendants and the acts committed by them as aforesaid constitute a violation of Section 340 of the General Business Law of the State of New York, commonly known as the Donnelly Act.

The third cause of action repeats all the allegations of the first cause of action and alleges (pars. 43, 44, 45) that "the defendants, or some of them" have discriminated against plaintiffs in certain specified respects, in violation of the Clayton Act and the Robinson-Patman Act (par. 48), with intent to drive plaintiffs out of business and to suppress competition (par. 46), thereby damaging plaintiffs in the sum of $200,000 (par. 47), for which plaintiffs are entitled to recover threefold (par. 49).

The relief demanded is an injunction against continuance by defendants of any acts in furtherance of the alleged conspiracy and in interference with plaintiffs' conduct of their business, and for a judgment against the defendants and each of them in the amount of $600,000 with interest, reasonable counsel fees, and the costs and disbursements of the action.

The moving defendants contend that since plaintiff The Judge Linen Supply Co. Inc. is not alleged to have been in existence and in competition with defendants throughout the period during which the conspiracy is alleged to have been in operation, the relief which that plaintiff is claiming cannot be based upon the same transaction, occurrence or series of transactions as the transaction, occurrence or series of transactions upon which plaintiff Commercial Laundry Inc. is claiming relief; that therefore they may not be joined as plaintiffs (Rule 20) and one or the other should be dropped as such (Rule 21).

Although it is alleged in paragraph 29 that defendants conspired "beginning on or about February 1933, June 1937 and December 1939," it would appear from the complaint, giving plaintiffs the benefit of all reasonable intendments from the allegations thereof, that plaintiffs are relying on a single continuing conspiracy by all the defendants to fix prices, monopolize the business of furnishing linens and flatwork to consumers thereof, to apportion the customers among themselves, to prevent others from entering the field, and to restrain competition; that this conspiracy has continued up to the commencement of the action, that among the objects of said conspiracy has been the elimination of both plaintiffs from the field, and that both of them have been damaged by the effectuation thereof. In these circumstances, it is immaterial that one of the plaintiffs entered the field after the conspiracy had been hatched and put into operation; it is sufficient that such plaintiff has been in existence during a part of the period, that the conspiracy has operated upon it as it has upon the other plaintiff, and that it has been damaged by the conspiracy and the acts done in effectuation thereof. Since the complaint alleges a conspiracy on the part of all defendants which contemplated the elimination and financial destruction of concerns like plaintiffs, and, in effectuation thereof, a series of acts directed against, and which damaged, both plaintiffs, there is sufficient identity in occurrences and transactions, and in the question of fact and law which will be involved, to entitle the plaintiffs to join in bringing the action, and they are not required in the complaint to allege their claims separately, except as hereinafter stated.

The third cause of action alleges that the acts therein complained of were committed by "the defendants, or some of them." Although no motion is addressed to this cause of action, except as above indicated, it thus appears that there is no allegation against any identifiable defendant. While it is not necessary that all the relief be demanded against all the defendants, it is necessary that each defendant know the wrongs which are alleged against it. Although any defendant as to whom the allegations of this cause of action are untrue could deny them, no defendant should be required to plead to allegations which are not made against him, and until it appears which of the defendants are claimed to have committed the acts referred to in the third cause of action, none of them may be called upon to plead to it.

Plaintiffs are therefore directed to serve an amended complaint within ten days after service of notice of entry of the order to be entered hereon, repleading the third cause of action so as to allege which of the defendants are claimed to have committed the acts alleged in paragraph 43 of the complaint. In all other respects the motion is denied.

[¶ 62,340] **Oscar L. Vines v. General Outdoor Advertising Company, Inc.**

In the United States Court of Appeals for the Second Circuit. Docket No. 20967. December 2, 1948.

Sherman Antitrust Act

Summary Judgment—Quantum Meruit Action—Claim Based on Antitrust Violations. —In an action upon a quantum meruit for work and services rendered to the defendant by the plaintiff as a solicitor for outdoor advertising, the lower court summarily dismissed the complaint. On appeal, it is held that the dismissal of a claim based on the antitrust laws was erroneous. In holding that, since the employment contracts reserved to the defendant the privilege of withdrawing any assigned advertiser at its pleasure, it could not be a wrong to withdraw a certain account from plaintiff by classifying it as a national account and assigning it to a company with whom it had entered into a contract which had been declared to be a violation of the antitrust laws by a decree in an action brought by the United States, the lower court denied to the plaintiff an opportunity to prove that he was injured by a violation of the antitrust laws. Those laws give a right of action to "any person who shall be injured in his business or property by reason of anything forbidden" therein, and those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him.

See the Sherman Act annotations, Vol. 1, ¶ 1220.507.

Reversing and remanding the decision of the United States District Court for the Southern District of New York, reported in 1946-1947 Trade Cases at ¶ 57,543.

For appellant: Lyman Stansky.

For appellee: Maxwell S. Mattuck.

[*Nature of Action*]

L. HAND, C. J.: This is an appeal from a judgment, summarily dismissing a complaint in four counts, upon a *quantum meruit* for work and services rendered to the defendant by the plaintiff as a solicitor for outdoor advertising. The defendant before answer moved to dismiss the action by producing four written contracts under which the plaintiff served from March 1st, 1936, to March 1st, 1943, when he resigned; and, so far as is relevant to the disposition of the four counts, there is no dispute of fact. The first contract, executed on March 1st, 1936, provided that the defendant "employed" the plaintiff "to solicit" advertisements and "to render such other services as may be required of him"; and that he accepted the employment and agreed to give all his time to it, each party being free to end the employment at will by written notice. The plaintiff was to solicit only such advertisers as the defendant should "from time to time" assign to him, and these assignments might be "withdrawn * * * at any time," whether the "solicitation" or "negotiation" were "pending" or "prospective." The plaintiff was to have no "compensation" for securing any contract after any "assigned" advertising had been withdrawn, even though he might have "solicited" the contract, and "wholly or in part negotiated" it before the withdrawal. The pay was based upon a "quota" for each solicitor, fixed from time to time by a complicated computation, depending upon the contracts which he should "procure" from the advertisers "assigned" to him. No contract would be included, if the advertiser was "withdrawn" before "the acceptance and signing of the contract" by the defendant. The contract also contained the following clause: "Upon the termination of this agreement all rights of the salesman to compensation for any services rendered to the company hereunder or otherwise shall thereupon cease and terminate, and the salesman hereby waives and relinquishes any and all rights to any compensation from the Company for any services he may have so rendered." The three later contracts executed on April 8th, 1941, January 7th, 1942, and January 1st, 1943, did not differ in the provisions relevant to the action at bar, although the pay was a fixed weekly stipend, to which was added a bonus computed on the contracts procured by the solicitor. The "termination" clause and the clause permitting the withdrawal of "assigned" advertisers were incorporated in each, substantially unchanged.

[Portions of the opinion dealing with the issues of mutuality, duress and fraud are omitted herein as not pertinent to the scope of these reports.]

[*Antitrust Issue*]

There remains the amorphous claim, based upon the Anti-Trust Acts. The judge held

that, since the contracts reserved to the defendant the privilege of withdrawing any "assigned" advertiser at its pleasure, it could not be a wrong to withdraw the Liebmann Breweries by classing it as a "national" account and assigning it to Outdoor Advertising Company, Inc. In this we think he failed to consider the basis of such a claim. The Anti-Trust Acts * give a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"; and it has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him.** There has been indeed much difference of opinion as to what is adequate proof that the "forbidden" act has caused "injury," and how great the "injury" was; but with that we have nothing to do upon a motion for summary judgment. We cannot deny the plaintiff an opportunity to prove that the defendant would have allowed him to continue to be the solicitor of the Liebmann Breweries, if it had not transferred the account to Outdoor Advertising Co., Inc.; or to prove that that transfer was in pursuance of an unlawful agreement between the two companies. If he should succeed on both issues, it would be no defense that the defendant was not bound to him by contract not to take away assigned advertisers. The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort. Decisions such as *Connolly v. Union Sewer Pipe Co.*,† *A. B. Small Co. v. Lamborn & Co.*,[1] and *Bruce's Juices v. American Can Co.*,[2] are beside the point; they held that the buyer of goods from a seller, who is engaged in violating such a statute, may not keep the goods without paying the price. The theory was that the seller's unlawful enterprise did not forfeit his title to the goods and that, since the buyer got his own title from the seller, he was obliged to conform to the conditions imposed upon its transfer. In the case at bar the wrong had nothing to do with any contract between the parties; it would have made no difference if there had been no contract of any kind between them. *Continental Wall Paper v. Voight*[3] helps the plaintiff as little as the decisions, on which the defendant relies, help it.

The release provisions in the contracts do not protect the defendant; they were all limited to "compensation for services rendered," and the claim is for damages for depriving the plaintiff of the opportunity to render services. The case is not so clear as to the release of April 8th, 1941, which described the claims released as follows: "all claims and demands of any kind whatsoever to the date hereof, and particularly * * * any claims or demands for salary, commissions or other compensation under any employment or contract of employment between the undersigned and the said General Outdoor Advertising Co., Inc." Although the plaintiff says that on April 8th, 1941, he did not know that the transfer of the Liebmann Breweries had been made in pursuance of an illegal contract between the defendant and Outdoor Advertising Co., Inc., that ignorance might not alone be enough to avoid the release, had it contained only the general words.[4] Moreover, the fact that words of general import were followed by particular instances, did not inexorably leave no scope to the words of general import. In releases, as elsewhere, the intent of the parties is to be gathered from the instrument as a whole.[5] Nevertheless, the courts of New York accept the common law doctrine that in a release words of general import, followed or preceded by words relating to specific claims, are, *ceteris paribus*, limited to the specific claims.[6] For the present, we need say no more than that the release of April 8th, 1941, did not inevitably release claims which the plaintiff might have under the Anti-Trust Acts, of which he was ignorant at the time.

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* § 15, Title 15, U. S. Code.

** *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251; *Straus v. Victor Talking Machine Co.*, 297 Fed. Rep. 791 (C. A. 2); *Roseland v. Phister Mfg. Co.*, 125 Fed. (2d) 417 (C. A. 7); *Package Closure Corp. v. Seabright Co.*, 141 Fed. (2d) 972 (C. A. 2); *McWhirter v. Monroe Calculating Machine Co.*, 76 Fed. Supp. 456.

† 184 U. S. 540.

[1] 267 U. S. 248.

[2] 330 U. S. 743.

[3] 212 U. S. 227.

[4] *Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182.

[5] *Murphy v. City of New York*, 190 N. Y. 413.

[6] *Haskell v. Miller*, 221 App. Div. 48; aff'd. 246 N. Y. 618; *Romaine v. Sweet*, 57 App. Div. 613; *Matter of Quick*, 147 Misc. 28, 34.

[*Reversed and Remanded in Part*]

The judgment will be affirmed insofar as it dismissed the four counts of the complaint; but it will be reversed insofar as it dismissed any claim the plaintiff may be able to establish under the Anti-Trust Acts. The cause will be remanded and judgment will be entered in the district court in accordance with the foregoing opinion.

[¶ 62,341] Bernard M. Shotkin, Trustee v. General Electric Company, et al.

In the United States Court of Appeals for the Tenth Circuit. No. 3604. December 2, 1948.

Appeal from the United States District Court for the District of Colorado.

Sherman Antitrust Act, Clayton Antitrust Act, Robinson-Patman Act

Action for Treble Damages—General Allegations—Failure to Allege Specific Acts.— A complaint in an action brought by a wholesale dealer of electrical equipment against manufacturers and distributors of such equipment, alleging in general language that the defendants combined and conspired to restrain trade and commerce in the manufacture, sale and distribution of electrical equipment, that they fixed prices, and that they stifled competition, without any averment of specific acts on the part of the defendants from which it could be determined as a matter of law that the defendants did in fact violate the antitrust laws with resulting damages to plaintiff, is held to be fatally infirm, and the dismissal of the action by the trial court is affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1640.121, the Clayton Act annotations, Vol. 1, ¶ 2024.19, and the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.475.

For appellant: Bernard M. Shotkin *pro se.*

For appellees L. A. Goalby and Westinghouse Electric Corporation: Donald S. Stubbs (Irving Hale, Jr., and Lewis, Grant, Newton, Davis & Henry were with him on brief). For appellees General Electric Company, Edison General Electric Appliance Company, now Hotpoint, Inc., and Hendrie & Bolthoff Company; Henry W. Toll (Grant, Shafroth & Toll were with him on brief). For appellees Mine & Smelter Supply Company: O. H. Johnson, and John D. Nicholson; Winston S. Howard, and Pershing, Bosworth, Dick & Dawson were on brief. For appellee New England Electric Company; Merrill A. Knight, and Schnaetzel and Knight were on brief.

Before PHILLIPS, Chief Judge, and BRATTON and MURRAH, Circuit Judges.

[*Nature of Action*]

BRATTON, C. J.: This was an action instituted in the United States Court for Colorado by Bernard M. Shotkin, as trustee for his minor children, against General Electric Company, General Electric Supply Company, Westinghouse Electric & Manufacturing Company, Westinghouse Electric Supply Company, Thomas A. Edison, Inc., Edison General Electric Appliance Company, and approximately seventy-five other corporations and individuals. Drawn without the aid of counsel, the amended complaint alleged that the action was filed under sections 1, 2, 3, 4, 7, and 15 of the Sherman Anti-Trust Act, sections 14 and 16 of the Clayton Act, and the Robinson-Patman Act. It further charged in general language that fluorescent and incandescent lamps, fixtures, apparatuses, appliances, devices, parts, and materials were manufactured by various of the defendants in different localities and were shipped and distributed through the channels of interstate commerce; that the defendants controlled and monopolized the manufacture, sale, and distribution of such commodities; that trading under the names Edison Light & Power Company, Dison Power & Light Company, and Chicago Wholesale Merchandise Company, plaintiff was engaged at Denver, Colorado, in the sale as wholesale distributor of electric lamps, light fixtures, apparatuses, appliances, devices, and other electric goods; and that most of his business was in interstate commerce. The complaint further alleged that the defendant Westinghouse Electric & Manufacturing Company agreed to furnish plaintiff lamps at the highest distributor's discount for sale and distribution in the course of his business in Denver; that such defendant did furnish plaintiff lamps for a

period of time; that the defendants entered into a combination or conspiracy to drive plaintiff out of business, with the intent to monopolize or attempt to monopolize a part of the interstate trade in fluorescent and incandescent lamps and fixtures originating in Denver; that as part of such combination or conspiracy or as the result thereof, the defendant Westinghouse Electric & Manufacturing Company ceased to furnish lamps to plaintiff and thereafter refused to furnish them to him; that the effect of driving him out of business in that manner would be substantially to lessen competition and create a monopoly in the sale of lamps to the great injury of the public; and that the defendants were discriminating against plaintiff. The complaint contained allegations respecting the decree entered against some of the defendants in a civil action previously pending in the United States Court for New Jersey but plaintiff was not a party to the action and had no personal interest in its subject-matter. And the complaint contained further allegations relating to a criminal prosecution against some of the defendants in the United States Court for Illinois, but that was long prior to the time plaintiff entered business at Denver and it had no bearing whatever upon any justiciable issue appropriate for determination in this case. The prayer was for injunctive relief and treble damages. The court dismissed the action for failure of the amended complaint to state a claim for which relief could be granted, and plaintiff appealed.

The general principles of the common law relating to contracts for the restriction or suppression of competition in the markets, agreements to fix prices, concerts to divide marketing territories, understandings to apportion customers, meeting of minds to restrict production, unity of purpose to furnish inferior products, and other like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the markets are familiar to all and therefore do not call for elaboration here. But the resulting restraints of trade were not penalized and they did not give rise to any actionable wrong. The Sherman Act, approved July 2, 1890, 26 Stat. 209, took its origin from that common-law background, and its primary purposes were more effective protection of the public from the evils of restraints on the competitive system. It extended the inhibition to any combination or conspiracy, whatever its form, having injurious effects of that kind upon the competitive system, and it provided both public and private remedies for the injuries flowing from the restraints. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U. S. 211; *Standard Oil Co. v. United States*, 221 U. S. 1; *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets. *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U. S. 165; *Ramsay Co. v. Bill Posters Assn.*, 260 U. S. 501; *United States v. American Oil Co.*, 262 U. S. 371; *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30. A common form of such combination, agreement, or concert is one having for its purpose or tendency the raising or fixing of prices, or one having for its purpose or tendency the dividing of territories, or one having for its purpose or tendency the apportionment of customers, or one having for its purpose or tendency the controlling or narrowing of outlets in order to raise or maintain prices.

In determining whether a contract, combination, or concert constitutes restraint of trade or commerce in violation of the Act, the intention of the parties may or may not be material, depending on whether the necessary effect of the agreement or concert or acts done is to directly restrain such trade or to create a monopoly. A specific intent to restrain such trade or commerce or to build up a monopoly in order for an agreement or concert to come within the scope of the Act is not always necessary. *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Griffith*, 334 U. S. 100. But regardless of the intent of the parties, if the inherent tendency of the combination, agreement, or concert is substantially to lessen, hinder, or suppress competition in the channels of the trade or commerce, it comes within the sweep of the Act. *Fashion Guild v. Trade Commission*, 312 U. S. 457.

It is essential to recovery in an action of this kind that plaintiff allege and prove two

things, a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form or undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert. *Wilder Manufacturing Co. v. Corn Products Co., supra; Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F. (2d) 885. The injury to the public need not be nationwide in geographical scope. If it involves monopolistic effect upon interstate commerce, it is enough even though it be narrow in geographical extent. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U. S. 219; *William Goldman Theatres, Inc. v. Loew's, Inc.,* 150 F. (2d) 738, 164 F. (2d) 1021, certiorari denied, 334 U. S. 811. But it must injuriously affect public interest, and the effect must be appreciable.

The amended complaint in this case alleged in very general language that the defendants combined and conspired to restrain trade and commerce in the manufacture, sale, and distribution of fluorescent and incandescent lamps, fixtures, appliances, devices, parts, and materials; that they fixed prices; and that they stifled competition. The pleading further alleged in general terms that the action of the defendant Westinghouse Electric & Manufacturing Company in discontinuing to furnish plaintiff lamps and in refusing further to furnish lamps to him was a part of such conspiracy or was in furtherance of it. And it further alleged in equally general terminology that the effect of such refusal to furnish lamps to plaintiff was substantially to lessen competition and to create a monopoly. But these were general allegations in the nature of conclusions, without any averment of specific acts on the part of the defendants from which it could be determined as a matter of law that the defendants did in fact violate the Act with resulting damages to plaintiff. The complaint did not allege that the defendants combined and conspired to refrain from competing with each other in the manufacture, sale, and distribution of the enumerated commodities. It did not allege that the defendants conspired to raise prices. It did not charge that they combined to divide trade territory. It failed to allege that they conspired to apportion customers. It did not aver that they agreed to furnish the public commodities of inferior quality. And it was barren of any charge that the defendants engaged in any trade practices of that kind in furtherance of a combination or conspiracy. While it was alleged that the refusal to furnish merchandise to plaintiff for sale in connection with the conduct of his business was in furtherance of the conspiracy and that the public was injured, it was not charged generally or specifically that as the result of that refusal the prices of such merchandise were enhanced or that the volume thereof in the competitive markets was diminished. In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into whch brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce. Instead, the pleading bore clear internal indications of a personal grievance on the part of plaintiff based solely and exclusively upon the declination of the defendant Westinghouse Electric & Manufacturing Company further to transact business with him as an outlet for its manufactured merchandise, with no evil consequence to the consuming public. During all of the time referred to in the amended complaint, the defendant General Electric Company and its related companies, the defendant Westinghouse Electric & Manufacturing Company and its related companies, and the defendant Thomas A. Edison, Inc., and its related companies, sold their products in all parts of the United States through dealers in virtually every city, town, and village; and the inability of plaintiff to sell the products of all or any of them in interstate commerce as a part of his business in Denver would in the very nature of things have infinitesimally little effect upon such commerce. The amended complaint was fatally infirm and therefore the court providently dismissed the action. *Glenn Coal Co. v. Dickinson Fuel Co., supra.*

The judgment is affirmed.

[¶ 62,342] Society of Independent Motion Picture Producers, et al. v. United Detroit Theatres Corporation, et al.

In the United States District Court for the Eastern District of Michigan, Southern Division. No. 7589. November 17, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Suit for Damages and Injunction—Motion to Vacate Notice of Taking Depositions—Place of Taking Depositions.—In an action by ten independent motion picture producers and an association of which they are members against motion picture exhibitors for damages for and injunctive relief against violations of the antitrust laws, plaintiffs' motion that defendants' notice of taking depositions be vacated is denied in view of the provisions of Rule 26(a) of the Federal Rules of Civil Procedure which authorizes either party to take depositions without leave of court if the notice to take the depositions is served more than twenty days following the commencement of the action. The notice in this case was served thirty-six days after filing of the complaint. Plaintiffs' request that the depositions be taken by interrogatories is denied where the complexity and ramifications foreseeable in the case indicate that interrogatories will not adequately serve the defendants' purposes. The request that the place of the taking of depositions be changed from Detroit to Los Angeles, for the reason that the proposed deponents are engaged in the production and direction of motion pictures and are unable to come to Detroit without disrupting such work to the great loss and damage of their respective organizations, is denied. Plaintiffs' objection can be obviated by deferring the taking of each proposed deponent's testimony until such time as each of them completes the production or direction of the motion pictures now in process of being produced or directed by any proposed deponent now so engaged. Plaintiffs' motion to quash the notice insofar as it purports to compel some of the proposed deponents to produce certain described documents is denied, and defendants' notice is treated as a motion to produce the documents requested, and as such is granted. The notice to take depositions and for the production of documents is vacated as to a proposed deponent who is not a party to the suit, without prejudice to a showing at any later time that he is an officer or director of, or is acting in a managerial capacity for, any of the plaintiff corporations.

See the Sherman Act annotations, Vol. 1, ¶ 1640.593, and the Clayton Act annotations, Vol. 1, ¶ 2036.76.

For plaintiffs: Robert J. Rubin, Beverly Hills, California; Joseph L. Alioto, San Francisco, California; Crawford, Sweeney & Dodd, Detroit, Michigan.

For defendants: Rockwell T. Gust; William Henry Gallagher; James E. Haggerty; David Newman; all of Detroit, Michigan.

[*Nature of Action*]

A complaint was filed against the defendants under Sections 15 and 26 of Title 15, USCA, being part of the Act of Congress of July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraint and monopoly", as amended, commonly known as the Sherman Act and the Clayton Act, for damages and injunction.

Time for filing answers was by stipulation extended by counsel and within that time defendants, United Theatres Corporation and Earl J. Hudson, filed identical notices to take depositions of the following officers or managing agents of plaintiffs or their assignors, whose respective addresses are set forth after their names: Marvin L. Faris, 357 N. Canon Dr., Beverly Hills, Cal.; Samuel Goldwyn, 1041 N. Formosa Ave., Los Angeles 46, Cal.; Walt Disney, 2400 W. Alameda Ave., Burbank, Cal.; David O. Selznick, 9336 Washington Blvd., Culver City, Cal.; Walter Wanger, 7324 Santa Monica Blvd., Hollywood 46, Cal.; Seymour Nebenzal, 1041 N. Formosa St., Hollywood 46, Cal.; Edward Small, 846 N. Cahuenga, Hollywood 38, Cal.; Benedict Bogeaus, 1040 N. Las Palmas Ave., Hollywood 38, Cal.; Hunt Stromberg, 1040 N. Las Palmas Ave., Hollywood 38 Cal.; and William Cagney 1040 N. Las Palmas Ave., Hollywood 38, Cal. The place at which depositions are to be taken is 733 Majestic

Building, City of Detroit, County of Wayne and State of Michigan. Six of the above named persons were requested to produce documents and records listed under their respective names.

Plaintiffs filed timely motions to vacate notice for taking depositions; that depositions be taken on written interrogatories, or, in the alternative, that depositions be taken in Los Angeles, California; and that the notice be quashed insofar as it purports to compel the production of documents. This motion is based on the grounds (1) that the witnesses reside at or near Hollywood and Los Angeles, California, approximately 2000 miles from the City of Detroit; that the corporations with which they are connected have their principal offices and place of business in the County of Los Angeles, California; (2) that the matters concerning which the witnesses will be examined are believed to relate to assignment of claims and can be inquired into effectively by written interrogatories, as evidenced by documents demanded in the notices of taking depositions; (3) that the taking of depositions in Detroit, Michigan, would be unduly oppressive to plaintiffs in the conduct of their business and will cause excessive hardship and great inconvenience to the persons designated in the notices; (4) that Paramount Pictures, Inc., the parent organization of defendant, United Detroit Theatres Corporation, has its place of business in Los Angeles, California, and retained legal counsel there.

Supporting affidavits were filed by each side. Following oral arguments in open court, counsel filed supplemental affidavits and briefs.

Plaintiffs' objections are filed under Rule 30(b) of the Federal Rules of Civil Procedure. Ordinarily, depositions of corporation executives and officers should be taken at the principal place of business of the corporation. This rule, however, is no more inflexible than is the rule that depositions of plaintiffs choosing a certain forum should be taken there. In this case ten witnesses who are residents of California will be required to travel 2000 miles to Detroit for a relatively short stay for any one of them, or, defendants' counsel would be obliged to travel 2000 miles from Detroit to Los Angeles for a more or less extended stay, during the taking of the depositions of all ten witnesses required, and be denied the benefit of material and relevant records which are in Detroit, during the taking of the depositions in California.

Each situation must be examined and decided in the light of its own peculiar facts and circumstances.

It is represented by defendants, and not seriously denied by plaintiffs, that proposed deponents make frequent trips from California to New York and either pass through or are near Detroit on such trips. On the part of the plaintiffs it is contended that proposed deponents have little knowledge of the business transactions or contracts entered into for the distribution of motion-picture films, and that their activities are confined largely to directing and to artistic features of motion-picture production industry; that their presence is required in Hollywood for the next several weeks or months because motion pictures are being produced and the production of pictures cannot proceed without them. It is claimed by the defendants, on the other hand, that the proposed deponents are the principal officers of the plaintiff corporations who dominate and control the actions and policies of plaintiff corporations and their assignors herein, and that, furthermore, they are the persons who actually make or pass upon and finally control all decisions regarding licensing of their feature pictures for exhibition in the Detroit area and elsewhere; that, also, in noticing the depositions to be taken at Detroit defendants had subpoenas issued for certain material and relevant records in possession of various members of the motion-picture industry at Detroit, and that these records must necessarily be referred to and be used at the time of taking the depositions here in Detroit; that, furthermore, if the depositions were taken at Los Angeles defendants' counsel would not have the benefit of these exhibits and information therein contained during the taking of these depositions.

The locale of the alleged unlawful practices is the Detroit area. Plaintiffs allege that defendant United Detroit Theatres Corporation is an exhibitor of motion pictures in the Detroit area and owns and controls four of seven first-run theatres and twelve of the most important neighborhood theatres in that area. Defendant Earl

J. Hudson is the manager of the "United" and supervises and controls its operation. It is further alleged by plaintiffs that defendant Cooperative Theatres of Michigan, Inc., is a Michigan corporation engaged in the business of negotiating for the licensing and booking of motion pictures in theatres operating principally in the Detroit area. It is owned by theatre-owning member stockholders; it is also alleged that defendant James F. Sharkey is the general manager of the "Cooperative" and is in charge of and controls the operation thereof and supervises the services rendered by "Cooperative" to its member stockholders.

Plaintiffs further allege that the remaining forty defendants are either corporations or partnerships, whose names are not known to plaintiffs at this time, and all forty of such defendants are named only as "Doe" defendants and numbered from one to forty.

After describing in detail the alleged unlawful practices of defendants, the plaintiffs ask for a decree adjudging that defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the licensing, supply, and exhibition of motion pictures, in violation of Sections 1 and 2 of the Sherman Act; that membership contracts of "Cooperative" be adjudged illegal *per se,* and that "Cooperative" be dissolved; that a receiver be appointed for "United", and that all theatres owned, operated or controlled by it be sold; further, that an injunction issue prohibiting the alleged unlawful practices; and that treble damages be awarded to plaintiffs in the aggregate of $8,750,000.00.

Prior to being served with the motion to vacate the notice of taking depositions defendants' counsel caused subpoenas to be issued directed to the Detroit offices of RKO Radio Pictures, Inc., Universal Film Exchanges, Inc., United Artists Corporation, and Eagle Lion Films, Inc., represented as being the agents and distributors of motion pictures produced by plaintiffs, to produce at the time and place of taking of said depositions in Detroit the documentary evidence in their possession relating to the licensing for exhibition in the Detroit area.

No problem of advancing traveling costs to proposed deponents is involved in this proceeding.

Plaintiffs' first request is that the notice of taking depositions be vacated. This request must be denied in view of the provisions of Rule 26(a) of Federal Rules of Civil Procedure which authorizes either party to take depositions without leave of court if the notice to take the depositions is served more than twenty days following the commencement of the action. The notice in this case was served thirty-six days after filing of the complaint.

Plaintiffs' second request is that the depositions be taken by interrogatories. Because of the complexity and ramifications even now foreseeable in this case, it is the considered judgment of this court that interrogatories will not serve the defendants' purposes adequately. The defendants not only vigorously deny plaintiffs' suggestion that the scope of oral deposition will apparently be restricted to information contained in the assignments of contracts to plaintiffs, but charge that the proposed deponents are the dominant and controlling force in each of the plaintiff corporations and that they set the policies of the motion-picture distribution and licensing. Whether this be so or not, defendants ought to have their choice of the method to be used by them in obtaining such information as will be necessary in filing answers to the plaintiffs' complaint, and to definitely determine the issues foreshadowed by the complaint.

The alternative to plaintiffs' second request is that the place of the taking of depositions be changed from Detroit to Los Angeles. Counsel for both sides have filed exhaustive briefs on this issue. It is interesting to note that both sides quote from the same decisions to buttress their respective contentions as to place of taking the depositions. Plaintiffs' serious objection to the taking of the depositions in Detroit is the representation that the proposed deponents are engaged in production of certain moving pictures at this time and that they are unable to come to Detroit without disrupting such work to the great loss and damages of their respective organizations. This, however, can be obviated by deferring the taking of each proposed deponent's testimony by deposition until such time as each of them in turn completes

the production or directing of the motion pictures now in process of being directed or produced by any proposed deponent so engaged. And, as it is not denied that most, if not all, of the proferred deponents travel to and from New York from time to time, no unusual hardship will be imposed on them by requesting their presence in Detroit for the taking of their testimony. Their agents for licensing and exhibiting their productions in the Detroit area are in Detroit with all their local records. Defendants should have the benefit of referring to these records while taking the proposed deponent's depositions in Detroit. Therefore, motion to transfer the taking of depositions from Detroit to Los Angeles will be denied.

The depositions will be taken in Detroit, as requested by defendants. Counsel may arrange the time to suit the convenience of each individual proposed deponent. In general, proposed deponents should be given a reasonable time to complete the production of the motion pictures, the making of which they are now actively engaged in, including cutting, retaking, and such other necessary work in readying the motion picture for public exhibition. Should counsel be unable to agree, the court will fix the time upon application and notice to opposing counsel.

There is one remaining problem to be resolved. Plaintiffs seek to quash the notice insofar as it purports to compel some of the proposed deponents to produce certain described documents. It is contended by plaintiffs that this can be accomplished by *subpoenas duces tecum,* subject to provisions of Rule 45(d). The proposed deponents have already submitted themselves to the jurisdiction and process of this court. Under the provisions of Rules 30(a) and 45 (d) (2) the court has authority to fix the place at which the order of the court is to be complied with, regardless of their residence. No claim is made by plaintiffs that the desired documents do not contain evidence material to the issues in this case. Clearly, the defendants have the undoubted right to have the described documents produced for their examination under Rule 30(a). Accordingly, defendants' notice to take depositions and to produce the documents described, will be treated as a motion to produce the documents requested, and as such it is granted.

Plaintiffs' motion to quash the notice for production of the documents at the time of taking the depositions is denied.

Proposed deponent Nebenzal is not a party to this suit. It has not been made apparent to the court that he is either an officer or a managing agent of any of the plaintiffs. The notice to take his deposition and produce documents will be vacated, without prejudice to a showing at any later time that he is an officer, director, or is acting in a managerial capacity of any of the plaintiff corporations.

An order, not inconsistent with this opinion, may be presented.

[¶ 62,343] Sun Cosmetic Shoppe Inc. v. Elizabeth Arden Sales Corporation.

Mirror Cosmetic Shoppe Inc. v. Elizabeth Arden Sales Corporation.

In the United States District Court for the Southern District of New York. Civ. 47-258, 47-259. December 4, 1948.

Robinson-Patman Price Discrimination Act

Motion for Summary Judgment—Jurisdiction of Court—Sufficiency of Complaints.—Complaints alleging price discrimination by a New York manufacturer of cosmetics between plaintiffs, New York cosmetics dealers, and their competitors in New York, fail to meet the jurisdictional requirement of the Robinson-Patman Act, which requires that the goods or commodities be in the flow of commerce. If the goods or commodities are not wholly within that flow, they at least must be touched by it. A motion to dismiss the complaints is granted, with leave to plaintiffs to amend.

See the Robinson-Patman Act, Vol. 1, ¶ 2212.170.

For plaintiffs: Morris Siegel, New York, New York.

For defendant: Townley, Updike & Carter, J. Howard Carter, John R. Schoemer, New York, New York.

Opinion

HULBERT, D. J.: Defendant moves for summary judgment or in the alternative seeks an order dismissing the complaint in each action, urging that this court lacks jurisdiction over the subject matter of the actions and further contends that the complaints are insufficient in law.

The plaintiffs, Sun Cosmetic Shoppe Inc. and Mirror Cosmetic Shoppe Inc., are New York corporations, and bring these actions under the Robinson-Patman Act, 15 U. S. C. A. § 13, to recover from the defendant $46,800 in each action, as treble damages for alleged violations of the Act.

Plaintiffs, engaged in the retail sale of cosmetics, allege that defendant designated plaintiffs in 1938 as agencies to sell its products, that up to May 1948 defendant represented to plaintiffs that it sold its goods to plaintiffs at the same price and upon the same terms as it was affording to plaintiffs' competitors. It is further claimed by plaintiffs that demonstrators were furnished to some of defendant's customers, who were competitors of plaintiffs, but not to the plaintiffs. Plaintiffs also allege that they continued to purchase defendant's products until May 1948, when they learned of the alleged discrimination, i. e. defendant was making rebates or allowances to plaintiffs' competitors in the City of New York and furnishing some of them with services and facilities not afforded to plaintiffs.

Defendant, Elizabeth Arden Sales Corp., is a Delaware corporation, and "it has its offices and principal place of business at 681 Fifth Avenue New York, New York." All of defendant's officers have business addresses in this state, and most of them reside here as well.

Prior to January 1, 1948 all cosmetics manufactured by Elizabeth Arden Inc., a New York corporation, were purchased from it by defendant for resale to cosmetic retailers. These cosmetics were manufactured in New York.

On January 1, 1948, defendant leased the manufacturing plant from Elizabeth Arden Inc., and since that time has manufactured the cosmetics. "It is at that location alone that Elizabeth Arden cosmetics are manufactured, packaged in containers, and made ready for shipment to retailers."

Plaintiffs' orders were made and filled in New York from stocks held by defendant at its Long Island City, N. Y., plant. Deliveries were made wholly within the City of New York, where they were offered by plaintiffs for sale to the retail trade.

On the argument of these motions it was admitted that defendant is generally engaged in interstate commerce. Defendant also admits that some of the raw materials used in the manufacture of cosmetics were acquired by Elizabeth Arden Inc. or by Elizabeth Arden Sales Corp. from sources outside the state of New York.

Defendant argues that since the wrongs complained of took place wholly within intrastate commerce there has been no violation of the Robinson-Patman Act; that merely because defendant is generally engaged in interstate commerce does not mean that defendant is subject to that Act in regard to the transactions in question here.

Plaintiff's position, on the other hand, is that since the defendant has engaged in interstate commerce generally it "thereby became amenable to the provisions of the Robinson-Patman Act in all of its transactions including those that might have been local or intrastate." The transactions involved in these actions, according to plaintiffs, are part of the overall picture of interstate activity engaged in by the defendant.

The applicable sections of the statute involved in this case are subdivisions (a) dealing with unlawful price discriminations, (d) and (e) of section 1 of the Robinson-Patman Act, 15 U. S. C. § 13, which read as follows:

"(d) It shall be unlawful for any person *engaged in commerce* to pay or contract for the payment of anything of value to or for the benefit of a customer of such person *in the course of such commerce* as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, han-

dling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." (Italics supplied.)

While the latter subdivision does not contain the clauses "engaged in commerce" and "in the course of such commerce" that subdivision (d) contains, this language is to be read into subdivision (e). *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. (2d) 988 (C. C. A. 8th, 1945) cert. den. 326 U. S. 773; *Elizabeth Arden Inc. v. Federal Trade Commission,* 156 F. (2d) 132 (C. C. A. 2nd, 1946).

The Robinson-Patman Act grew out of an investigation made by the Federal Trade Commission, aided by a strong lobby. Its purpose was to curb the advantageous buying position of large chain stores. 46 Yale Law Journal 447. The act does not, however, affect chain stores alone; rather by the use of broad language it is applicable to all classes of marketing. 80 Cong. Record 6674 (April 30, 1936).

There is no doubt that the defendant is a "person engaged in (interstate) commerce." Thus the ultimate question for determination here is whether the transactions which form the basis of plaintiffs' causes of action occurred "in the course of such commerce."

In considering this question it is well to look into the background of the Robinson-Patman Act to determine so far as possible the Congressional intent in using the phrase. Discussing subdivision (a) of section 13 of Title 15 U. S. C. (§ 2a of the Clayton Act as amended by the Robinson-Patman Act) which contains the jurisdictional test above referred to, the Senate Report contains the following:

> "Section 2 (a) attaches to competitive relations between a given seller and his several customers, and the clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate. * * * When granted by a given seller to his customers in other States and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress." Sen. Rep. No. 1502, 74th Cong. 2nd Session (1936).

In discussing jurisdiction under the Act, the Court of Appeals for the Third Circuit said the following in *Shaw's Inc. v. Wilson-Jones Co.,* 105 F. (2d) 331 (1939):

> "Section 2 of the Act was designed, however, to prevent interference with the current of commerce. For the provisions of the Section to be operative, goods or commodities must be in the flow of commerce, or services must have been rendered or have been contracted to be rendered in connection with goods or commodities so placed. We may surmise that if the goods or commodities are not wholly within that flow, they at least must be touched by it, affected by it, so to speak. This we think to be the limitation imposed by Congress."

This test is quite broad, but it appears to be in line with the Congressional intent in enacting the statute, as evidenced by the above quotation from the Senate Report. An examination of the complaint in this action reveals that it does not meet this test as it now stands. The facts alleged have been referred to above. The discrimination complained of is referred to [in] paragraphs eighth and eleventh which read as follows:

> "*EIGHTH:* That during the time that the plaintiff maintained such agency for the sale and distribution of the defendant's products, the defendant represented to the plaintiff that the goods and merchandise which it sold and would sell to the plaintiff would be sold at the same prices and upon the same terms as similar goods and merchandise which it was then selling and intended to sell to its other customers located in the *City of New York, State of New York.*
>
> "*ELEVENTH:* That subsequent to May, 1948, the plaintiff learned that the defendant had discriminated against it in the price of the goods and merchandise sold to it, and had paid and contracted to pay to its competitors in the *City of New York, State of New York,* by rebate or allowance, something of value, and furnished to a number of its competitors *in the City of New York,* services and facilities connected with the sale and offering for sale of such goods and merchandise so purchased upon terms not accorded to the plaintiff, * * *." (Italics supplied.)

It is to be noted that all the discrimination alleged in the complaint was between the plaintiffs and its *competitors in the City of New York*. However, on the argument of the motion, and in their brief, plaintiffs aver that they were "in competition with similar establishments in the State of New

York, New Jersey, and other states." And "Demonstrators' services were furnished to many of defendant's customers in the City and State of New York and in other States of the United States."

The court, in its reluctance to dismiss a pleading, often follows one of two courses: (1) it exercises its discretion under Rule 12 and defers the determination of any legal issues raised thereunder by motion until the trial, cf. *Equitable Life Insurance Society v. Saftlas*, 35 F. Supp. 62 (E. D. Penn., 1940); *Dysart v. Remington Rand Inc.*, 31 F. Supp. 296 (D. Conn., 1939); *Hawn v. America S. S. Co.*, 26 F. Supp. 428 (W. D. N. Y., 1939); or (2) the court may grant the motion to dismiss the pleading but grant the pleader leave to amend his pleading to correct the defects, cf. Rule 15 (a). F. R. C. P.

It appears that if plaintiffs amend their complaints to include the allegations made on the argument of this motion, the jurisdictional defects of the complaints will be remedied.

In accordance with the foregoing discussion the motions to dismiss the complaints are granted with leave to the plaintiffs to amend the complaints within 20 days after entry of an order hereon.

In view of this disposition of the motion to dismiss the complaints, the motion for summary judgment is denied without prejudice, and defendant's time to answer is hereby extended to 20 days subsequent to the filing of the amended complaint.

Settle order on notice.

[¶ 62,344] Office Machine Dealers Ass'n of New York, Inc. v. Tytell Typewriter Co., Inc.

In the New York Supreme Court, Special Term, Part III. 120 N. Y. L. J. 119. December 22, 1948.

New York Fair Trade Act

Motion for Injunction—Disputed Facts—Proper Party.—An application for injunctive relief under the Fair Trade Act is denied where the facts are in such sharp dispute that the drastic relief sought may not be granted on motion. Defendant's contention that plaintiff trade association is not a proper party is overruled. Since it has been held that a retailer may obtain relief under Section 369-b of the Act, it follows that an association of retailers is a proper party.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.30, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7361.

[*Application for Injunction*]

COHALAN, J.: This is an application for injunction relief under the Fair Trade Law. The application is denied. Plaintiffs, if they so elect, may, however, have an early trial, in which event the clerk, upon payment of his proper fees, is directed to accept a note of issue setting the cause down for the tenth court day after the joinder of issue. The facts are in such sharp dispute that the drastic relief sought will not be granted on motion. Defendant's contention that the plaintiff trade association is not a proper party within section 369-b is overruled. It has been held that a retailer may obtain relief under this section. It would seem to follow, therefore, that an association of retailers would be a proper party. Order signed.

[¶ 62,345] Excelsior Laboratory, Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 76—October Term, 1948. Decided December 20, 1948.

Petition by Excelsior Laboratory, Inc. to review an order of the Federal Trade Commission. Petition dismissed and enforcement granted.

Federal Trade Commission Act

Petition to Set Aside Order Denied—Sufficiency of Evidence.—Petition to set aside a Federal Trade Commission order prohibiting misrepresentation as to the therapeutic

value of a medicinal preparation designated "Gosewisch's Odorless Garlic Tablets" as a remedy for high blood pressure is denied. There was sufficient evidence based on expert testimony to show that it was deceptive to use the word "Garlic" as a distinguishing part of the name of the preparation when the average garlic oil content of each tablet was 1.5 millionth of a gram, and that garlic has no therapeutic value in the treatment of high blood pressure or its symptoms.

Petition to set aside Federal Trade Commission cease and desist order denied in Dkt. 5394.

See Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.378, 6630.37.

For petitioner: Frank & Frank, David Frank, of counsel.

For respondent: W. T. Kelley, General Counsel, James W. Cassedy, Assistant General Counsel, A. B. Hobbes, Special Attorney.

Before SWAN, CHASE and FRANK, Circuit Judges.

[*Nature of Action*]

CHASE, Circuit Judge: After due notice and hearings, the Federal Trade Commission found upon adequate evidence that the petitioner manufactured at its plant on Staten Island in New York a product which it sold and distributed in interstate commerce as "Gosewisch's Odorless Garlic Tablets" by means in part of advertisements in newspapers and periodicals published in various states. By these advertisements, and otherwise, the petitioner represented that the use of the tablets was an effective treatment for the effects of high blood pressure, including symptoms of dullness, tiredness, nervousness, dizziness and involuntary naps. The therapeutic value of the garlic in tablets as a remedy for such disorders was emphasized together with the opportunity the use of these tablets afforded to obtain the benefit of garlic treatment without fear of having an offensive breath.

The Commission also found upon undisputed evidence, which the petitioner contends was nevertheless inadequate, that the tablets contained but a negligible amount of garlic and that garlic has no therapeutic value in the treatment of high blood pressure or its symptoms.

[*Practices Prohibited by Order*]

It ordered the petitioner forthwith to cease and desist from:

"1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which:

(a) Represents, directly or by implication, that respondent's preparation possesses any therapeutic value in the treatment of high blood pressure or the symptoms thereof, or any other pathological condition;

(b) Represents, directly or by implication, that garlic possessed any therapeutic value in the treatment of high blood pressure or the symptoms thereof;

(c) Uses the word 'Garlic' or any other word of similar import in the product name of any preparation not containing a substantial quantity of garlic; or otherwise uses the word 'Garlic' or any simulation thereof in such manner as to represent or imply when such is not the fact, that a preparation contains garlic in substantial quantity.

(2) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of respondent's preparation in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement contains any representative prohibited in paragraph 1 (a), 1 (b), or 1 (c) above."

Thereupon this petition was duly filed to review and set aside the order. The Commission has opposed the petition and requested its affirmance and enforcement as provided in § 5 (c) of the Federal Trade Commission Act, 52 Stat. 112, 15 U. S. C. § 45 (c).

[*Cases Cited*]

It is familiar law that the findings of the Commission are conclusive if there is substantial support for them in the evidence. *Benton Announcements Inc. v. Federal Trade Commission*, 2 Cir., 130 F. 2d 254. Moreover, reasonable inferences drawn from facts found on substantial evidence are adequate to support findings. *Federal Trade Commission v. Pacific States Paper Trade Ass'n*,

273 U. S. 52, 63. And when there is room for choice among reasonable inferences which may be drawn the Commission may make the choice which in its best judgment should be made. *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 2 Cir., 139 F. 2d 393, 395; *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105.

[*Problem Presented*]

The problem here presented is, therefore, not so much one of law as one of fact and we shall go directly to the record to see what evidence there was to support the findings.

[*Testimony by Experts*]

A chemist, Dr. Wright, who had been employed by the government continuously since 1912 "mostly on the analysis of drugs and related products" distilled with steam two hundred of the tablets, the average weight of each being 0.609 of a gram, and found that the distillate contained less than 0.0003 of a gram of garlic oil. The remainder consisted of substances other than garlic oil, and for the most part of sucrose; the residue insoluble in water was 0.34%. He testified that this amount of garlic oil in two hundred tablets showed that the average garlic oil content of each tablet was 1.5 millionth of a gram.

Another chemist who had been employed by the government since 1937 examining food and drug products to determine their content received from Dr. Wright three of the whole tablets and the residue of solids insoluble in water left when Dr. Wright made his analysis. This second chemist made a microscopic examination of this residue and found that it "consisted of insoluble siliceous particles and a small amount of plant tissues closely resembling garlic." He testified that the identification of these plant tissues could not be more definite "because the particles were so scarce." Also that the "amount of plant tissues in the tablet was extremely small compared to the bulk of the tablet."

A doctor of medicine who had been employed in the United States Public Health Service since 1923 as a pharmacologist studying the action of drugs on health and disease testified that he was familiar with the garlic tablets of the petitioner. He testified that in the treatment of disorders caused by an above normal increase of blood pressure garlic had been used and years ago was thought to be beneficial. Modern controlled scientific tests had, however, shown otherwise. When asked whether the quantity of garlic or garlic oil in these tablets was of any therapeutic value he testified, "It would be too small to be of any pharmacological action in any dose that you could give of the tablet. Even if the dose were a hundred times greater however, I would feel that there would be no therapeutic value to be expected from the extract."

[*Sufficient Evidence to Support Commission's Findings*]

These witnesses were qualified experts. Cross-examination of them left this positive testimony unretracted and the petitioner did not offer any evidence at all. The Commission was free to believe and base findings upon it as it did. It, with the other evidence in the record was, if believed, undoubtedly sufficient to support findings which the Commission made to the effect that petitioner's advertisements were "erroneous, and misleading and * * * false" and that the use of "Garlic" on the name of the tablets was a representation that there was a substantial amount of garlic in their content. That being so, the findings are to be given effect. They show that it was deceptive to use the word "garlic" as a distinguishing part of the name of the preparation and the Commission was justified in forbidding its use unless the garlic content was increased to a substantial amount. Even if the descriptive part of the petitioner's trade-name and advertising had been accurate the ascription of therapeutic properties would have been deceptive and its prohibition justified.

[*Petition to Set Aside Order Denied*]

Petition to set aside the order denied and prayer for its enforcement granted.

[¶ 62,346] United States v. Bendix Home Appliances, Inc. and Telecoin Corporation.

In the United States District Court for the Southern District of New York. Civil Action No. 39-247. December 17, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Consent Judgment—Restrictive Distribution System—Practices Enjoined.—A consent judgment entered against a manufacturer of automatic washing machines and a distributor of those washing machines for rental purposes terminates certain restrictive distribution arrangements between the manufacturer, its distributors and dealers. The defendants are ordered to cancel agreements under which the defendant distributor is required to buy all of its automatic washing machines from the defendant manufacturer, and under which the manufacturer is prohibited from selling washing machines for rental purposes to any one other than the defendant distributor. Arrangements by which a distributor of the manufacturer's products is confined to a designated territory and is prohibited from reselling or servicing machines outside the designated territory are ordered terminated. The defendant distributor is prohibited from limiting the number of rental machines any operator may purchase or lease and from controlling the location at which any such machine may be installed.

See the Sherman Act annotations, Vol. 1, ¶ 1530.40, 1590, and the Clayton Act annotations, Vol. 1, ¶ 2023.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; Sigmund Timberg, Manuel M. Gorman, J. Francis Hayden, Irving B. Glickfeld, Special Assistants to the Attorney General.

For defendants: Goldwater & Flynn; Hawkins, Delafield & Wood.

Final Judgment

The plaintiff, United States of America, having filed its complaint herein on December 13, 1946, both of the defendants having appeared and severally filed their answers to such complaint, denying the substantive allegations thereof, all parties hereto, by their respective attorneys herein, having severally consented to the entry of this final judgment, without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue:

NOW, THEREFORE, without any testimony or evidence having been taken herein, and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, the court being advised and having considered the matter;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

[Jurisdiction]

I

This court has jurisdiction of the subject matter of this action and of the parties hereto; the complaint states a cause of action against the defendants under Sections 1 and 2 of the Act of Congress dated July 2, 1890, as amended, commonly known as the Sherman Act, and under Section 3 of the Act of Congress of October 15, 1914, as amended, commonly known as the Clayton Act.

[Terms Defined]

II

When used in this final judgment, the following terms have the meanings assigned respectively to them below:

(A) "Bendix" means defendant, BENDIX HOME APPLIANCES, INC., a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at South Bend, Indiana.

(B) "Telecoin" means defendant, TELECOIN CORPORATION, a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business in New York City, New York.

(C) "Machine" means an automatic washing machine which washes, rinses and damp dries clothes automatically, and any parts thereof.

(D) "Bendix Laundry" means a machine sold under the name of defendant Bendix.

(E) "Rental Machine" means a machine used for commercial purposes, or otherwise than in ordinary home use. Rental machines are used in the following ways,

among others: by multiple patrons in apartment, store, or public laundry locations, or in hospitals, industrial plants, and in similar institutions.

(F) "Person" means any individual, firm or corporation.

(G) "Distributor" means a person who purchases machines from Bendix for resale.

(H) "Dealer" means a person who purchases Bendix laundries from distributors for resale.

(I) "Operator" means a person engaged in the business of renting rental machnies. Operators usually install their rental machines in apartment, store or public laundry locations.

[*Applicability of Provisions*]

III

The provisions of this judgment applicable to any defendant shall apply to its subsidiaries, successors and assigns, and to each of their officers, directors, agents, nominees, or employees, and to any other person acting under, through, or for such defendant.

[*Agreements Ordered Terminated*]

IV

Defendant Bendix be, and it hereby is, directed to terminate and cancel all contracts, understandings and agreements concerning machines with its distributors whereby, and is enjoined and restrained from entering into, maintaining, enforcing or adhering to any contract, understanding or agreement concerning machines by which, any distributor is excluded from any designated territory; or by which any distributor is required, induced or agrees:

A. Not to resell, service, or repair Bendix Laundries outside of any designated territory; or

B. To pay a penalty or become subject to any discrimination because of sales, rentals or services made or performed by the distributor outside of any designated territory; or

C. To use or sell for use in the repair or servicing of Bendix Laundries only parts manufactured by or approved by Bendix; or

D. To resell machines only to or through dealers approved or suggested by Bendix.

E. Not to sell machines for use as rental machines other than to or through Telecoin, or through any other person designated by Bendix; or

F. To sell identical parts to any operator at higher or lower prices than to any other operator; or

G. To sell Bendix Laundries at prices fixed by Bendix or at not less than minimum prices stipulated by Bendix.

[*Future Practices Enjoined*]

V

Defendant Bendix be, and it hereby is, directed to advise distributors to terminate and cancel all contracts, understandings and agreements whereby, and is enjoined and restrained from entering into, maintaining, enforcing, adhering to, requiring or suggesting any future practice, contract, understanding or agreement by which, any dealer is required, induced or agrees:

A. Not to resell, service or repair machines outside of any designated territory; or

B. To pay a penalty or become subject to any discrimination because of sales, rentals or services made by the dealer outside of any designated territory; or

C. Not to sell machines for use as rental machines; or

D. To use or sell for use in the repair or servicing of Bendix Laundries only parts manufactured or approved by Bendix; or

E. To sell Bendix Laundries at prices fixed by Bendix or at not less than minimum prices stipulated by Bendix.

[*Agreements Ordered Terminated*]

VI

Defendants Bendix and Telecoin be, and they hereby are, directed to terminate and cancel any contracts, understandings and agreements between them whereby, and are enjoined and restrained from entering into, maintaining, enforcing or adhering to any contract, understanding or agreement by which:

A. Telecoin has or acquires the sole and exclusive right to buy rental machines, provided that this provision does not apply to or affect, or determine the legality or illegality of, the contract entered into between defendant Bendix and defendant Telecoin on April 14, 1948; or

B. Bendix induces or causes its distributors to sell machines exclusively to Telecoin for use as rental machines; or

C. Telecoin uses only Bendix Laundries; or

D. Telecoin submits to Bendix agreements it executes with operators.

VII

A. Defendant Telecoin be, and it hereby is, directed to terminate and cancel all contracts, understandings and agreements with operators whereby, and is enjoined and restrained from entering into, maintaining, enforcing by litigation or otherwise or adhering to any contract, understanding or agreement by which:

1. Telecoin limits or restricts the number of rental machines any operator may purchase, lease or operate; or

2. Telecoin limits or restricts the location at which any operator may install or operate rental machines; or

3. Any operator is required, induced or agrees not to resell or remove rental machines; or

4. Any operator is required, induced or agrees to purchase soap, laundry bags and other materials and accessories to be used in connection with the operation of the rental machines exclusively or preponderantly from Telecoin, or from any source or sources designated by Telecoin; or

5. Telecoin agrees not to sell or lease or refuse to sell or lease rental machines to any person because such machines are to be installed or used in any existing operator's territory; or

6. Any operator is required, induced or agrees to obtain Telecoin's approval in connection with the installation or use of rental machines; or

7. Any operator is required, induced or agrees to buy, sell or use only parts manufactured or approved by Bendix; or

8. Any operator is required, induced or agrees to purchase parts only from a distributor or other source designated by Bendix or Telecoin; or

9. Any operator is required, induced or agrees to buy parts at prices fixed by Bendix or Telecoin; or

10. Any operator is required, induced or agrees to charge rental fees for the use of rental machines in accordance with terms and conditions fixed or determined by Bendix or Telecoin.

B. Defendant Telecoin be, and it hereby is, enjoined and restrained from selling or leasing rental machines in any manner unless it sells or leases them to all bona fide operator applicants and without any discrimination whatsoever.

C. Defendant Telecoin be, and it hereby is, enjoined and restrained from selling or leasing rental machines upon any condition whatsoever other than payment of purchase price on a sale or rental fee on a lease.

VIII

Nothing in this judgment shall prevent defendants Bendix and Telecoin from availing themselves of the benefits, if any, of the Act of Congress of 1937, commonly called the Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

[*Copies of Judgment*]

IX

Defendant Bendix be, and it hereby is, directed to cause copies of this final judgment to be mailed, postage prepaid, within fifteen (15) days from the effective date of this judgment, to each of its distributors, and to dealers through its distributors.

X

Defendant Telecoin be, and it hereby is, directed to cause copies of this final judgment to be mailed, postage prepaid, within fifteen (15) days from the effective date of this judgment to each of its operators.

[*Inspection Authorized*]

XI

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice, upon the written request of the Attorney General or Assistant Attorney General, and on reasonable notice to the defendants made to their principal offices, shall be permitted: (a) access, during the office hours of said defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession of or under the control of said defendants relating to any of the matters contained in this judgment, such access to be subject to any legally recognized privilege; and (b) subject to the reasonable convenience of said defendants and without restraint or interference from them, to interview officers or employees of defendants, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, and upon reasonable notice to its principal office, shall submit such written reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment. No information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party, for the purpose of securing compliance with this judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

XII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modification, or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 62,347] Opinion of the Attorney General of Wisconsin.

Addressed to Kenneth L. Swanson, District Attorney, Ellsworth, Wisconsin, by —— Attorney General. Vol. ——, page 530. September 16, 1948.

Wisconsin Fair Trade Act

Marketing and Trade Practices—Trading Stamps.—The use of trading stamps if given with the purchase of a product as to which a valid minimum resale price has been established by the producer or distributor is prohibited by the Trading Stamp Law, sec. 100.15(2), Stats. if the sale price less the cash value of the stamps is less than the minimum resale price so fixed under the Fair Trade Act.

See the Commentary on Resale Price Maintenance, Vol. 2, ¶ 7314, and the Wisconsin Fair Trade Act, Vol. 2, ¶ 8944.

[*Question*]

You inquire whether the following situation constitutes a violation of the trading stamp law, sec. 100.15, Stats.

Several Ellsworth and River Falls merchants, dealing respectively in drugs, feed, clothing, furniture, hardware, photography and a filling station, have joined in a plan to give trading stamps to customers at the rate of one for each 10 cents of merchandise or services purchased. Customers are given booklets containing 60 pages, on each of which 25 stamps may be pasted. When the book is half filled it will be redeemed for $1.50 or when entirely filled, for $3. According to pictures submitted with your request the stamps appear to bear no cash value on their face but do not appear to be redeemable in merchandise. The scheme is said to represent a 2 per cent cash discount.

[*Trading Stamp Law*]

Section 100.15 (1), Stats., provides, so far as is material here, as follows:

"No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check *shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value,* and only by the person, firm or corporation issuing the same * * *."

Since the stamps do not bear on their face a stated cash redemption value, and are

not redeemable in amounts aggregating 25 cents or more, the plan is clearly illegal under this section so far as it applies to sales of merchandise but not as applied to services. See XX Op. Atty. Gen. 1107.

[*Fair Trade Act*]

You inquire further whether the use of these stamps may be in violation of sec. 100.15 (2) if given with the purchase of a product as to which a minimum resale price has been fixed or established by the producer or distributor, if the sale price less the cash value of the stamps is less than the minimum resale price so fixed. This situation is fully covered in the case of *Ed. Schuster & Co. v. Steffes,* (1941) 237 Wis. 41, 295 N. W. 737, 133 A. L. R. 1071. Under that decision such use of the stamps is prohibited by sec. 100.15 (2) if a valid minimum resale price has been fixed under the fair trade act, sec. 133.25, Stats.

[¶ 62,348] Opinion of the Attorney General of Minnesota.

Addressed to James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. December 30, 1948.

Minnesota Trusts and Combinations Law

Refusal to Sell—No Agreement or Understanding—No Violation Disclosed.—The refusal of a corporation manufacturing, distributing and servicing business machines, on which it holds patents, to sell repair parts to independent service repairmen does not violate the Minnesota Trusts and Combinations Law. In the absence of an agreement or understanding with another corporation, by virtue of which agreement the corporation refuses to sell to independent repairmen, there is no violation of the provision which prohibits the making of agreements in restraint of trade. The statute does not compel a concern to do business with persons with whom it does not choose to deal.

See the Minnesota Trusts and Combinations Law, Vol. 2, ¶ 8435.

[*Facts*]

Your letter of December 28 informs the Attorney General that it has come to your attention that:

"A corporation manufacturing, distributing and servicing business machines, on which it holds numerous United States patents, refuses to sell repair parts to independent service repairmen who have the requisite skills and abilities to repair and service the business machines sold by the aforementioned manufacturer and distributor. This refusal makes it impossible for independent service repairmen to obtain the requisite parts required to maintain the business machines owned by their customers and is in fact forcing them out of business."

You have submitted the question:

Question

Do these facts disclose that the corporation conducts such business in violation of M. S. A., Sec. 623.01?

Opinion

So far as the facts disclose, it does not appear that the corporation has entered into any pool, trust agreement, combination, or understanding with another by virtue of which agreement it conducts its business as disclosed. The facts stated fail to disclose that any agreement has been made between the corporation and another which tends in any way or degree to limit, fix, control, maintain or regulate the price of any article of trade, manufacture, or use bought and sold within the state. Such facts do not disclose that an agreement has been made which limits or tends to limit the production of any article. They do not disclose that any such agreement has been made which prevents or limits competition in the purchase or sale of any article. They do not disclose that the corporation has made an agreement which tends or is designed to do any of the things mentioned.

It appears to me that the most that can be said concerning this state of facts is that the corporation selects the person with whom it chooses to do business. It is not a public service corporation as disclosed by the facts. An individual or corporation not operating a public utility does not hold itself out to the public as offering to do business with

all persons who may choose to do business with it.

We have statutes which prevent discrimination between different sections of the state by selling a commodity, such as petroleum or its products, at a lower rate in one section than is charged for the same commodity by such party in another section after making due allowance for the difference, if any, in the quality and cost of transportation. For example, see M. S. A., Sec. 623.08. But this statute does not compel the owner of the petroleum to sell to any one who applies to buy it. It relates merely to the price.

But Sec. 623.01 relates to the agreement itself and prohibits the making of agreements in restraint of trade. It does not by its terms prohibit discrimination on the part of vendors between purchasers.

Although not on the precise point here considered, the case of *Pittsburgh Plate Glass Company v. Paine & Nixon Company*, 182 Minn. 159, decided in 1930, considered this statute. The opinion of the court is interesting. It was there held that this statute in relation to the restraint of trade, etc., should be construed in the light of reason; and, so construed, the contract mentioned in the opinion, which restrained trade and limited competition in a reasonable way only, was not obnoxious to the statute.

[*No Violation of Statute*]

It is my conclusion that a corporation manufacturing, distributing and servicing business machines on which it holds patents may, if it chooses, refuse to sell repair parts to independent service repairmen who have the requisite skills and abilities to repair and service the business machines sold by the manufacturer or distributor. This statute does not compel such concern to do business with persons with whom it does not choose to deal.

[¶ 62,349] United States v. Bendix Aviation Corporation, Westinghouse Air Brake Company, et al.

In the United States District Court for the Southern District of New York. Civil Action No. 44-284. December 22, 1948.

Sherman Antitrust Act

Consent Judgment—Braking System Industry—Acquisition of Shares in Co-defendant Prohibited.—A consent judgment entered in an action charging several manufacturers of braking systems with conspiring to monopolize the automotive and industrial brake business in violation of the Sherman Act, prohibits one of the defendants from acquiring further shares in or participating in the business acts of one of the corporate defendants.

See the Sherman Act annotations, Vol. 1, ¶ 1220.211, 1530, 1590.

Consent Judgment—Braking System Industry—Price Fixing and Related Practices.—The defendant, a manufacturer of braking systems, is restrained from contracting with any other manufacturer in this field so as to allocate markets, restrict the importation or exportation of braking systems, or fix prices.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10.

Consent Judgment—Braking System Industry—Exclusive Dealing Prohibited.—A consent judgment enjoins a manufacturer of braking systems from entering into agreements designed to supress competition, from attaching monopolistic conditions to the sale of the product, and from cancelling dealer contracts because the dealer refuses to deal exlusively with the defendant.

See the Sherman Act annotations, Vol. 1, ¶ 1530.40.

Consent Judgment—Braking System Industry—Patent Monopolies—Action for Patent Infringement Abrogated.—Legal action by a manufacturer of braking systems for

infringement of any braking patent is forbidden and the defendant is required to license its existing automotive brake patents to all applicants on a royalty-free basis and to license all patents acquired or applied for during the next five years on a reasonable royalty basis.

See the Sherman Act annotations, Vol. 1, ¶ 1530.50.

For plaintiff: Herbert A. Bergson, Assistant Attorney General; Sigmund Timberg, Special Assistant to the Attorney General; John F. X. McGohey, United States Attorney; J. Francis Hayden, Marcus A. Hollabaugh, Irving Glickfeld, Special Assistants to the Attorney General.

For the defendant Westinghouse Air Brake Company: Bruce Bromley of Cravath, Swaine & Moore; Homer Cummings of Cummings, Stanley, Truitt & Cross.

Final Judgment

JOHN C. KNOX, United States District Judge: Plaintiff, United States of America, having filed its complaint herein on December 9, 1947; the defendant, Westinghouse Air Brake Company, having appeared and filed its answer to such complaint denying any violation of law; plaintiff and defendant Westinghouse Air Brake Company by their respective attorneys herein having severally consented to the entry of this final judgment without trial or adjudication of any issue of fact or of law and without admission by either party herein in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein and without trial or adjudication of any issue of fact or law herein, and upon consent of plaintiff and defendant Westinghouse Air Brake Company, it is hereby

Ordered, adjudged and decreed as follows:

[*Jurisdiction*]

I

That this Court has jurisdiction of the subject matter hereof and of all parties hereto; that the complaint states a cause of action against the defendant Westinghouse Air Brake Company under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act, and under Section 3 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for other Purposes," commonly known as the Clayton Act.

[*Terms Defined*]

II

As used in this judgment:

"Bendix" means Bendix Aviation Corporation, a corporation organized and existing under the laws of the State of Delaware with its principal place of business at South Bend, Indiana;

"B-W" means Bendix-Westinghouse Automotive Air Brake Company, a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Elyria, Ohio;

"Westinghouse" means Westinghouse Air Brake Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business at Wilmerding, Pennsylvania;

"Person" means any individual, partnership, firm, corporation, association, trustee, or any other business or legal entity;

"Braking system" or "braking systems" means any apparatus, and each part thereof, by which an automotive vehicle outside of the railway field is brought to a stop.

"Braking system patents" means all United States Letters Patent and Applications therefor, all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications, owned or controlled by defendant Westinghouse, covering braking systems.

[*Applicability of Provisions*]

III

The provisions of this judgment applicable to defendant Westinghouse shall apply to defendant Westinghouse, its officers, directors, agents, employees, successors, assigns, and all other persons acting under, through or for Westinghouse.

[*Acts Enjoined*]

IV

Defendant Westinghouse is hereby enjoined and restrained from:

(1) Instituting or threatening to institute, or maintaining or continuing any action or proceeding for acts of infringement of any braking system patent occurring prior to the date of this judgment.

(2) Bringing against any person any action or proceeding for acts of infringement of any braking system patent (other than those listed in Schedule A attached hereto) owned or controlled by defendant Westinghouse and issued or applied for within five years after the entry of this judgment, unless such person has refused to enter into a license agreement as provided for in Section VI of this judgment after being requested so to do by defendant Westinghouse.

[*Patent Licensing Required*]

V

Defendant Westinghouse is ordered and directed, in so far as it has the power to do so, to grant to any applicant therefor, a non-exclusive royalty-free license under any, some, or all of the patents listed in Schedule A, which license shall continue during the entire term of such patent. Defendant Westinghouse is furthermore enjoined and restrained from making any disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires, assignment, that the purchaser, transferee or assignee thereof shall observe the provisions of Sections IV and V of this judgment with respect to the patents so acquired and the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of said Sections IV and V of this judgment with respect to patents so acquired.

VI

A. Defendant Westinghouse is hereby ordered and directed, in so far as it has the power to do so, to grant to any applicant therefor a non-exclusive license under any, some, or all braking system patents (other than those listed in Schedule A attached hereto [omitted herein]) now owned or controlled by Westinghouse and issued or applied for within five years from the date of this judgment, and is hereby enjoined and restrained from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires a condition of such sale, transfer or assignment that the purchaser, transferee, or assignee shall observe the requirements of this Section of this judgment with respect to the patents so acquired and the purchaser, transferee, or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section of this judgment with respect to the patent so acquired.

B. Defendant Westinghouse is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this Section except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty days' notice in writing to the licensor.

C. Upon receipt of a written request for a license under the provisions of this Section, defendant Westinghouse shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license was received by defendant Westinghouse, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and defendant Westinghouse shall, upon receipt of notice of the

filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on defendant Westinghouse to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend under the patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of Subsection D of this Section.

D. Where the applicant has the right to make, use and vend under any patents pursuant to Subsection C of this Section, said applicant or defendant Westinghouse may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, defendant Westinghouse shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under Subsection C shall terminate. Where an interim license or sublicense has been issued pursuant to this Subsection, reasonable royalty rates, if any, as finally determined by this Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant files his application with this Court.

E. Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents nor shall this judgment be construed as importing any validity or value to any of the said patents.

[*Agreements Terminated*]

VII

A. The following agreements, and any agreements or arrangements amendatory thereof or supplemental thereto having been terminated:

(1) Agreement dated April 1, 1932, between B-W and Canadian Westinghouse Company, Ltd;

(2) Agreement executed August 28, 1934, between B-W and Compagnie des Freins Westinghouse;

(3) Agreement executed August 28, 1934, between B-W and Westinghouse Bremsen, g. m. b. h.;

(4) Agreement executed August 28, 1934, between B-W and Westinghouse Brake & Saxby Signal Co., Ltd.;

(5) Agreement executed September 4, 1934, between B-W and Campagnia Italiana Westinghouse Freni a Signali,

defendant Westinghouse is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program which has as its purpose or effect the continuing or renewing of any of the agreements above listed.

B. Defendant Westinghouse is hereby enjoined and restrained from the performance of the so-called "1931 agreement" between B-W and Westinghouse Pacific Coast Brake Company of California, which agreement, made effective as of January 1, 1931, consists of a transmittal letter dated June 12, 1931 of a service sales agreement executed April 22, 1931 and two memoranda of conferences dated February 23rd and 25th, 1931, and any agreements or arrangements amendatory thereof or supplemental thereto. Defendant Westinghouse is further enjoined and restrained from enfering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under, any contract, agreement, understanding, plan or program which has as its prupose or effect the continuing or renewing of the said so-called 1931 agreement.

[*Acts Enjoined*]

VIII

A. Defendant Westinghouse is hereby enjoined from:

(1) Acquiring or holding, directly or indirectly, any increased proportion of the ownership or beneficial interest in any shares of stock in B-W beyond that presently held by defendant Westinghouse in B-W;

(2) Participating in, controlling or directing, in any manner whatsoever, any

commercial policy or act of B-W, except as contemplated in subparagraph (3) following;

(3) After the first regular meeting of the stockholders of B-W held after entry of this judgment, causing, authorizing or permitting any director, officer, employee or agent of defendant Westinghouse, or any other person having any affiliation with or interest in defendant Westinghouse, to serve as a director, officer, employee or agent of B-W.

B. In order to carry out the provisions of Subsection A(2) and (3) of this Section:

(1) Defendant Westinghouse is hereby enjoined and restrained from exercising the right to vote the stock it holds in B-W except for the purpose of electing two directors of B-W (hereinafter referred to as "the Westinghouse directors") at the regular annual stockholders' meeting held for such purpose, and except for such necessary business acts as, under B-W's certificate of incorporation, require the vote of the Westinghouse stock in B-W to be effectuated and are approved by the Attorney General;

(2) The Westinghouse directors are to have no affiliation with or interest in defendant Westinghouse, which absence of affiliation and interest is to be certified to by affidavits of defendant Westinghouse filed with this Court, and are to perform their duties in accordance with the provisions of this judgment;

(3) Removal or replacement of the Westinghouse directors shall only be for cause shown to this Court, with opportunity for hearing by the plaintiff and the defendant Westinghouse. Both the election and removal of the Westinghouse directors shall be subject to the approval of this Court, upon reasonable notice to the Attorney General.

C. After entry of a judgment terminating this action against Bendix and after expiration of the time period for review, if any, of such judgment, defendant Westinghouse shall have the right to apply to this Court for whatever modification of the provisions of Subsections A and B of this Section VIII it considers appropriate and to be heard and to present any relevant facts thereon. Defendant Westinghouse shall give the Attorney General reasonable notice of such application and, upon the hearing of such application, plaintiff shall have the right to make such recommendations as it considers appropriate and to present any relevant facts thereon.

D. In the event of a finding by this Court, upon motion by the Attorney General, that any of the preceding subsections of this Section VIII have been violated, defendant Westinghouse shall be required within ninety (90) days of such finding to submit for the approval of this Court a plan to establish a trust under which a trustee, acting independently of defendant Westinghouse, shall exercise all the powers and voting rights in any and all shares of stock in B-W held or owned by defendant Westinghouse. Upon approval of this Court of such a plan, this Court shall appoint a trustee who shall have no affiliation or interest, direct or indirect, with defendant Westinghouse. Such trustee shall act as an officer of the Court and under its direction and shall assume the obligation of exercising all necessary and appropriate powers vested in him so as to conform with the provisions of this judgment and, consistently therewith, to protect the financial investment of defendant Westinghouse in B-W.

IX

Without in any way affecting the relief which the plaintiff may subsequently obtain against B-W and Bendix:

A. Defendant Westinghouse is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program with any manufacturer of braking systems, their officers, directors, employees, or agents to:—

(1) Allocate or divide territories, markets or fields of production for the distribution, sale or use of braking systems;

(2) Restrict or prevent the importation into or exportation from the United States, its territories or dependencies of braking systems;

(3) Fix, determine, maintain or adhere to prices, differentials, discounts or other terms or conditions of sale of braking systems to or by others.

B. Defendant Westinghouse is hereby enjoined and restrained from:

(1) Refraining from competing in the manufacture, sale or distribution of braking systems on the condition that any person will not compete with defendant Westinghouse in the manufacture, dis-

tribution or sale of compressed air brakes for other uses and purposes;

(2) Conditioning the sale, distribution or use, or any discount, differential or other term or condition of sale of braking systems upon:

(i) the purchaser, distributor or user not buying, selling, using, servicing or distributing braking systems for others than defendant Westinghouse, or braking systems made or sold by others than defendant Westinghouse;

(ii) the purchaser or user compelling or influencing manufacturers to install only braking systems manufactured or sold by defendant Westinghouse;

(iii) the purchaser or user using only replacement parts manufactured or sold by defendant Westinghouse.

(3) Cancelling or threatening to cancel any dealer or distributor contract or arrangement, refusing to deal with or in any way discriminating against any dealer, distributor, purchaser or user, because such dealer distributor, purchaser or user distributes, deals in or uses braking systems manufactured or sold by others than defendant Westinghouse.

[*Inspection for Compliance Purposes*]

X

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to defendant Westinghouse, made to its principal office, be permitted subject to any legally recognized privilege (1) access during the office hours of defendant Westinghouse to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendant Westinghouse relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of defendant Westinghouse and without restraint or interference from it to interview officers or employees of defendant Westinghouse, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this judgment defendant Westinghouse upon the written request of the Attorney General, or an Assistant Attorney General, and upon reasonable notice to its principal office, shall submit such written reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

[*Jurisdiction Retained*]

XI

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment or for the modification of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 62,350] United States v. Imperial Chemical Industries, Inc., et al.

In the United States District Court for the Southern District of New York. Civil Action No. 24—13. January 3, 1949.

Sherman Antitrust Act

Answers to Interrogatory Directed—Objection Overruled.—The defendant objects to certain interrogatories on the ground that the evidence would be irrelevant and that its compilation would impose an unreasonable burden. The Court, in overruling the objection on both grounds, holds that the answer would constitute evidence of intent, the search for which should not be unduly hampered. Although the interrogatory requires the compiling of an overwhelming list of patents, this task is not unduly burdensome for a large concern.

See the Sherman Act annotations, Vol. 1, ¶ 1610.345.

For plaintiff: Leonard J. Emmerglick, Special Assistant to the Attorney General; Ephraim Jacobs, Attorney, Department of Justice.

For defendant: Covington, Burling, Rublee, Acheson & Shorb, Attorneys for E. I. duPont de Nemours; John Lord O'Brien & Gerhard Gesell, of Counsel; Charles E. Hughes, Attorney for Imperial Chemical Industries (New York) Ltd.; Charles E. Hughes, Richard Hogue & Mahlon Doing, of Counsel.

[*Nature of Motion*]

RYAN, J.: This motion by defendant E. I. duPont de Nemours and Company is addressed to interrogatories served by plaintiff. DuPont asks for time within which to answer certain of the interrogatories and also objects to interrogatory No. 1(f).[1]

We determined at the hearing of the motion that duPont shall answer interrogatories Nos. 1(a) to 1(e) inclusive and 2 by February 15, 1949, and interrogatories Nos. 3 and 4 by January 3, 1949.

[*Objection*]

We are concerned then only with the objection to subsection (f) of interrogatory No. 1, which reads as follows:

> "(f) A designation of whether the invention claimed by the patent was used by duPont or any of its wholly-owned subsidiaries in the commercial manufacture of any product."

The patents included in subsection (f) are those relating to products embraced in the written agreements, and are set forth in subsections (a) and (b) of interrogatory No. 1. They are of two categories:

> "(a) The United States patents issued to duPont and duPont's pending patent applications, and
>
> "(b) United States patents and pending patent applications assigned or licensed to duPont by any defendant or co-conspirator named in the complaint, . . ."

DuPont does not object to interrogatory No. 1(f) insofar as it asks for information concerning the patents designated by subsection (b), that is, the patents which have been licensed or assigned to duPont by any alleged co-conspirators. DuPont objects to interrogatory No. 1(f), only in so far as it relates to the patents in subsection (a).

The objection is predicated upon two grounds, (1) that the information sought as

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[1] Interrogatory No. 1 reads: "With respect to each class of products coming within the provisions of the written agreements, referred to in paragraphs 32 to 193 of the Complaint herein, and listed in the appendix attached hereto, list in tabular form under appropriate column headings:

(a) The United States patents issued to duPont and duPont's pending patent applications, and

(b) United States patents and pending patent applications assigned or licensed to duPont by any defendant or co-conspirator named in the complaint, and

(c) The date of issue of each such patent,

(d) The name of the assignor or licensor of each such patent, the date of acquisition, and a designation of whether the rights were acquired by license or assignment,

(e) In case of license, whether it was exclusive or non-exclusive,

(f) A designation of whether the invention claimed by the patent was used by duPont or any of its wholly-owned subsidiaries in the commercial manufacture of any product.

Note: Products 'within' the provisions of a written agreement are intended, in these interrogatories, to include all products named or designated in the product descriptions of the agreement and in addition products which the parties, subsequent to the execution of the agreement, treated as being within, or added to, the agreement."

to the use or non-use of these particular patents by duPont or its subsidiaries is irrelevant and immaterial to the issues in this action, and (2) that the expense and labor required to assemble the information sought would impose on duPont a burden so great and unreasonable as to outweigh any possible probative value as evidence on the main issues of conspiracy in this case.

"It is not questioned," by duPont, however, "that in a case of this importance evidence which is clearly and certainly relevant to the issues should be produced with little regard for the burden and expense which its compilation may entail. Further, the information requested by this interrogatory need not, in and of itself, be material and relevant evidence which could be introduced at the trial of this case." And, all of this we accept as correct and accurate.

[*Interrogatory of Probative Value*]

Interrogatories may relate to any matter which "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P., 26(b) and 33. Meeting this requirement interrogatories are subject to such protective orders, under Rule 30(b) and (d), as may be made when justice requires, to save a party from interrogatories made in bad faith and which serve only to unreasonably annoy, embarrass or oppress.

Plaintiff's good faith is not questioned; that the inquiry may incidentally annoy is immaterial, (interrogatories do this frequently); the reasonableness of the interrogatory must be judged in the light of whether it appears "calculated to lead to the discovery of admissible evidence," and must be determined by the relative importance of such evidence. It is to this that we address ourselves.

The complaint alleges a world-wide conspiracy to withdraw the markets of the world, to suppress competition between duPont and Imperial Chemical Industries in the United States and elsewhere, to control the technology involved through an exchange of patents, processes and "know-how," and to restrain the foreign and domestic trade and commerce of the United States. It is alleged by way of defense that the challenged agreements between the defendants were valid patent agreements.

It is plaintiff's contention that patents of no commercial value were used to keep Imperial Chemical Industries out of the United States, and that by unlawful use and non-use of duPont United States patents, duPont was able to secure a division of world markets. Proof in support of this contention is admissible within the allegations of the complaint. The extent of duPont's use or non-use of these patents would throw light upon the intent and purpose with which duPont entered into the alleged illegal agreements with its alleged co-conspirators. Intent and purpose are at times most difficult of proof and evidence bearing upon either is to be received with great liberality. A search for proof of intent should not be unduly hampered. The extent to which these patents were commercially used will be of help in determining whether the patents were the inducing reason for the agreements or simply a screen to conceal a hidden purpose to restrain trade. Plaintiff states that it expects to show by the answer to this interrogatory that but a trifling number of these many patents was used. If this hope is fulfilled, it appears that it will have disclosed by the interrogatory evidence of considerable probative value. The interrogatory concerns relevant and material matters, vital to plaintiff's case.

[*Interrogatory Not Burdensome*]

We now consider the reasonableness of the extent and scope of the interrogatory.

When preparing its answer to interrogatories No. 1(a) to 1(e) inclusive, duPont must set out its patents, stating whether they were duPont developments, or acquired by license, and if so the nature of the license. This will, of necessity, entail an examination of all its patents. All that is further required by interrogatory No. 1(f) is that information be given as to whether the United States patents issued to duPont, and pending patent applications, were used by it in the commercial manufacture of any product. This does not appear to be unreasonably burdensome, when considered with its relevancy to the issues and the ever present possibility that it will result in the discovery of admissible evidence.

DuPont points out that all of this can only be accomplished by personal inquiry of duPont employees at its various manufacturing plants, because "there are no records available which contain this information." It taxes credulity almost beyond bounds to hear that in the entire duPont organization

information concerning the use of these patents rests not in recorded writings but solely in the memory and recollection of mortal employees. Be that as it may, it does appear that within the last several months duPont placed upon the United States Register some 4,500 patents. Common sense urges that at least in regard to some (if not most) of these patents, consideration was given to commercial use, past as well as present.

This interrogatory, duPont states, will cover classification of approximately 8,000 patents and 1,700 applications according to commercial use. This is truly an impressive and overwhelming number. The task would be incapable of performance by a smaller business venture, but duPont is alleged to be a world-wide business organization and a vast enterprise, which has during a period of the last 45 years, produced, manufactured and marketed some 4,600 different products. The complaint alleges that duPont is "by far the largest manufacturer of chemical products in the United States, and has total assets of approximately one billion dollars." When considered in the light of operations of such magnitude, the interrogatory is not unduly burdensome.

It is suggested that knowledge of the commercial use of some of these patents may no longer be available, having gone with the passing of former employees and that others, at one time in duPont's employ, may be unable to be located. Should this be so and information as to any particular patent, after thorough and diligent efforts have been made, be unobtainable, as to such patent or patents, duPont may so state under oath, setting forth in detail the efforts which it made.

[*Objection Overruled*]

The objection to plaintiff's interrogatory No. 1(f) is therefore overruled. Defendant duPont is directed to answer not later than April 11, 1949.

Settle order on notice.

[¶ 62,351] Office Machine Dealers Ass'n of N. Y., Inc. v. Tytell Typewriter Co., Inc.

In the New York Supreme Court, Special Term, New York County. 121 N. Y. L. J. 228, January 19, 1949.

New York Fair Trade Act

Sales Below Established Price.—Motion for examination of plaintiffs before trial is granted where plaintiff association, having no rights in and of itself, seeks to restrain the defendant from selling typewriters below the price fixed under Section 369-b of the New York Fair Trade Act. Special circumstances exist which make the testimony of the true plaintiffs, members of the association, material and necessary.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.

PECORA, J.: This is an action by a dealers association and one of its members to restrain the sale of typewriters below the price fixed under the "Fair Trade Act" pursuant to section 369-B, of the General Business Law. The complaint alleges that the action is brought on behalf of the members of the plaintiff dealers association and sets forth the various acts done to their detriment, and states that pecuniary compensation will not afford adequate relief to the plaintiffs and all the members of the plaintiff corporation. This motion for examination before trial seeks to examine the named plaintiffs and some named members as well as unnamed members of the plaintiff corporation, the latter as witnesses. The dealers association has no rights in and of itself. The true plaintiffs are the members of the corporation. Such special circumstances exist as to make their testimony material and necessary. Accordingly, the plaintiff corporation, by Jessie Taylor, its secretary, and the individual plaintiff, Bela A. Engel, and the ten named members of the association only will appear for examination at Special Term, Part II, of this court, on January 21, 1949, at 11 A.M., and be examined as follows: The corporation as to items 1, 2, 3 and 4 A-B; B. A. Engel as to items A, B and C; the ten named members as to items A, B, C and D. Pertinent books, records and documents to be produced pursuant to section 296, C. P. A.

[¶ 62,352] United States v. General Electric Company, International General Electric Company, Inc., Westinghouse Electric and Manufacturing Company, Corning Glass Works, American Blank Company, Empire Machine Company, N. V. Philips' Gloeilampenfabrieken, Consolidated Electric Lamp Company, Hygrade Sylvania Corporation, Ken-Rad Tube & Lamp Corporation, Chicago Miniature Lamp Works, and Tung-Sol Lamp Works Incorporated.

In the District Court of the United States for the District of New Jersey. Civ. 1364. January 19, 1949.

Sherman Antitrust Act

Monopolization of Incandescent Lamp Industry—Restraint of Competition—Deprivation of Markets for Independent Manufacturers.—Domestic and foreign manufacturers charged with monopolization of the entire incandescent lamp industry in the United States in violation of the antitrust laws are adjudged guilty where the evidence establishes that (1) defendants monopolize the glass bulb, tubing and cane industry, (2) one defendant individually monopolizes the lamp base industry, (3) one defendant individually monopolizes patents employed in the incandescent electric lamp industry, and (4), defendants entered into foreign license agreements to restrict competition in the United States. Two of the defendants cooperated in a joint effort to restrain competition by seeking to deprive independent manufacturers of a market through the design of restricted specifications. The defendants who were subordinate, or "B," licensees, by adhering generally to the program, became co-conspirators and hence violated Section 1 of the Sherman Antitrust Act. The foreign defendant, by virtue of its contractual relations with other of the defendants, became a party to the monopoly and restraints of trade in violation of Section 1 of the Sherman Act, and was in violation of Section 2 of that Act, together with other defendants, by aiding and assisting in the maintenance of a domestic defendant's monopoly of the incandescent lamp industry in the United States.

See Sherman Act annotations, Vol. 1, ¶ 1021.361, 1210.315, 1220.175, 1220.211, 1270.201; and Clayton Act annotations, Vol. 1, ¶ 2023.63.

For plaintiff: Alfred E. Modarelli, United States Attorney; Wendell Berge, Assistant Attorney General; John S. James, Robert B. Hummel, Horace A. Robbins, Burton R. Thorman, Special Attorneys; Leonard J. Emmerglick, Bartholomew A. Diggins, Special Assistants to the Attorney General.

For defendants: Katzenbach, Gildea & Rudner, by George Gildea, Attorneys for General Electric Company and International General Electric Company, Incorporated; Simpson, Thacher & Bartlett, by Whitney North Seymour, Albert C. Bickford, Stephen P. Duggan, Jr., R. E. Anderson, Charles J. Colgan, Irving Parker, George G. Gallantz, and James H. Sheils. Fish, Richardson & Neave, by Alexander C. Neave, H. R. Ashton, Charles H. Walker, and Harry Pugh. Quincy D. Baldwin, of Counsel. Lindabury, Depue & Faulks, by Josiah Stryker, Attorneys for Westinghouse Electric & Manufacturing Company; Cravath, DeGersdorff, Swaine & Wood, by Robert T. Swaine, and Roy Weidman, Harold Smith, Donald C. Swatland, and Edwin H. Todd, of Counsel. Hobart, Minard & Cooper, by Ralph E. Cooper, and Donald O. Hobart, Attorneys for Corning Glass Works, American Blank Company, and Empire Machine Company, John Lord O'Brian, Halsey Sayles, and William P. Stewart, of Counsel. Edgar W. Hunt, Attorney for N. V. Philips' Gloeilampenfabrieken; George C. Sharp, and Emery H. Sykes, of Counsel. Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Consolidated Electric Lamp Company; Edwin Foster Blair, and Gregory H. Doherty, of Counsel. Pitney, Hardin, Ward & Brennan, by John R. Hardin, Arthur J. Martin, Jr., and William R. Lockridge, Attorneys for Sylvania Electrical Products, Inc. Ropes, Gray, Best, Coolidge & Rugg, by John B. Hopkins, Charles B. Rugg, and Warren F. Farr, of Counsel. Wicoff & Lanning, by Kenneth H. Lanning, Attorneys for Chicago Miniature Lamp Works; Leonard & Leonard, by Gordon McL. Leonard, and Ernest Freeman, Jr., of Counsel. Martin & Reiley, by Blair Reiley, Attorneys for Tung-Sol Lamp Works, Inc.; Bartlett, Eyre, Keel & Weymouth, by Richard Eyre, of Counsel.

The Pleadings

[*Digest*] Pursuant to § 4 [1] of the Sherman Act, § 15 [2] of the Clayton Act and § 74 [3] of the Wilson Tariff Act, the plaintiff, the United States of America, filed a complaint to prevent and restrain alleged continuing violations of §§ 1 [4] and 2 [5] of the Sherman Act, § 3 [6] of the Clayton Act and § 73 [7] of the Wilson Tariff Act respectively. It named the following defendants:

1. General Electric Company.
2. International General Electric Company, Inc.
3. Westinghouse Electric & Manufacturing Company. [8]
4. Corning Glass Works. [9]
5. American Blank Company [10]
6. Empire Machine Company. [10]
7. N. V. Philips' Gloeilampenfabrieken. (Jurisdiction over Philips was obtained by service on its officers who had taken refuge in this country to escape Nazi domination.)
8. Consolidated Electric Lamp Company.
9. Hygrade Sylvania Corporation.
10. Ken-Rad Tube and Lamp Corporation. [11]
11. Chicago Miniature Lamp Works.
12. Tung-Sol Lamp Works Incorporated.

The complaint was filed January 27, 1941 and trial commenced in 1942, but was suspended at the request of the Secretaries of War and Navy and not resumed until March 1946.

At the opening of its case, General Electric attacked the complaint of the Government with the assertion that the matters offered in proof in this action would be shown to be in all substantial respects the same as those of which the complaint was made or could have been made in the former action against it in 1926. At the end of its case, General Electric argued that this was established and that the doctrine of *res adjudicata* applied to the principal issues in this case. General Electric pointed out that its operations under its agency system of distribution and under its license agreements with Westinghouse and its "B" licensees were substantially identical in all material respects to its operations prior to 1926; that its position in legal effect remained the same and that its position in the lamp industry, if it has changed, has become less prominent than it was prior to the 1926 suit. It cited the case of *Straus v. American Publishers'*, 201 F. 306, as authority for the proposition that successive suits may not be maintained when they are based upon a continuing conspiracy where the defendants' course of conduct remained substantially similar although the basic agreements had been modified in some respects. The fact that additional parties were added and that different statutes were invoked in the second suit, it is pointed out, were held to be immaterial. It cited a number of other cases to support this view and claims that the present suit violates the rule against splitting a cause of action. It contended that even if the two causes of action are somewhat different that those matters actually litigated in 1926 are *res adjudicata* here.

It is true that the complaint in the 1926 case and the present one were filed for violation of the anti-trust laws. It is equally true that new matters are brought forward in the present controversy which make it different. Also a different period of time is involved. That very passage of time has evolved new activities upon the part of the defendants and is essentially a factor bearing upon the continuing validity of patents and their efficacy as a basis for contractual relationships. It is sufficient to say that there are such differences in the time element, the parties, and their activities and relationships and the prayers for relief that the doctrine of *res judicata* cannot be applied as a complete bar to this entire action.

The result of the 1926 case was to grant General Electric a legal monopoly in the manufacture and sale of the incandescent lamps. General Electric operated under a system of licenses permitting use of its patents, 527 in number at the commencement

1 15 U. S. C. A. § 4.
2 15 U. S. C. A. § 25.
3 15 U. S. C. A. § 9.
4 15 U. S. C. A. § 1.
5 15 U. S. C. A. § 2.
6 15 U. S. C. A. § 14.
7 15 U. S. C. A. § 8.
8 Consent decrees were entered without prejudice against Westinghouse Electric & Manufacturing Company and Corning Glass Works, but the operation of the decrees is conditioned upon the final outcome of this suit.
9 See note 8.
10 These companies were dissolved prior to the institution of this suit.
11 Ken-Rad Tube and Lamp Corporation was acquired by Westinghouse Electric and Manufacturing Company since the institution of this suit and was subsequently dissolved.

of this action, under specified conditions. The license system involved two types, "A" and "B" with considerable differences in their requirements.

The Alleged Adjuvant Monopolies

The Government primarily contended that General Electric monopolized the incandescent lamp industry. In order to support and maintain this monopoly, it asserted that General Electric maintained separate illegal monopolies which it termed "Adjuvant Monopolies" claiming that separate anti-trust actions could have been maintained on each and listed them as follows:

(1) "All modern high-speed automatic lamp-making machinery manufactured and distributed in the United States is made and directly controlled by General Electric."

(2) "All machinery for producing all types of glass bulbs, tubing, and cane manufactured in the United States for electrical purposes is made or directly controlled by General Electric and Corning."

(3) "All lamp base-making machinery manufactured in the United States is made or controlled by General Electric."

(4) "General Electric is the only manufacturer in the United States thates lls a complete line of lamp bases."

(5) "General Electric and Corning produce practically all of the large glass bulbs, tubing, and cane used in the manufacture of incandescent lamps in the United States."

(6) "General Electric manufactures or controls approximately 90% of the tungsten filament wire, lead-in wire, and support wire used in incandescent lamps in the United States."

(7) "General Electric expanded its distribution outlets from 39,777 to 83,391 in the period in question, and by this means, together with the 30,000 odd Westinghouse agents, who are tied to the General Electric marketing scheme, dominates lamp marketing in the United States."

(8) "General Electric has a monopoly of lamp patents. This was secured by means of its license agreements with Westinghouse, the B Licensees and foreign companies, agreements with large domestic industrial concerns, namely, American Telephone & Telegraph Co. and Radio Corporation of America, and by its deliberate effort to obtain from the Patent Office patents covering every aspect of the lamp and its manufacture no matter how trivial and without regard to validity."

The Government undertook to show that each of the foregoing alleged "adjuvant monopolies" was in itself illegal as a separate, choate monopoly in addition to its claim that in each instance the structure described was in support of the monopoly over the incandescent electric lamp industry. Separated into water tight compartments that the Government places each of these activities of General Electric and viewed therein, the Government proved that General Electric in combination with Corning monopolizes the glass bulb, tubing and cane industry; that it individually monopolizes the lamp base industry; and that it individually monopolizes patents employed in the incandescent electric lamp industry. As for the remaining alleged "adjuvant monopolies", the Government's proof failed but it did prove individual restraints of trade and competition. Permitting all these activities, however, to intermingle in the general stream of evidence, they support the theory that General Electric has acquired the power to and in fact does monopolize the entire incandescent lamp industry in the United States. *U. S. v. Griffith,* 334 U. S. 100, 105-109; *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, 401; *Standard Oil Co. v. U. S.*, 283 U. S. 163; *U. S. v. Reading Co.,* 226 U. S. 324, 357; *Standard Sanitary Mfg. Co. v. U. S.,* 226 U. S. 20, 41, 48; *U. S. v. Pullman Co.,* 50 F. Supp. 123, 135.

Agency

Two of the same adverse parties to this litigation—the Government and General Electric—litigated substantially the same agency contract issue in the Supreme Court case in 1926. All of the circumstances we have considered are almost identical with those which appeared in the 1926 case. The question of the validity of the agency agreements was put in issue by the Government at that time and the ruling of the Court was adverse to the Government. It now appears that the exposure of the same issue a second time is barred by reason of the rule of *res adjudicata.* Whether the decision is induced by that doctrine or estoppel upon the part of the Government to raise the question again or by the precedent created by the 1926 case is immaterial. The ultimate conclusion must be that the Supreme Court has passed judgment favorably upon the form of agency agreements in question in this case which in their present aspects are no different from what they were when

under consideration in 1926. *Commr. of Internal Revenue v. Sumner*, 333 U. S. 591, 597-598.

However, there is a phase of relationship to the agency system which was not litigated in the 1926 case and which raises an issue of conflict with the anti-trust laws. General Electric and Westinghouse operate their agency systems under the joint supervision of a Supervisor appointed by General Electric. This supervisory mechanism was superimposed by General Electric as a governor to completely synchronize and coordinate the perfect enmeshment of the agency systems of itself and Westinghouse. In holding that the agency system of General Electric in itself has not been shown to be violative of the standards set by the 1926 case, reservations are maintained as to the effect of the operations of the supervisor as they are referred to later in this opinion.[12]

Foreign Agreements

It has been all too evident that the primary purpose of the foreign licenses was to restrict competition in the United States by dividing markets in the foreign countries, all geared to the Phoebus agreement and domestic licenses to reduce interest of potential foreign competition in United States trade. There is in the foreign licenses a striking similarity to the situation interdicted in *United States v. National Lead Co., supra.* General Electric's objections to the use of the word "cartel" are immaterial for the criterion is not one of semantics.

General Electric has contended that there was no competition between the domestic licensees and the foreign companies. This contention loses force in the fact of the revelations made in the series of exhibits, 88-G to 129-G that show a lively competition might have developed but for the territorial restrictions placed upon the General Electric domestic licenses. It is true that General Electric's domestic licensees sought to evade these restrictions and were subjected to pressures from it (Exs. 106-G, 107-G, 108-G, 117-G and 121-G) but notwithstanding, they deemed it to their best interests to succumb.

Philips is the only foreign licensee before the court and while the restraints were primarily precipitated by General Electric through IGE, Philips participated therein and is equally responsible. IGE is chargeable with unlawful conduct by virtue of its being the direct tool of General Electric in the manipulation of the foreign agreements. Westinghouse[13] and the "B" licensees[14] are likewise violators by virtue of their engagements in and practical fulfillment of the clauses in their licenses prohibiting them from engaging in the export trade. A conspiracy and combination to restrain trade and competition in violation of § 1 of the Sherman Anti-Trust Act have been made out and General Electric, International General Electric, Philips, Westinghouse, Sylvania, Consolidated, Kenrad, Tungsol, and Chicago Miniature were co-conspirators.[15]

Mazda

There can be no doubt that General Electric organized and maintained at the expense of many millions of dollars, research laboratories in which scientists, technicians, and the most modern agencies of investigation were employed to promote maximum efficiency in the manufacture of incandescent electric lamps and the machinery for their production. There can be no doubt that the research field was regarded by General Electric as a very fundamental department of its great business. Indeed, this intelligent policy is very probably one of the factors accountable for the phenomenal growth and advances that were made in the business. It took pains to show the public the depth of its scientific and technical investigations in its advertisements devoted to the "Research-Laboratories" of General Electric Company (Ex. GE-135, tabs 9 to 22). There can be no doubt that it applied its mark "Mazda" to the results of its research as that was embodied in the incandescent electric lamp and other of its products. The proof adduced by the Government fails to show,

[12] See discussion in "Suppression of Domestic Trade," "Monopoly of Incandescent Electric Lamps," "Mazda" and "Public Business."

[13] Although not stressed in the opinion, Exs. 2137-G, 2142-G, 2145-G, 2147-G, 2148-G, 2153-G, 2156-G and 2161-G weigh heavily against Westinghouse and further show this defendant to have been actively engaged in the foreign aspects of this case. These documents further rebut General Electric's contentions that Westinghouse did not conspire with it.

[14] Other links between GE and the "B" licensees are discussed under the heading "Suppression of Domestic Trade."

[15] Corning was not discussed in this section although it was found to have violated the Sherman Anti-Trust Act where it applied to the glass agreements.

however, that the "Mazda" mark per se was invalid. Its contention that "Mazda" was keyed to tungsten incandescent lamps and passed into the public domain upon expiration of the Langmuir patent also falls because of lack of proof that the word "Mazda" became a general trade name of the tungstem filament lamp. Under ordinary circumstances there would be no vice in General Electric licensing the use of the "Mazda" symbol conditioned upon observance of its technical specifications as the American Viscose and similar cases hold or in denying a license to any one.

But in a consideration of the use made by General Electric of the mark "Mazda" within the area of the anti-trust laws different implications arise. General Electric contended that a department of its business was devoted to the sale of its collected and selected specifications "directly to lamp manufacturers selected by General Electric as 'Mazda' licensees, and indirectly to the public as actually embodied in lamps by General Electric and its 'Mazda' licensees".

Who were the customers in this department in the United States? The only "Mazda" license granted by General Electric was that to Westinghouse in 1927 (Ex. 26-G) and its duration was conditioned upon Westinghouse remaining a patent licensee of General Electric. Insured of a production quota based upon General Electric's total lamp production with its prices similarly fixed by General Electric (Ex. 25-G), Westinghouse was in the status of a controlled competitor. The "B" licensees craved the use of the "Mazda" mark but were denied it. Similarly no independent manufacturer was granted this right. It is therefore apparent that the second branch of the business was illusory. It was for the benefit of General Electric and only one customer of its choice —Westinghouse.

When consideration is given to this aspect in conjunction with the conduct of General Electric and its sole "Mazda" licensee, Westinghouse, in their joint use of the mark, as discussed in "Public Business" and "Suppression of Trade by Domestic Licensees" and the General Electric activities discussed in "Electrical Testing Laboratory", the design in the general pattern of monopoly by General Electric of the incandescent electric lamp industry become very vivid. "Mazda" formed a panoply to screen interrelated General Electric-Westinghouse activities.

Public Business

The evidence fully sustains the contention that General Electric and Westinghouse cooperated in a joint effort to restrain competition in this area by seeking to deprive independent manufacturers of a market through the design of restricted specifications and by so doing violated the Sherman Anti-Trust Act § 1.

General Electric has objected to the Westinghouse correspondence as being inadmissible against it but under the co-conspirator rule such declarations are admissible since independent evidence demonstrates that Westinghouse and General Electric combined to restrain trade and competition.

Electrical Testing Laboratories

A consideration of the evidence of the Government and the testimony adduced by General Electric leads to the conclusion that ETL (Electrical Testing Laboratories) was substantially supported financially by General Electric and was utilized by it to obtain information in its aggressive pursuit of incandescent electric lamp business. It further served as one of the means whereby General Electric could maintain a surveillance over the entire incandescent lamp industry. That employees and officials of both ETL and General Electric were in close and intimate contact is beyond question. Undoubtedly the influence of General Electric was such that it obtained information, sometimes of a confidential nature, which no other customer of ETL was able to obtain. However, the showing made fails to support the theory of the Government that such influence as General Electric had over ETL constituted a direct violation of the antitrust laws. At most, it illustrates the aggressive tendencies General Electric exhibited in seeking to maintain its dominant position.

Public Utilities

Another activity by which the Government claimed General Electric acquired and maintained its monopoly in the manufacture of incandescent electric lamps was in seeking to coordinate its acts with those of public utilities so as to promote their individual interests at the expense of the public and suppress newcomers who might disturb this activity. It asserted that public utilities were interested in increasing and maintaining a kilowatt hour load at the highest peak

and General Electric was interested in not merely selling lamps to and through public utilities but in preventing the other manufacturers from selling their lamps through them. An additional objective alleged to be accomplished by the harmonization of activities was to strengthen the notion that "Mazda" was the only acceptable standard electric lamp. Thus it is claimed that General Electric and Westinghouse influenced public utilities to discourage the use of competitive lamps.

There may be an anti-trust case against the public utilities and General Electric in this particular phase, but the proofs developed by the Government fail to do other than to prove that General Electric pushed an aggressive advertising campaign and sought to utilize all avenues by which its lamp products could be distributed and sold. The early history of the lighting industry shows that utilities were important distributors of incandescent lamps and in a number of cases were the only source of such lamps. As the industry grew and lighting fixtures were gradually standardized, it was but a natural evolutionary process for General Electric as well as other lamp producers to seek to continue relationships whereby their products would be more extensively employed. It would be lacking in realism, however, if it were supposed that General Electric or the public utilities were conducting their business for purposes other than to create the maximum demand for their respective products. The most that the Government has shown in this section under consideration is that officers and employees of General Electric endeavored to sell a maximum number of lamps. If the lamps General Electric sold induced the sale of additional electrical current by the public utilities as the Government suggested, there is still no convincing proof offered by it that the anti-trust laws were violated or that this was a design that gave General Electric its monoply in the industry. The proofs fail to show any combination with public utilities to restrain trade and competition, and evidence only the concomitants of an aggressive policy of seeking market outlets.

Argon Gas

The Government charged that "General Electric's argon gas activities tend to prove a purpose to monopolize and General Electric's great power". It claimed that as a result of agreements and understandings between General Electric and the principal suppliers of argon gas in the United States, General Electric controlled the sales of argon gas and forced lamp manufacturers to look to General Electric for their supply of high ratio argon. This resulted in arbitrary and non-competitive price figures and as the supplier of high grade argon to its incandescent lamp licensees, no incentive was left to independent producers of argon gas to maintain high ratio argon production facilities to supply unlicensed lamp manufacturers.

The proofs are at most in such a state of balance that there is not a sufficient preponderance that General Electric illegally dominated the argon gas industry or that its control of argon arose to the level of a byproduct of a monopoly and the Government's contentions in this regard must fall.

Suppression of Trade by Domestic Licensees

(A) Competition Between General Electric and Westinghouse Eliminated.

The Government charged that in furtherance of the maintenance of General Electric's monopoly competition between Westinghouse and General Electric was eliminated in that: (1) General Electric required Westinghouse to follow the agency system; (2) the provisions of the licensing agreement relating to price fixing were in effect a bilateral agreement between Westinghouse and General Electric to fix prices; (3) there was agreement between the two organizations not to compete in the solicitation of agents; (4) they eliminated competition between themselves and others in the sale of Christmas tree lamps; (5) they eliminated competition between themselves and large consumers and distributors; and (6) they combined to eliminate non Mazda competition.

There can be no doubt that General Electric followed an aggressive policy to persuade agents to handle only General Electric or Mazda lamps and that it conducted intensive sales campaigns to increase the efforts of its salesmen to gain that objective. During one of these campaigns in 1939 the Government showed that General Electric offered bonuses to them in the way of credits for securing new agencies, and for such agencies as would handle exclusively General Electric or Mazda line lamps where these intentions

were recorded in writing. The thread of the urge upon agents to carry only General Electric or Mazda lamps appeared from the top to the bottom of the sales organizations of General Electric and agents were persuaded, or otherwise decided, to handle General Electric or Mazda lamps to the exclusion of all other kinds. There is, however, no proof of reprisals taken against an agent for carrying other lines and General Electric's assertion that more agents carried multiple lines than exclusively General Electric or Mazda lamps was never rebutted by the Government.

The Government proved that suggestions were made by some of the General Electric sales force that inducements for exclusive handling of its or Mazda lamps should be made by way of holding out distributorships of General Electric products other than lamps but it has not shown that these suggestions ever ripened into activity. The comment by a Westinghouse sales force representative (Ex. 1722-G) that he understood General Electric had acted unethically in threatening to cancel a distributorship of one of its other products in the hands of a DB lamp agent if he cancelled its lamp agency is plain hearsay and, in the absence of any other evidence to connect it to some action, it proves nothing.

Westinghouse consistently followed an identical policy with General Electric in accordance with the requirements of the license agreement. Agents were submitted for the scrutiny of the Supervisor and waivers were granted where the protection of General Electric or other mutual Mazda interests was concerned. The primary consideration of General Electric and Westinghouse was to create the maximum distribution of Mazda lamps. The quota allowance of Westinghouse increased only as the volume of this distribution increased. The secondary consideration was the sharing by General Electric and Westinghouse of the product of maximum distribution of Mazda lamps within the quota set by the framework of the license. With the expiration of the basic and controlling patents in 1933, the framework of the license collapsed and two competitors were joined in a common effort under a common symbol. Any rivalry that existed between them was devoid of the elements of normal competition as is sought to be preserved by the anti-trust laws and their association was designed to and did eliminate such competition between themselves.

* * * * *

The price of Westinghouse's cooperation with General Electric is evident. Under the Corning-General Electric agreements, it received the benefits accruing therefrom. It was the favored beneficiary of all that flowed from employment of the "Mazda" symbol. It was granted a share in the foreign lamp markets by virtue of the agreements negotiated by International General Electric. Granted a larger share of the domestic lamp business, its policy and program were those of General Electric since both operated under the "Mazda" symbol. Competition that menaced General Electric menaced Westinghouse and correspondingly reduced its percentage of production. Westinghouse proved to be a valuable ally to General Electric in extending and maintaining dominance over the incandescent electric lamp industry in the United States.

The conclusion is that the Government has prevailed in its contention that in furtherance of the maintenance of the General Electric monopoly of the incandescent electric lamp industry in the United States, competition between Westinghouse and General Electric was eliminated. The joint activities engaged in by Westinghouse and General Electric operated to suppress competition in the United States and thereby violated § 1 of the Sherman Anti-Trust Act.

(B) "B" Licensees

The Government charged that the "B" licensees joined with General Electric and other defendants in carrying out the unlawful monopolies, conspiracies and combinations in restraint of trade alleged in the complaint beginning with the dates upon which the renewed licenses and agreements were entered into. It alleged that the purpose and effect of the licenses and agreements as to General Electric, Westinghouse and the "B" licensees were to limit the production of the "B" licensees, thereby preventing their free and uncontrolled competition with General Electric and Westinghouse in the United States, preventing the exportation from the United States to foreign countries of lamps manufactured by the "B" licensees in order to assure to General Electric the continued operation of its restrictive agreements with foreign companies, thereby precluding such foreign companies from

competing or aiding other domestic manufacturers to compete with General Electric in the sale of lamps in the United States, enlarging and extending the patent monopoly of General Electric by giving it rights under all patents relating to lamps, machinery and appliances having to do with the manufacture of lamps owned or acquired during the term of each of the agreements by each of such "B" licensees or by each of their officers and directors for the lives of such patents; precluding such "B" licensees from questioning or attacking the validity of the patents of General Electric and Westinghouse relating to lamps and to the manufacture of lamps; assuring to General Electric and Westinghouse the continued control and domination of the domestic lamp industry and lamp market after the expiration of General Electric's controlling lamp patents; assuring to each "B" Licensee sources of supply of lamp machinery, materials and parts, particularly at advantageous prices.

The "B" licensees fully conceived their positions as favored beneficiaries under the protection of the General Electric licenses although at times they chafed under the restrictions. By their general adherence, however, to the General Electric program they became co-conspirators with it and as such violated Section 1 of the Sherman Anti-Trust Act: *U. S. v. Paramount Pictures,* 334 U. S. 131; *United States v. Line Material Co.,* 333 U. S. 287, 315; *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, 388, 389; *U. S. v. Masonite Corp.,* 316 U. S. 265, 275; *Interstate Circuit v. United States,* 306 U. S. 208, 226-227.

Clayton Act

The Government additionally charged that General Electric and Westinghouse have violated § 3 of the Clayton Act (15 U. S. C. A. § 14).[16] It referred to the evidence submitted to show how non-Mazda competition was eliminated and charged that in their sales, contracts for sale, or contracts for the distribution of incandescent lamps manufactured by General Electric and Westinghouse for use, consumption or resale within the United States, they imposed the condition that the purchaser or distributors should not use or deal in any other incandescent electric lamps. General Electric insisted that there is no basis for the claim that its transactions with its agents were in effect "sales". It contends that they were true agency relationships, and that all of the Government's evidence which constituted the basis for the alleged violation of the Clayton Act dealt with agency appointments except three purchase contracts in which any inference that they were violations of the Clayton Act is likewise unjustified.

In the discussion under "Agency" it was pointed out that General Electric followed a firm policy of adhering to an agency relationship as approved in the 1926 case. The evidence submitted by the Government fails to support its contentions of sale or resale. The cases cited by it, such as *Butterick Co. v. Federal Trade Commission,* 4 F. 2d 910, cert. denied 267 U. S. 602, are not persuasive that the General Electric and Westinghouse agency contracts were unlawful contracts of sale in violation of the Clayton Act in the light of the definitive holding of the Supreme Court as to the General Electric agency status in the 1926 case. Accordingly, the Government has failed to sustain the burden of showing that any contract of General Electric or Westinghouse was violative of the Clayton Act.

Philips

The Government contended that Philips violated § 73 of the Wilson Tariff Act in making agreements to unlawfully restrain the importation of glass bulbs, tubing, can and glass machinery into the United States; § 1 of the Sherman Anti-Trust Act by unlawfully restraining the importation and exportation from the United States of incandescent electric lamps and machinery; and that by the combination of these foregoing activities it was unlawfully conspiring with General Electric to assist the latter to secure

[16] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

and maintain a monoply of the incandescent electric lamp industry in the United States in violation of § 2 of the Sherman Anti-Trust Act.

There was no violation of § 73 of the Wilson Tariff Act by Philips, General Electric or Corning when they became parties to the glass agreements in 1937. Economic, political and legal interferences had taken place which Philips claimed reduced the potentiality of American trade in glass bulbs within the next ten years to something less than a hope. It alleged that it was motivated by the realities of the situation and sought to capitalize upon some property remaining to it since there remained no possible trade in bulbs. It urged that it simply exercised its judgment that the possibilities were not worth as much as it could derive out of its agreement with Corning and in signing the glass agreements it was capitalizing upon what it could obtain from its patents. The Wilson Act, § 73, requires that the combination, conspiracy, trust agreement, or contract should be between persons either of whom as agent or principal "is engaged in *importing* any article from any foreign country into the United States." There is no proof that either General Electric, Corning, or International General Electric was engaged in importing glass bulbs. The Government supported its charge of the Wilson Act violation by the cases of *United States v. Sisal Sales Corp.*, 274 U. S. 268, and *United States v. General Dyestuff Corp.*, 57 F. Supp. 642. It is plain that the appellees in the *Sisal* case were importers. The *General Dyestuff* case is on a demurrer to an indictment and the point is not raised.

It was a fortuitous circumstance that officers of Philips happened to be refugees in the United States and available for service of process when this action was commenced. Philips contended that it had been haled before the court because of agreements it entered into in its native land which were entirely legal there and that it has been put to great trouble and expense in defending this suit. It contended that the court should seize this opportunity to announce the rule that foreign corporations like Philips engaged in business abroad may enter into agreements among themselves or with American corporations or with individuals freely and without fear of anti-trust suits here, so long as what they do is not done wilfully to restrain United States trade and does not have a direct and substantial restrictive effect upon it. Thus, it claimed, " a different test must be applied when considering the legality of acts of foreign corporations whose activities are wholly abroad, and a fortiori if such acts are done abroad than if Americans are involved."

It is admitted that the industrial climate of Europe was that of cartelized operation often with governmental participation. The norm of Europe was such that cartels were a matter of course and not limited by any public policy as in the United States. See League of Nations, Review of the Economic Aspects of Several International Agreements (1930); Knorr, The Problems of International Cartels and Intergovernmental Commodity Agreements, 55 Yale Law Journal 1097. Philips transgressed no law of Holland in entering into the agreements with IGE or the Phoebus Agreement. Nor is it necessarily a wrong doer simply because it entered into a number of agreements in Europe with European manufacturers. The question herein revolves around the course of conduct followed by Philips in its relations with IGE and the resulting effect of such conduct upon United States trade and commerce.

After a review of all the facts and circumstances concerning Philips brought forward by the Government as well as the evidence adduced by Philips and its arguments, forcefully made, the conclusion appears inevitable that Philips knew full well that its activities, though with parties other than General Electric, were dictated by it. If it did not know, it should have known, particularly after 1933, that they were a substantial contribution to the scheme whereby the domination of General Electric over the United States market of incandescent electric lamps would be perpetuated and competition thwarted. It is not sufficient for the defense of its position that it considered itself well compensated for that contribution and was not aware that the anti-trust laws of this country were affected. Philips was perhaps the chief leader in its industry in Europe, as skillfully managed, intelligent, efficient and effective in its own sphere as General Electric was on its larger scale. In its enlightened state its very apathy to the impact of its real relationship with General Electric upon those laws was an indifference to them that amounted to a willingness to be a party to a breach of them. There was actual knowledge on the part of Philips of the United States anti-trust laws and it gov-

erned itself accordingly. Just as it was concerned with the anti-trust laws in the X-ray situation, it is a reasonable inference that such a concern governed its actions in signing the 1931 agreement and the glass agreements.

As to the second requirement for the finding of a violation on the part of Philips that its activities must have had a direct and substantial effect upon trade, its allegations and arguments that conditions made it impossible for it to conduct business abroad after 1933 have been given all the credit which they deserve. They did not thwart the glass agreements where Philips procured an annual stipend for ten years to refrain from the use of its United States patents in glass, among other things, and Philips is left upon the ground that it was, at least to the extent of its own power and ability, willing to prevent any birth or rebirth of trade here. Even though there is no showing as to the extent of commerce restrained, it deleteriously affected commerce by entering into the agreements with IGE and Corning since it lent itself to the General Electric plan of throttling potential sources of foreign lamp parts. Cf. *United States v. American Tobacco Co.,* 221 U. S. 106, 139-141, 183-185. Philips was aware of the relationship existing between IGE and General Electric and understood General Electric's position in the incandescent electric lamp industry in the United States, and it knew of the Corning-General Electric relations. Competition was aborted by the agreements to which it became a party and it thereby came into conflict with the anti-trust laws for they "are as much violated by the prevention of competition as by its destruction." *United States v. Griffith, supra,* p. 107. "For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures,* 334 U. S. 131, 161. By virtue of its contractual relations with Corning and IGE, it became a party to the restraints of trade and monopoly exercised by General Electric and was in violation of § 1 of the Sherman Anti-Trust Act.

For reasons stated herein together with those discussed under the heading "Monopoly of Incandescent Electric Lamps," Philips is likewise found to have violated § 2 of the Sherman Anti-Trust Act for having aided and assisted in the maintenance of General Electric's monopoly of the incandescent lamp industry in the United States.

General Electric's Monopoly of the Incandescent Electric Lamp Industry

(1) Dominant Position

The fact stands out that General Electric and its licensees exerted a combined position that presented an almost impregnable front to those manufacturers not part of their combination. General Electric's emphasis upon its individual percentage decrease over the course of years does not hide the clear cut picture that the supposed loss of percentage was absorbed by its licensees who were combined with it. The size of the combination herein coupled with General Electric's intent to dominate the industry serves as an indicia of monopoly.

(2) Profits

It is an undisputed fact that General Electric and the Lamp Department enjoyed substantial profits. Standing alone this, of course does not render it violative of the anti-trust laws. Like size, itself, it can only be given consideration along with myriad other circumstances for the purpose of determining whether in combination they are elements in the generation of that power to monopolize that constitutes violation of the law. Cf. *U. S. v. Columbia Steel Co., et al.,* 334 U. S. 495, 527.

(3) General Monopoly Powers

The Government argued generally that due to its size, financial position and dominance in the incandescent electric lamp industry, General Electric had the power

(a) to intimidate businesses from selling to purchasers who might compete with General Electric;

(b) to deteriorate the quality of the lamps it produced and with its technical knowledge to produce a better product; and

(c) to exclude lamp companies from domestic licenses.

(a) Intimidation of Business

The Government has offered no direct proof that General Electric intimidated business. However, when it is considered that the position of General Electric, its licensees and independent lamp manufacturers has remained relatively unchanged over the years as reflected in Exhibit 21-G, analyzed under the heading "Dominant Position"; that this position together with the very nature of the restraints exercised

by General Electric as discussed throughout the opinion, limited the entry of newcomers into the industry; and the actual decrease of independent manufacturers; the conclusion must be that General Electric has at least the power to intimidate other businesses from selling their products to purchasers who might compete with it. Cf. *American Tobacco Co. v. U. S.*, 328 U. S. 781.

(b) *Deterioration of Product*

The claim of the Government of deterioration of the product was based upon the testimony of Dr. William David Coolidge, who testified that the efficiency of light production of the tantulum lamp was approximately six lumens, that this was doubled to "perhaps twelve lumens" with the advent of the vacuum tungsten filament lamp, and again doubled to "let's say 24 lumens" when the gas filled tungsten lamp was introduced (R. 1627). Against this the Government referred to Exhibit GE-14, a schedule showing approximate lamp efficiencies in initial lumens per watt which indicated that from 1927 to 1942 the 60 watt gas filled tungsten lamp increased from 11.1 lumens per watt to 14 lumens in 1942. From this the Government concluded that General Electric does not produce a commercial standard line lamp better than 14 lumens, although Dr. Coolidge testified that 24 lumens were possible.

Although the Government's contention that it has proved that General Electric could have produced a 60 watt lamp giving 24 lumens of light has been rejected, these latter contentions with regard to flashlight bulbs and Christmas tree lamps illustrate an existing ability upon the part of General Electric to shorten the life of a lamp. At the same time it should be borne in mind that the life of a lamp is inextricably related to the power of its light in that the greater the strength of the light the shorter will be the life of the lamp. It is realized that flashlight and Christmas tree lamps are lines of lesser importance in the incandescent electric lamp industry, although the overall production and profit in them is far from inconsequential. Despite assertions of good faith, sound business discretion, great technical research, and consideration for the interest of the consuming public, there was manifested in the two situations a paramount concern in what would afford the maximum return in profits to the manufacturer and that General Electric had the power in the instance of the flashlight lamp, to shorten the life of the lamp, and in the instance of the Christmas tree lamp, at least to promote a product with a short life for a specific use over one that had four times its life. However, the total proof leads to the conclusion that by virtue of General Electric's dominating position in the industry and relative lack of competition it had the power to set the standard of efficiency of incandescent electric lamps for the entire industry and in so doing to determine what should be their length of life, and this constitutes an attribute of monopoly.

(c) Power to Exclude

In connection with the Government's argument as to the manifestations of monopoly, it contended that General Electric had been capable of excluding from the manufacture of incandescent lamps those seeking to enter the field.

The power to exclude does not flow from the fact that General Electric denied licenses but is the direct result of its being the dominant force in the industry. General Electric controlled certain sources of essential parts necessary to manufacture lamps and restricted access to those sources. Similarly, it maintained a widespread system of surveillance whereby it was able quickly to determine newcomers in the field. Applying its massive dominance over the industry it could by asserting patent control, by controlling and restricting domestic sources of parts and machines, by sealing off the foreign source of parts and machinery through the foreign agreements, and by its exertions in behalf of the Mazda mark seriously limit domestic competition. All of these conditions generated the power to exclude competitors from the industry. Cf. *American Tobacco Co. v. U. S.*, 328 U. S. 781, 809.

(4) Industrial Surveillance

In the normal conduct of a business there is a valid interest in the progress and status of a competitor. The sources of information correspondingly can be as varied as can be the means of securing such information. There have been cited numerous instances of how General Electric kept itself informed of the state of the incandescent electric industry in all its phases whether under its control or not.

From time to time, officials and employees of General Electric visited the facilities of other manufacturers and distributors of incandescent electric lamps. Certain of these visits were for the legitimate purpose of detecting infringement of General Electric patents. Reports of these visits found their way into the files of General Electric which contained information, however, totally unrelated to patent infringement. During the course of its efforts to establish the Mazda marked product as the standard specification to be set by public bodies, General Electric obtained various pieces of information concerning possible competitors. It prosecuted aggressive quests for information at the Bureau of Standards and ETL directed at other manufacturers and distributors. The very act of filling orders for lamp bases by General Electric's Providence Works provided means whereby reports were made from which the probable number of lamps to be manufactured by those purchasers could be calculated. A wealth of information was funneled through the Supervisor from sales personnel of both Westinghouse and General Electric in all parts of the country. General Electric accumulated this data at a central point in its organization for strategical and tactical planning by the Lamp Department in halting encroachments upon its frontiers of the incandescent electric lamp industry.

Although these activities in collating information may have been innocent isolated by themselves and might be readily countenanced as between genuine competitors, here they emanated from a dominant force in the industry to envelope its controlled allies and the few remaining independent manufacturers. In that light, viewed in their aggregate, they represent a picture of espionage and policing activity. This surveillance was not for the ordinary purpose of sharpening competition but rather designed to reinforce and maintain the domination of the industry; and to inhibit the growth of existing, and abort the birth of, new competition. These activities, part of the general pattern of conduct, do not of themselves rise to the level of a violation of the Sherman Anti-Trust Act but they disclose a manifestation of monopoly in the incandescent electric lamp industry by General Electric. Cf. *United States v. Eastman Kodak Co.,* 226 F. 62, 78.

(5) Conclusion

Without atempting to enumerate them in the order of their importance, the previously determined individual restraints of trade and competition and the activities manifesting a monopoly are summarized as follows:

(1) Dominant position in the industry of General Electric.

(2) Lack of a valid patent support to sustain price, quantity and expert limitations in the incandescent electric lamp domestic licenses in existence after 1933.

(3) Combination with and integration of Westinghouse resulting from and evidenced by the following:

(a) Westinghouse's enjoyment of a favored position under the glass agreements.

(b) Mutual use of the Mazda trademark by General Electric and Westinghouse.

(c) Common solicitation and elimination of agents.

(d) Joint use of the Supervisor.

(e) Joint effort in soliciting public business.

(f) Cooperative efforts in Mazda sales campaigns.

(g) Westinghouse's adherence to the restrictions established in the "A" license.

(4) Combination with Corning to monopolize the manufacture and distribution of glass bulbs, tubing and cane.

(5) Combination with Corning, American Blank and Empire to restrain trade and competition in the manufacture and distribution of machinery for manufacture of glass bulbs, tubing and cane.

(6) Employment of International General Electric as a means of eliminating foreign competition through

(a) Foreign subsidiaries,

(b) Phoebus Agreement and the 1941 agreement,

(c) Separate agreements between International General Electric and the individual members of the Phoebus combination encompassing the general terms of the Phoebus Agreement and coordinated with General Electric's domestic licenses.

(7) Lamp base monopoly.

(8) Lamp machinery restraints.

(9) Filament and leading-in wire restraints.

(10) General Electric's profits in the incandescent electric lamp industry.

(11) Public business activities.

(12) The monopoly of incandescent electric lamp patents.

(13) Invalid restriction in fluorescent licenses.

(14) The power to intimidate and exclude manufacturers from the incandescent electric lamp industry and to fix the standards for the industry.

(15) Industrial surveillance.

The aggregation of the foregoing activities and manifestations inevitably leads to the conclusion that General Electric monopolized the incandescent electric lamp industry in violation of the Sherman Anti-Trust Act § 2. *United States v. Griffith,* 334 U. S. 100, 105-109; *American Tobacco Co. v. United States,* 328 U. S. 781, 809-810; *Associated Press v. United States,* 326 U. S. 1, 12; *United States v. Aluminum Co. of America,* 148 F. 2d 416, 431-432.

By virtue of their having acted in combination with General Electric and acquiescence in the relationships established with it as previously determined, Westinghouse, Philips, Corning, Sylvania, Tungsol, Ken-rad, Chicago Miniature and Consolidated have violated § 2 of the Sherman Anti-Trust Act. *U. S. v. Paramount Pictures,* 334 U. S. 131, 161.

General Conclusion

The record of General Electric's industrial achievement has been impressive. Its predecessors pioneered the lamp industry and it organized through the years an establishment that stands as a model of industrial efficiency. It early established the policy of making the best lamps as inexpensively as possible and to this end developed a lamp research, engineering, and production system which established it in the first position of industrial leadership in the incandescent electric lamp field not only in the United States but in the world. By means of extensive research initiated by such scientists as Steinmetz, Whitney, Langmuir and Coolidge, mechanical and technological advances were accomplished (Ex. GE-235) which made possible a progressive price reduction policy (Ex. GE-239). Therefore, it was able in the twenty year period between 1922 and 1942 to reduce the prices of large lamps, 78.6%; miniature lamps, 70.3%; with an average for both types of 77.2% (Ex. GE-239). It can take just pride in the more graphic statistic that the price of a 60 watt bulb was 45 cents in 1922 and 10 cents in 1942. By the efficiency which it employed in its business, the use of research to improve its lamps, the development of new lamps and new uses for old lamps to increase the market, there was established a firm foundation for leadership.

On the other hand there can be no doubt that it paced its industrial achievements with efforts to insulate itself from competition. It developed a tremendous patent framework and sought to stretch the monopoly acquired by patents far beyond the intendment of those grants. It constructed a great network of agreements and licenses, national and international in scope, which had the effect of locking the door of the United States to any challenge to its supremacy in the incandescent electric lamp industry arising from business enterprise indigenous to this country or put forth by foreign manufacturers. Its domestic licenses gave fiat to a few licensees whose growth was carefully limited to fixed percentages of its own production and expansion so that over the years its share of the business was not materially diminished and its dominant proportion was never exposed to any hazard in that direction.

Admiration for the business acumen of General Electric, however, cannot avoid adherence to the philosophy of political economics enunciated in the anti-trust laws of the United States.

General Electric, as has been indicated herein, must be held to have violated § 1 and § 2 of the Sherman Anti-Trust Act. International General Electric, Philips, Sylvania, Tungsol, Consolidated and Chicago Miniature are likewise so held. Corning and Westinghouse are therefore bound by their consent decrees.

Concededly many of the practices which are adjudged in this opinion to be violative of the law by force of the consent decrees, lapse of time, and other circumstances, have been discontinued. Ordinarily the issues involving them might have been rendered moot, but, under the stipulated conditions governing this case, the hiatus of time involved and changed conditions are to be disregarded and continuity is to be given to the case as if it were tried in regular order.

A motion should be made by the Government for a day when the form of the findings of fact, conclusions of law and the decree may be considered in accordance with the findings and conclusions set forth in this opinion.

[¶ 62,353] In the Matter of the Grand Jury.

In the United States District Court, Northern District of Ohio, Eastern Division. Cr. 19609. January 3, 1949.

Sherman Antitrust Act

Contempt Proceeding—Failure to Respond Properly to Subpoena *Duces Tecum* and *Ad Testificandum*.—Where the president of a corporation was served with a subpoena *duces tecum* and *ad testificandum* to appear before the grand jury, but, instead of appearing personally with the required documents, on the advice of counsel sent the documents to a member of the Antitrust Division, the president is guilty of contempt. However, since failure to respond properly to the subpoena was not wilful or contumacious, the judgment of contempt and the payment of costs will be considered a purge of the contempt.

See Sherman Act annotations, Vol. 1, ¶ 1610.345.

For plaintiff: Don C. Miller, U. S. District Attorney, Federal Building, Cleveland, Ohio; George L. Derr, 237 Leader Building, Cleveland, Ohio.

For defendant: C. W. Sellers, Guardian Building, Cleveland, Ohio.

Before JONES, United States District Judge.

Memorandum on Proceedings in Contempt

On November 16, 1948, A. A. Chilcote was duly served with a subpoena *duces tecum* and *ad testificandum* as president of The Chilcote Company. The subpoena was directed to the Chilcote Company and ordered it to appear and produce certain documents "in the District Court of the United States for the Northern District of Ohio" on December 1, 1948 at 9:30 a. m., "then and there to testify on behalf of the United States and not depart the court without leave of the United States Attorney."

On December 1, 1948, counsel for The Chilcote Company tendered some documents to Mr. Oberg, an assistant to Mr. Derr of the Antitrust Division, together with a letter from the law firm of Thompson, Hine and Flory stating that "the documents delivered herewith constitute the complete response of this company to the subpoena heretofore served upon it."

Although Mr. Oberg stated that he had no authority to appear before the Grand Jury he accepted the papers and signed the receipt. No person appeared before the Grand Jury on either December 1st or December 2nd to produce the papers or to testify for the corporation in response to the subpoena.

The subpoena was a valid one directed to The Chilcote Company and served personally upon the company's president. Counsel for respondents conceded that it was a valid subpoena and for that reason had made no earlier challenge or motion to quash. The subpoena contained *duces tecum* provisions requiring the production before the Grand Jury of specific, as well as other papers, relating to correspondence with named concerns. Also, the subpoena contained an *ad testificandum* clause.

Although respondents' counsel made objection to the method of procedure adopted by the Government, and probably it was not strictly in accordance with Rule 42, nevertheless adequate notice was given of the hearing and counsel for respondents stated that his case was fully prepared.

Treating the Government's motion and notice as tantamount to a rule to show cause the matter was heard fully upon the merits and submitted on oral argument and briefs.

It was the duty and responsibility of the president as chief executive officer of the corporation either to present himself or to send such officer or responsible representative of the corporation who could respond to the requirements of the subpoena, and he or the one selected by him should have attended the session of the Grand Jury on the date fixed by the subpoena and awaited questioning, dismissal or other action by that body. This required response seems clearly implicit in the decisions of the Supreme Court relied upon, and this is so even if the *Wilson* case did not involve *ad testificandum* provisions. I cannot subscribe to the proposition that an *ad testificandum* provision in a subpoena directed only to a corporation is mere surplusage. These matters must of necessity be handled in a practical manner so long as corporate and personal rights are

observed and preserved. It certainly would not be desirable even from the standpoint of the corporation to subpoena all the officers or responsible executives of the company to make sure that the papers or information desired by the Grand Jury would be produced.

There could be no point, as it seems to me, in holding, as the High Court does, that a corporation is amenable to subpoena but place no responsibility upon its chief executive for fulfilling the requirements of the subpoena. A corporation only can act or respond by and through its responsible executives and certainly not through a messenger when a subpoena calls for attendance and testimony.

It is assumed that the principal defense for failure to respond to the subpoena is, that it was upon advice of counsel that the president or other responsible executive was not legally required to attend the Grand Jury session and testify if called upon. Of course, action taken on advice of counsel can not thus be defended, but it may be considered in mitigation of failure to comply. It is the duty of an attorney-at-law to advise his client and preserve his rights to the best of his understanding, but compelling legal reason and genuine apprehension of irreparable loss of rights only would justify advice to disregard the clear and solemn mandate for attendance issued out of a court of competent jurisdiction. Candidly, I can see no sound reason why the president or other responsible officer of the corporation could not just as conveniently have presented himself before the Grand Jury with the papers requested as to have them delivered, unidentified, by a messenger to the office of a member of the Antitrust Division attorneys' staff, who had no authority to waive the requirements of the subpoena of this Court. This was not an appearance in the District Court as commanded by the subpoena; and there was no response to the express command of the subpoena, even if one should concede that a delivery of papers to the Grand Jury by a messenger was all that was required.

Certainly I should not believe that any court would reject a claim of immunity, timely asserted, by an officer or a representative of a corporation, on any theory that such officer or representative responding to a subpoena directed only to a corporation, was a volunteer and not entitled to make such claim. But no question of immunity ever arose in this case since no one appeared before the Court or the Grand Jury in response to the subpoena.

Failure of a responsible officer, or some one designated by him, to appear before the Grand Jury in response to a subpoena *duces tecum* with *ad testificandum* clause, duly served upon him, although directed only to the corporation of which he is the responsible head, hardly can be considered other than contempt of court.

Judgment in contempt is therefore ordered; but, since the failure to respond to the subpoena according to its command does not appear to have been wilful or contumacious, the judgment of contempt and the payment of costs will be considered, at once, as vindication of the Court's authority in such matters and a purge of the contempt.

[¶ 62,354] Opinion of the Attorney General of Louisiana.

Addressed to James L. Earhart, State Representative, New Orleans, Louisiana, by M. E. Culligan, Assistant Attorney General. January 12, 1949.

Louisiana Unfair Sales Act

Condition of Sale Warranting Offer of Gift Merchandise.—A gift of an item of merchandise in connection with the sale of another item or items, is not prohibited by Section 2 of the Louisiana Unfair Sales Act, but the "gift" item is then considered as if it were also a "sale" item, so that the practical effect would be that the selling price of the "sale" item would have to be based upon the costs of both the "sale" and "gift" items, as provided in Section 2 of the Louisiana Unfair Sales Act, the cost of the "gift" item being added to the cost of the "sale" item.

See the Louisiana Unfair Sales Act, Vol. 2, ¶ 8328.

[*Request for Information*]

Your letter of January 3, addressed to Honorable Bolivar F. Kemp, Jr., Attorney General, has been referred to me for attention.

You have quoted Section 2, subsection (e) of Act 338 of 1940, as amended by Acts 79 of 1942, 256 of 1946, and 486 of 1948, and desire to be advised if a merchant can give away any merchandise in his store as a gift.

[*"Gift" Items*]

If an item is given away by itself, it violates this Act. If the item is given away in connection with the sale of another item or items, such gift is not prohibited, but the gift item is then considered as if it were also a "sale" item, so that the practical effect would be that the selling price of the "sale" item would have to be based upon the costs of both the "sale" and "gift" items as provided in the Act, the cost of the "gift" item being added to the cost of the "sale" item.

[*Meaning of Term "Cost of the Retailer"*]

Subsection 2 also defines what is meant in the Act by the term "cost of the retailer." As shown therein, this term means the invoice cost of the merchandise to the retailer at the time he purchased the item or if there has been a reduction in the cost to the retailer since he purchased the item and he can at the time of sale or at the time he offers the same for sale he could have within thirty days prior thereto purchased the item in the same quantity he originally purchased the same, then he must base his selling price on whichever "cost" figure is lowest as provided in Section 2 (d).

[*Section 3 of Unfair Sales Act Quoted*]

I respectfully call your attention to the fact that the gravamen of the offense is set forth in Section 3, reading as follows:

"It is hereby declared that any advertising offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act, plus any State, County or Municipal sales tax that is then payable under any existing law or ordinance, with the intent, or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairing and preventing fair competition and thus injuring public welfare are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create monopoly in any line of commerce."

I trust this gives you the information desired, but if I can be of further assistance, do not hesitate to call on me.

[¶ 62,355] A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.

In the United States District Court of Massachusetts. Civil Action No. 7687. January 7, 1949.

Clayton Antitrust Act, Robinson-Patman Act

Action for Treble Damages—Proof of Cause of Injury Required.—There is no recovery in an action for treble damages even though a violation of the antitrust laws may be established, unless it can be proven that the violation was the causative factor of the plaintiff's alleged injury. Loss of expected profits from a contract still in negotiation is purely speculative damage, the cause of which can not be attributed to any action on the part of the defendant.

See the Clayton Act annotations, Vol. 1, ¶ 2024.19.

Interpretation of the Clayton Act—Purchasers and Prospective Purchasers.—Section 2 (a) of the Clayton Act as amended requires that there be actual sales at two different prices to two different actual buyers. Discrimination against prospective buyers is not an offense within this section.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.165.

Interpretation of the Robinson-Patman Act—Contracts to Sell.—Section 3 of the Robinson-Patman Act covers price discrimination in contracts to sell as well as actual sales.

However this section is limited to cases where a price in one region is lower than the price exacted by the same seller in another.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2219.

Offense under the Robinson-Patman Act—Sufficiency of Allegation.—The defendant contracted to sell lacquer to the plaintiff at a price set out in the plaintiff's bid to the State of New Hampshire. The defendant also submitted a bid to the State at a price lower than that agreed upon in the contract between the plaintiff and the defendant, which bid was accepted in preference to that of the plaintiff. Such conduct supports an allegation of an offense under Section 3 of the Robinson-Patman Act which makes it unlawful "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2219.

For the plaintiff: Kaplan & Linsky, Irving M. Fanger.

For the defendant: Max J. Zieman.

Memorandum In Re Defendant's Motion to Dismiss

FORD, D. J.: This is an action by A. J. Goodman & Son, Inc., against the United Lacquer Mfg. Corp., brought under the Clayton Act, C. 323, 38 Stat. 730, 15 U. S. C. A., Sec. 12-27, as amended, and the Robinson-Patman Act, C. 592, 49 Stat. 1526, 15 U. S. C. A., Sections 13 and 13a. Defendant has moved to dismiss the action for failure to state a claim upon which relief can be granted.

[*Allegations*]

Plaintiff in its complaint has alleged that on March 10, 1948 the State of New Hampshire, Office of the Purchasing Agent, issued a Proposal 802 calling for bids for 18,000 gallons of Yellow Traffic Lacquer to conform to certain specifications, and to be delivered in accordance with a certain delivery schedule to a warehouse of the State in Concord. On March 17, 1948, the plaintiff, a New Hampshire corporation doing business in that state, and defendant, a New York corporation having a place of business in Massachusetts entered into a contract by which defendant agreed to sell to plaintiff 18,000 gallons of lacquer conforming to the specifications of Proposal 802 and to be delivered in accordance with the schedule therein. The price was to be $1.85 per gallon (less 2% if paid within 10 days) and the contract was expressly conditioned on the plaintiff's being awarded the contract as successful bidder under Proposal 802. Thereupon plaintiff submitted its bid to the State of New Hampshire under Proposal 802 at a price of $1.97 per gallon.

Plaintiff further alleges that the defendant then, unknown to the plaintiff, and for the purpose of destroying or eliminating plaintiff as a competitor, submitted a bid on the same proposal at a price of $1.75 per gallon which the plaintiff alleges was unreasonably low, and the state subsequently awarded the contract to defendant at that price.

Plaintiff contends that the facts alleged, if established, would constitute a violation of Sec. 2 (a) of the Clayton Act as amended (15 U. S. C. A., Sec. 13 (a) and of Sec. 3 of the Robinson-Patman Act (15 U. S. C. A., Sec. 13a) and therefore gives it a right to sue for treble damages under Sec. 4 of the Clayton Act (15 U. S. C. A., Sec. 15).[1] Defendant contends that the complaint sets forth no conduct on its part which violates these acts, and that even if it has so violated,

[1] Sec. 13. *Discrimination in price, services, or facilities—Price; selection of customers*

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; * * *.

Sec. 13a. *Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties*

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be party to, or assist in, any transaction of sale, or contract to sell, which discriminates to

the complaint makes no showing that any injury suffered by plaintiff was due to any such violation.

The alleged violation of the law consists in the sale of the lacquer by the defendant to the state at a price of $1.75 per gallon, either because this price, compared with the price of $1.85 per gallon at which it would have been sold to the plaintiff, is an act of discrimination falling within the ban of Sections 13 (a) and 13a, *supra,* or because the price taken in itself is unreasonably low within the meaning of Sec. 13a.

[*Purchasers and Prospective Purchasers*]

It is clear that there is an allegation that the prices asked by the defendant from two different prospective buyers is not the same. But Sec. 13 (a) deals only with price discrimination between *purchasers.* Here there is only [one] purchaser, the State of New Hampshire. It is not enough that a prospective purchaser, the plaintiff, would have had to pay a higher price if it did buy. There must be actual sales at two different prices to two different actual buyers. *Shaw's, Inc. v. Wilson-Jones Co.,* 105 F. (2d) 331; *Sorrentine v. Glen-Gery Shale Brick Corporation,* 46 F. Supp. 709. Sec. 13a, on the other hand, does not require price discrimination in actual sales but also expressly includes discrimination in *contracts to sell.* But this section is limited to cases where a price in one part of the United States is lower than the price exacted by the seller in other parts of the United States. That does not apply to the situation here set forth, for there is here only one lot of lacquer which was to be delivered to the same warehouse whether sold directly to the state or sold to plaintiff for resale to the state.

[*Unreasonably Low Price*]

However, Sec. 13a also makes it unlawful "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Plaintiff claims that the price of $1.75 at which defendant sold to the state was unreasonably low, for the purpose of eliminating plaintiff as a competitor. The complaint sets forth sufficient facts to show that plaintiff and defendant were competitors, since they were rivals for the business of selling lacquer to the State of New Hampshire. It describes the basic facts of an alleged course of conduct by defendant which might on further proof justify a finding that defendant acted for the purpose of eliminating plaintiff as a competitor. Nor can I hold, in the absence of further evidence, that the price of $1.75 was not unreasonably low. Consequently, I hold that on this point, the complaint properly alleges a violation of Sec. 13a.

[*Insufficient Injury*]

But, in order for the plaintiff to recover in a suit for treble damages under Sec. 15, it is necessary to show not only a violation of the antitrust laws but also injury to the plaintiff which is the result of defendant's violation of those laws. *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F. (2d) 885. The injury here claimed is the loss of profit of 12¢ per gallon which the plaintiff would have made had it been awarded the contract. But even though plaintiff alleges that if defendant had charged the same price both to it and to the state, it would have been awarded the contract, the rest of the complaint shows that this conclusion is far from certain. In the first place, the copy of Proposal 802 attached to the complaint shows that "The State reserves the right to accept all or part, or decline the whole bid." Thus there is no assurance that had the plaintiff been the lowest bidder it would have received the contract.

But even assuming that the lowest bidder would have been assured of receiving the

his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

* * *

Sec. 15. *Suits by persons injured; amount of recovery*

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

contract, it still appears that the cause of plaintiff's loss of the contract was not the fact that defendant's price to the state may have violated the statute, but rather the fact that defendant itself entered the bidding, which did not violate the law. Defendant, if it desires to bid, can always, without violating the law, submit a bid lower than any at which the plaintiff could offer to sell to the state. It would not violate the law by selling to the state at the same price at which it was willing to sell to the plaintiff. Nor would there be any violation if it sold to the state at a price equal to the lowest price at which any of its competitors would supply lacquer to the plaintiff. In either case defendant's price to the state could be equal to the price plaintiff paid, and hence less than the price at which plaintiff could offer to sell to the state and still make any profit on the transaction. The contract would already be lost to plaintiff, and the fact that defendant lowered his price still further, so that it was either discriminatory or unreasonably low in itself, could add nothing to the injury.

[*Motion to Dismiss Granted*]

Hence, if the contract were assured to the lowest bidder, a violation of the statute by defendant does not harm plaintiff; if, as seems to be the case, the lowest bidder is not ssaured of the contract, any harm resulting from a violation by defendant becomes purely speculative. In either case there is no injury sufficient to support an action for treble damages under Sec. 15.

Defendant's motion to dismiss is granted.

[¶ 62,356] U. S. v. Scophony Corporation of America, General Precision Equipment Corporation, Television Productions, Inc., and Scophony, Limited.

In the United States District Court for the Southern District of New York. Civil Action No. 34-184. January 12, 1949.

Sherman Antitrust Act

Consent Judgment—Television Industry—Divesting of Ownership Ordered.—A consent judgment entered in an action charging television equipment manufacturers with violating the Sherman Act requires two of the companies to divest themselves of ownership interests in a holding and licensing defendant company.

See the Sherman Act annotations, Vol. 1, ¶ 1220.211, 1530, 1590.

Consent Judgment—Television Industry—Price Fixing and Related Practices.—By a consent judgment, manufacturers of television equipment are enjoined from allocating markets, excluding any person from the manufacture of television equipment, limiting the importation or exportation of installations, refraining from competition, or exchanging technical information exclusively.

See the Sherman Act annotations, Vol. 1, ¶ 1530.10.

Consent Judgment—Television Industry—Patent Monopolies—Action for Patent Infringement Abrogated.—A television company is enjoined from instituting action for patent infringement and required to license its patents on a reasonable royalty basis.

See the Sherman Act annotations, Vol. 1, ¶ 1530.50.

For the plaintiff: Sigmund Timberg, Mervin C. Pollak, Special Assistants to the Attorney General; Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; Manuel M. Gorman, Special Assistant to the Attorney General; J. Francis Hayden, Special Assistant to the Attorney General.

For the defendants: Joseph O. Ollier, Attorney for Scophony Corporation of America; Mudge, Stern, Williams & Tucker, Attorneys for General Precision Equipment Corporation; Simpson, Thacker & Bartlett, Attorneys for Paramount Television, Inc., formerly Television Productions, Inc.

Final Judgment

CONGER, E. A., District Judge: Plaintiff, United States of America, having filed its complaint herein on December 18, 1945; all defendants except defendant Scophony, Limited having severally filed answers to the complaint denying the substantive allegations thereof; defendant Scophony, Limited having unsuccessfully moved to dismiss this action and to quash service of process as to it for lack of jurisdiction over said defendant, and defendant Scophony, Limited being now in all respects in default herein, and defendants, Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc., by their respective attorneys, having severally consented to the entry of this final judgment without admission by said defendants with respect to any issue of fact or law,

Now, therefore, no testimony or evidence having been taken herein except the deposition of W. G. Elcock by plaintiff used on the motion of defendant Scophony, Limited, hereinabove mentioned, and without any trial or finding or adjudication of any issue of law or fact herein, and upon consent of plaintiff United States of America and defendants Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc.;

It is hereby ordered, adjudged and decreed:

[*Jurisdiction*]

I

That this Court has jurisdiction of the subject matter of this action and of the parties thereto; and that the complaint states a cause of action under Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and sets amendatory thereof and supplemental thereto.

[*Applicability of Provisions*]

II

That the provisions of this judgment applicable to any defendant shall apply with equal force to its successors and assigns, its directors, officers, agents, representatives or employees, and any person or corporation acting or with authority to act under, through, or for such defendant.

[*Agreements Terminated*]

III

That the following licenses and agreements and all amendments, modifications, or supplements of the same, are hereby terminated and cancelled as to defendants Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc. as of December 18, 1945, and said defendants are hereby enjoined and restrained from the performance, observance or enforcement of any of the terms or provisions thereof, and from directly or indirectly adopting, adhering to or furthering any course of conduct for the purpose or with the effect of maintaining, reviving, or reinstating the terms and provisions of said licenses and agreements:

A. Agreement dated July 31, 1942, between Scophony, Limited, William George Elcock, General Precision Equipment Corporation, and Television Productions, Inc., a copy of which is annexed to the complaint herein as Exhibit 1;

B. Agreement dated August 11, 1942, between Scophony, Limited, William George Elcock and Scophony Corporation of America, a copy of which is annexed to the complaint herein as Exhibit 2;

C. Agreement dated August 11, 1942, between Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc., a copy of which is annexed to the complaint herein as Exhibit 3.

[*Acts Enjoined*]

IV

That each of the defendants Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc., is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any agreement, combination, plan or program with each other or with defendant Scophony, Limited:

(a) To allocate, divide or restrict territories, customers, or markets for the manufacture, use or distribution of processes, inventions, products, apparatus or installations for, or relating to television;

(b) To exclude any person from or to restrict or limit any person in the manufacture, use or distribution of any process,

invention, product, apparatus or installation for, or relating to television;

(c) To limit, restrict or prevent the importation into, or exportation from the United States, its territories or possessions, of any process, invention, product, apparatus or installation for, or relating to television;

(d) To refrain from competition or to leave any person free from competition in any territory or market in the manufacture, use or distribution of processes, products, inventions, apparatus or installations for, or relating to television;

(e) To exchange exclusively among said defendant, or any of them, patent licenses or technical information with respect to the manufacture, use or distribution of any process, product, invention, apparatus or installation for, or relating to television.

[*Dispossession of Ownership*]

V

That each of the defendants, General Precision Equipment Corporation and Television Productions, Inc., divest themselves forthwith of any and all stock or ownership interests in defendant Scophony Corporation of America; and are hereby further severally enjoined and restrained from directly or indirectly:

(a) Acquiring any stock or ownership interest in defendant Scophony Corporation of America;

(b) Having any officer, director, representative, agent or employee who is at the same time an officer, director, representative, agent or employee of defendant Scophony Corporation of America;

(c) Dominating, controlling or interfering with, or attempting to dominate, control, or interfere with, the business, financial or promotional policies, practices, operation, management, expansion or other activities of defendant Scophony Corporation of America.

[*Patent Licensing Ordered*]

VI

A. That defendant Scophony Corporation of America is hereby ordered and directed to grant to each applicant making written request therefor a non-exclusive and non-assignable license, or sublicense, to make or have made for them, use and vend under any or all United States patents.

(1) Issued on or before the date of the entry of this judgment which are owned or controlled by defendant Scophony Corporation of America; or

(2) Issued or to be issued under any or all applications for United States patents filed by or on behalf of Scophony Corporation of America pending on the date of the entry of this judgment; or

(3) Issued or to be issued under any or all applications for United States patents filed after the date of entry of this judgment by or on behalf of Scophony Corporation of America covering inventions or discoveries, the rights in and to which were owned or controlled by Scophony Corporation of America or to which it was entitled on or before December 18, 1945; or

(4) Issued or to be issued under any or all applications for United States patents filed or to be filed after the date of entry of this judgment by or on behalf of Scophony Corporation of America on the basis of patents owned or controlled by defendant, Scophony, Limited, in the United Kingdom on or before December 18, 1945, or on the basis of patent applications of defendant Scophony, Limited, pending on December 18, 1945, in the United Kingdom; including, without limitation, all patents, reissue and patent applications listed in Appendix A annexed hereto, and any and all divisions, continuations, reissues or extensions thereof, all of such patents whether or not listed in Appendix A, and whether issued or to be issued, being hereinafter referred to as the Licensed Patents; and defendant Scophony Corporation of America is hereby enjoined and restrained from making any disposition of any said Licensed Patents which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee thereof shall observe the requirements of this Section of this judgment and the purchaser, transferee or assignee shall file in this Court, prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section of this Judgment.

B. That defendant Scophony Corporation of America is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the pro-

visions of this Section, except that (a) a reasonable non-discriminatory royalty may be charged; (b) reasonable provision may be made for a periodic inspection of the books and records of licensee by an independent auditor who shall report to the licensor only the amount of the royalty due and payable; (c) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of its books and records as hereinabove provided.

C. Upon receipt of written request for a license under the Licensed Patents, or any of them, defendant Scophony Corporation of America shall advise the license applicant in writing of the royalty which it deems reasonable for the claim or claims of the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by defendant Scophony Corporation of America, the license applicant may forthwith apply to this Court for the determination of a reasonable royalty, and defendant Scophony Corporation of America shall, upon receipt of notice of the filing of such court application, promptly give notice thereof to the Attorney General. The reasonable royalty rates determined by the Court in any such proceeding shall apply to the license applicant and to all other licensees under this judgment under the same claim or claims of the same patent or patents. For said sixty (60) day period, and pending the completion of any such court proceeding, the license applicant shall have full rights under the said patent claim or claims to which his application pertains without payment of royalty, but subject to the final judgment and order of the Court in such proceeding, and further subject to the following provision, defendant Scophony Corporation of America may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, defendant Scophony Corporation of America shall then issue, and the court applicant shall accept, a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the fiilng of such court application by the applicant. If the court applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application and for the rescission of any and all of the applicant's rights under this subsection. Where an interim license or sublicense has been issued pursuant to this subsection, or where the applicant has exercised any right under any patent hereunder, reasonable royalty rates as finally determined by the Court shall be retroactive for the applicant and for all other licensees under this judgment under the same claim or claims of the same patent or patents, to the date the applicant files his application with the Court.

D. Defendant Scophony Corporation of America is hereby ordered and directed, in so far as it has power to do so, to grant upon written request to any applicant licensed under the provisions of this Section VI, with respect to any products manufactured in the United States pursuant to such license, a non-exclusive grant of immunity from suit under foreign patents or patents issued on foreign applications corresponding to any of the Licensed Patents under which the applicant is licensed.

[*Legal Action Enjoined*]

VII

A. Defendant Scophony Corporation of America is hereby enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any proceeding under Sections 67 and 70 or Title 35, U. S. C. for the recovery of damages accrued prior to the date of this judgment for the infringement of any of its now issued or reissued United States patents applicable to the art of television.

B. Defendant Scophony Corporation of America is hereby directed during the period ending five years after the date of the entry of this judgment to furnish or make available in writing, at a nominal charge, to any person licensed to use the Licensed patents, information concerning the operational techniques, processes, formulae, plans, specifications, and other know-how in its possession as of the date of this judgment relating to patents or applications for patents referred to in Section VI hereof.

[*Inspection for Compliance Purposes*]

VIII

For the purpose of securing compliance with this judgment, and for no other pur-

pose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to the defendant be permitted, subject to any legally recognized privilege, (a) reasonable access, during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (b) subject to the reasonable convenience of said defendant, and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this judgment, and for no other purpose, any defendant, upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as may from time to time be necessary for the purpose of enforcement of this judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

IX

Jurisdiction of this action is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment of violations thereof.

APPENDIX A

I

All United States patents issued on or before the date of the entry of the foregoing judgment which are owned or controlled by defendant, Scophony Corporation of America, and all patents issued or to be issued on applications for United States patents, including continuations and divisions thereof, filed by or on behalf of defendant Scophony Corporation of America pending on the date of the entry of the foregoing judgment, or on applications for United States patents filed thereafter by or on behalf of Scophony Corporation of America covering inventions or discoveries, the rights in and to which were owned or controlled by Scophony Corporation of America or to which it was entitled on or before December 18, 1945, including, without limitation, the following:

Patents

1,914,314	2,112,002	2,267,251
1,918,358	2,138,224	2,270,232
1,919,139	2,140,584	2,296,943
2,012,207	2,153,490	2,296,944
2,021,162	2,155,659	2,306,407 (Reissue 22,628)
2,025,186	2,155,660	2,313,286
2,029,401	2,155,661	2,320,380
2,030,235	2,157,468	2,330,171 (Reissue 22,734)
2,041,036	2,158,990	2,330,172
2,053,014	2,161,299	2,335,265
2,061,016	2,182,043	2,349,298
2,086,833	2,193,422	2,355,110
2,088,626	2,193,953	2,371,643
2,088,732	2,238,089	2,420,198
2,089,155	2,245,119	2,435,458
2,100,044	2,251,525	2,452,211
2,110,945	2,258,311	2,454,094
		2,553,595

Applications for Patents

509,144	560,776	599.574
523,716	576,819	563,864
541,155	580,908	709,735
544,036	580,325	710,345
551,274	590,823	775,175
556,881	591,498	12,036
557,066	597,755	12,256

II

All patents issued or to be issued on applications for United States patents, including continuations and divisions thereof, filed or to be filed by or on behalf of defendant, Scophony Corporation of America, after December 18, 1945, on the basis of patents issued on or before December 18, 1945 in the United Kingdom which are owned or controlled by defendant Scophony,

Limited, or on the basis of patent applications by or on behalf of defendant Scophony, Limited, including continuations and divisions thereof, pending in the United Kingdom on December 18, 1945, or on the basis of patents issued on such applications.

[¶ 62,357] Modigliani Glass Fibers, Inc., and The Light Conditioning Company of America, Inc. v. The Glasfloss Manufacturing Company, Inc., and The Glasfloss Corporation.

In the United States District Court, Eastern District of New York. No. C. 8731. December 9, 1948.

Sherman Antitrust Act

Suit for Patent Infringement—Motion to Amend Allegation of Conspiracy Allowed. —A motion by the defendant in a patent infringement suit for leave to amend an answer will be allowed when the proposed amendment is based on an allegation of conspiracy with the inventor to use the patents to restrain trade.

See the Sherman Act annotations, Vol. 1, ¶ 1660.200.

For plaintiff: Kniesner, Hoag & Carlson.

For defendant: Mann & Burrows.

[*Nature of Motion*]

INCH, J.: This is a patent suit. The complaint is in the usual form, charging infringement, etc. The answer puts in issue these allegations, and now the defendants move for leave to file an amended answer, specifically in connection with the Fourth Defense alleged in such proposed amended answer.

The plaintiffs have no objection, apparently, to the service of an amended answer, but oppose vigorously the inclusion therein of this Fourth Defense.

[*Allegation of Conspiracy*]

In substance, this Fourth Defense alleges that the inventor, before transferring his patents to plaintiffs, entered into a conspiracy to illegally restrain trade, and thereby sought to establish an illegal monopoly, using these patents in question as a means of carrying out such conspiracy, and that, therefore, the plaintiffs are coming into this Court with unclean hands, and if so, the patents cannot be enforced.

[*Striking Out Leads to Delay*]

I agree with counsel for plaintiffs that the said defense as pleaded is not as precise as might be desired. Possibly at the trial it will not amount to much for various reasons, one of them possibly, a failure of proof on other issues as well as on this issue so raised; and not to delete it seems to me to impose no unusual burden upon plaintiffs, while striking it may lead to unnecessary delay caused by intervening legal procedure.

[*Unclean Hands Doctrine*]

Of course, the equitable doctrine of "unclean hands" is applicable only where plaintiffs' unconscionable conduct is directly connected with the subject-matter of suit, and it has been indicated that such a defense need not be pleaded, but may be taken up without affirmative claim therefore. [*Libbey-Owens-Ford Glass Co. v. Sylvania Indust. Corp.*, U. S. C. A. 2, 154 F. 2d 814 (1946)) Cert. denied. Decisions such as *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co. v. Ellis*, 314 U. S. 495, show that when substantiated, such defense has its place in such litigation.

[*Allegation Sufficient*]

It seems to me, therefore, that sufficient has been set forth in the present allegations of this defense, and that they are not so vague as to require that they be stricken out of the proposed amended answer. When the case is tried, the trial Judge, then having the evidence before him, will rule whether or not such a defense substantially exists, and should prevail. In this regard, I also have in mind that this is not a jury case.

[*Motion Granted*]

The motion for leave to file the amended answer is therefore granted, and the motion to strike out the Fourth Defense is denied.

Submit order.

[¶ 62,358] **The State of Kansas, on the Relation of John Anderson, Jr., County Attorney of Johnson County v. The Commercial Candy Company, Inc., of Topeka, and W. E. Schwartz.**

In the Supreme Court of the State of Kansas. No. 37,431. January 22, 1949.

Appeal from Johnson District Court.

Kansas Unfair Practices Act

Sales Below Cost—No Offense Where No Intent to Monopolize.—Tobacco wholesalers selling to retailers below cost do not violate Section 2 of the Unfair Practices Act of the State of Kansas when there is no evidence of intent unfairly to divert trade from competitors, to injure competitors and prevent fair competition and injure public welfare. Defendant discharges the burden of proof placed upon him by Section 5 of the Act by proving that such sales were made in good faith and to meet the price of a competitor. This section does not require the defendant to ascertain whether his competitors are selling below cost.

See the Kansas Unfair Practices Act, Vol. 2, ¶ 8288.

For appellants: Howard E. Payne.

For appellee: John W. Anderson, Jr., W. C. Jones.

[Pleadings]

PRICE, J.: This case involves an appeal by the defendants below from an order of the court enjoining them from violating the provisions of the Unfair Practices Act as set forth in G. S. 1947 Supp., 50-401 to 50-408, inclusive.

The petition filed by the county attorney, under the provisions of 50-404 of the act, alleges that defendants maintain and carry on a business as wholesalers of candy, and tobacco products in the state of Kansas, and as such wholesalers of candy and tobacco products sell and distribute cigarettes to retailers in the state of Kansas; that the defendants did, on the 31st day of October, 1947, sell, at wholesale, to two retail firms in Olathe, Johnson county, Kansas, twenty-five cartons of popular brand cigarettes at the price of $1.605 per carton; that said sales were made by defendants as wholesalers at less than cost to them and that said sales were contrary to the provisions of the Unfair Practices Act of the state of Kansas; that defendants will continue to offer for sale and will continue to sell said cigarettes at wholesale at less than cost to them and contrary to the laws of the state of Kansas if they are not enjoined and restrained by order of court from so doing and that said sales of cigarettes by defendants were made with intent unfairly to divert trade from competitors, to injure competitors and to impair and prevent fair competition and injure the public welfare. The prayer is for an injunction to restrain and enjoin the defendants from offering for sale and from selling cigarettes in Johnson county, Kansas, at less than cost to the wholesalers and contrary to the provisions of the act.

The defendants' answer admits certain formal allegations of the petition, admits the sales in question, but denies that said sales were made at less than cost to defendants, and alleges that they are entitled to the benefits under the provisions of subsection (*e*) of section 405 of the act in that said sales to said retailers herein admittedly made were made in good faith and to meet the price of The Theo. Poehler Mercantile Company of Lawrence, Kan. a competitor of said defendants, which company had, on many occasions and for a long time prior to said sales made by said defendants, made sales of the same brands of cigarettes in the same locality for $1.59 per carton; that they do not know and have no means of ascertaining whether the said The Theo. Poehler Mercantile Company, in the sale of cigarettes at $1.59 per carton, is doing so in violation of the Unfair Practices Act of the state of Kansas, but allege the fact to be that they have a right, under the terms of said act, to meet the price of said competitor in the same locality, towit: Johnson county, Kansas.

Further answering, defendants allege that the Unfair Practices Act is unconstitutional; that the same is in contravention of and offends the due process clause of the fourteenth amendment to the federal constitution; that it is likewise in contravention of

section 17 of article 2 of the constitution of the state of Kansas; that said act is discriminatory and arbitrary and is not uniform in its operation throughout the state; and further, that said act is and does constitute an attempt to fix prices at which commodities may be sold, is contrary to public policy, tends to create monopolies and to stifle competition and is detrimental to general public welfare.

Plaintiff's reply denies every material allegation contained in the answer except such facts therein contained as were agreed upon in the agreed statement of facts filed by the parties to the action.

The case was tried by the court on an agreed statement of facts, and in addition thereto the plaintiff offered one witness. The defendants offered no additional oral, written, or documentary evidence.

[*Facts Agreed Upon*]

The agreed statement of facts is as follows:

"It is hereby agreed between the respective parties, Plaintiff and Defendants, that the following do constitute and are facts upon which the respective parties are mutually agreed and may be so considered as such by the Court:

"1. That this action is properly brought by John Anderson, Jr., who is the County Attorney of Johnson County, Kansas, that the Defendant, Commercial Candy Company, is a corporation, doing business at Topeka, Kansas, that the Defendant, W. E. Schwartz, is general manager of said corporation and that the defendants are wholesale dealers in candy and tobacco products within the State of Kansas, and as such sell and distribute cigarettes and other merchandise to retailers within the State of Kansas.

"2. That this action is brought under the provisions of 50-401 to 408, inclusive of the 1945 Supplement to G. S. of Kansas, 1935, and that all of the provisions of said sections relating to wholesalers are applicable herein.

"3. It is agreed that the defendant, W. E. Schwartz, acting for and on behalf of the Defendant corporation, did make sale, at wholesale, and on the 31st day of October, 1947, of five cartons of Lucky Strike Cigarettes, 5 cartons of Old Gold cigarettes and five cartons of Phillip Morris cigarettes, to the Norris Drug Store, of Olathe, Kansas, and did likewise make sale, at wholesale, of five cartons of Lucky Strike and five cartons of Chesterfield cigarettes, on the same date to Carver Brothers Grocery, of Olathe, Kansas, and that both the Norris Drug Store and Carver Brothers Grocery are retailers, engaged in the sale of goods, wares and merchandise at retail.

"4. It is further agreed that said Defendants did make sale of said cigarettes to said retailers at a price of $1.605 per carton.

"5. It is further agreed between the parties hereto that the actual cost of said cigarettes, including the tax of $0.30 per carton thereon and other costs for cartage and mark-up is $1.65 per carton.

"6. It is likewise agreed that the actual cost to the Defendants, of each carton of cigarettes, was, at the time of said sales, exclusive of tax, cartage or mark-up $1.32 4/5 per carton.

"7. It is further agreed between the parties hereto that the Defendants will testify that The Theo Poehler Mercantile Company, of Lawrence, Kansas, was at the time of said sales, made by said Defendants, a competitor of said Defendants engaged in the same kind and character of business and that said competitor had, immediately prior and immediately after said sales made by said Defendants, made sales of the same brand of cigarettes, sold by said Defendants, and in the same locality, at a price of $1.59 per carton.

"8. It is agreed that the Defendants herein made no effort to determine whether said sales of cigarettes made by The Theo Poehler Mercantile Company, of Lawrence, Kansas, were made by it for less than cost to said mercantile company.

"9. It is agreed between the parties hereto that the Defendants are by law allowed eight (8%) percent discount from the face value of revenue stamps purchased from the State of Kansas, said stamps to be affixed by the wholesaler upon each package contained in each carton of cigarettes before sale, as provided in Section 79-3311, 1945 Supplement to G. S. of Kansas, 1935.

"It is further agreed between the parties hereto that in addition to the above agreed statement of facts each of the parties, Plaintiff and Defendants, reserve the right to introduce additional oral, written or documentary evidence."

The witness called by the plaintiff testified that for about fifteen years he had been engaged in the wholesale business in Johnson county, and, among other things, sold candy, tobacco and cigarettes; that

during such period he had acquired what might be called "regular customers;" that among those customers were the two retail firms in Olathe to which the defendants had sold the cigarettes in question; that he had been selling cigarettes at wholesale for $1.66 per carton; that popular "name brand" cigarettes are sold by the manufacturers to wholesalers at a uniform price all over the United States; that unless the defendants are enjoined and restrained from selling cigarettes in the Olathe community at less than cost to the wholesaler, trade would be diverted from the witness; that such practice would tend to prevent competition in the community, would create a monopoly for the defendants in Johnson county, and that he had asked the county attorney to bring this action.

On cross-examination, the witness testified that he was familiar with that part of the Unfair Practices Act which permits a wholesaler to meet the price of a competitor; that he knew the defendants, at the time the sales were made, were meeting the price of The Theo. Poehler Mercantile Company, and that he had no independent means of ascertaining and did not know what the cost of doing business might be so far as the defendants and The Theo. Poehler Mercantile Company were concerned.

[*Trial Court Holdings*]

The court made written conclusions of fact which were generally in favor of the plaintiff and against the defendants. Several of these findings, important for our purposes, are as follows:

"4. That the defendants did on the 31st day of October, 1947, sell, at wholesale, to the Norris Drug Store of Olathe, Kansas, a retailer, five cartons of cigarettes at the price of $1.605 per carton and that said defendants did sell to Carver Bros. Grocery, a retailer, at Olathe, Kansas, ten cartons of cigarettes at $1.605 per carton.

"5. That the sales as aforesaid and at the price as aforesaid made by said defendants as wholesalers is less than cost to said wholesalers.

"6. That cigarettes are sold by the manufacturer of cigarettes to all wholesalers at the same price everywhere in the United States, said price being $1.32 4/5 per carton.

. . . .

"10. That the cost to the wholesaler in this vicinity and in Olathe, Kansas, of popular brand cigarettes per carton, including cost to the wholesaler, state tax, cartage and two (2) per cent markup is $1.65 per carton.

"11. That the sale of cigarettes by the defendants at the price of $1.605 per carton is below cost to the wholesaler as defined by the Unfair Practices Act of the Statute of Kansas.

. . . .

"13. That the defendants did not make the sales as aforesaid in good faith and to meet the price of the Theo. Poehler Mercantile Company of Lawrence, Kansas, a competitor, as alleged in defendants, answer and that the defendants made no effort to determine whether the Theo. Poehler Mercantile Company made said sales for less than costs as alleged in defendants' answer."

Conclusions of law rendered by the court are as follows:

"1. That the plaintiff is entitled to judgment against the defendants as prayed for in plaintiff's petition, and the defendants, and each of them, are hereby restrained and permanently enjoined from selling cigarettes in Olathe or in Johnson County, Kansas, at a price below cost to the wholesaler.

"2. That the Unfair Practices Act of the State of Kansas is not in contravention and does not obstruct the due process clause to the Fourteenth Amendment to the Constitution of the United States of America.

"3. That the Unfair Practices Act is not in contravention of Article Two, Section Seventeen of the Constitution of the State of Kansas.

"4. That the Unfair Practices Act is legal and constitutional in all respects and is a valid and reasonable exercise of the police powers of the state.

"5. That the defendants herein made sales of cigarettes in this community and in Johnson County, Kansas, below cost with the intent or effect of injuring competitors and destroying competition.

"6. That if the defendants are permitted to sell cigarettes in Johnson County, Kansas, at a price below cost to the defendants, as wholesalers, said defendants will divert trade from the wholesalers in Johnson County, Kansas, thereby giving the defendants a monopoly of the cigarette business in Johnson County, Kansas, all of which is against the public welfare and against public policy."

Defendants' motion for a new trial was overruled and this appeal followed.

Considerable space in the brief of each of the parties is devoted to the question of the constitutionality of the Unfair Practices Act but our view of the facts of this case renders it unnecessary to discuss such question.

Section 50-402 of the act reads:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

The last portion of 50-403 reads:

> ". . . Proof of any such advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act."

Section 50-405, relating to exemptions, reads:

> "The provisions of this act shall not apply to sales . . . at wholesale . . .; (e) where the price of merchandise is made in good faith to meet the price of comppetitor in the same locality; . . . *Provided, however,* That any . . . wholesaler claiming the benefits of any of the exemptions hereinabove provided shall have the burden of proof of facts entitling such . . . wholesaler to any of the benefits of said exemptions: . . :"

[*Argument on Appeal*]

Appellee argues that the agreed statement of facts makes out a prima facie case against the defendants. Assuming, but not deciding, that it does, what about the provisions of the statute relating to exemptions? Defendants argue that in making the sales they were merely meeting the price of a competitor in the same locality. It is admitted that the Poehler Company was a competitor of defendants, engaged in the same kind and character of business, and that immediately prior to said sales in question the Poehler Company had made sales of the same brands of cigarettes in the same locality at $1.59 per carton. The witness Green testified he knew that the defendants, in making the sales in question, were meeting the price of the Poehler company.

[*Lack of Evidence of Interest*]

We are unable to find any evidence in this record upon which the trial court could base its conclusion of fact No. 13 and its conclusion of law No. 5, in which it found that the defendants did not make the sales in good faith and to meet the price of the Poehler company, their competitor, and that the sales in question were made below cost with the intent or effect of injuring competitors and destroying competition. It may be that the sales by the defendants resulted in injury to other competitors and tended to destroy competition, but by the very terms of the act (50-402) such sales must be made with the intent to bring about those results enumerated by the statute in order to constitute a violation of the act. The act (50-405) further provides that a wholesaler may sell for less than cost where the price of merchandise is made in good faith to meet the price of a competitor in the same locality.

[*Good Faith Proven*]

The trial court may have reached its conclusions on account of the fact the record shows that the defendants made no effort to ascertain whether or not the Poehler Company was selling below cost, and that, therefore, the defendants were guilty of bad faith and thus made the sales in question with the intent to bring about the results prohibited by the statute. However, we are of the opinion that this would be an erroneous and unreasonable construction of the burden of proof portion of the exemption provision. As a practical proposition, how could the defendants have ascertained whether or not the price of $1.59 per carton was below cost to the Poehler company unless resort be made to the books and records of such competitor?

We think that the burden of proof portion of the exemption provision means that when one claims the benefit of any of the enumerated exemptions, he has the burden of proving the facts entitling him to the benefit of such exemption, which, in this

case, would mean that the defendants had the burden of proving that they made the sales in question in good faith to meet the price of a competitor in the same locality. There is no evidence in this record of bad faith or of a conspiracy on the part of the defendants to injure competitors, stifle competition, or to bring about a monopoly. On the contrary, we think the evidence clearly shows that the sales were made in good faith by the defendants in order to meet the price of a competitor in the same locality. That, under the statute, they were entitled to do.

Accordingly, the judgment of the lower court is reversed and the cause is remanded with instructions to render judgment for the defendants.

[¶ 62,359] United States v. The Greater Kansas City Chapter, National Electrical Contractors Association, et al.

In the United States District Court for the Southern Division of the Western District of Missouri. No. 5287. January 18, 1949.

Sherman Antitrust Act

Agreement Between Electrical Contractors—No Effect on Interstate Commerce.—Electrical contractors who agree not to execute contracts for the installation of electrical equipment unless the materials are supplied by them or the profit on the material is paid to them do not impede the free flow of interstate commerce within the intendment of the Sherman Act. Whether the defendants furnished the equipment or whether the owners and builders furnished the electrical materials, the flow of commerce would continue just the same.

See the Sherman Act annotations, Vol. 1, ¶ 1021.581.

Agreement Between Electrical Contractors—Purpose of Alleged Unlawful Contract.—Where the intention to restrain interstate commerce is absent and the objectives are limited to intrastate activities, there is no offense under the Sherman Act. The fact that an agreement whereby contractors agree not to install equipment unless the material is supplied by them indirectly affects interstate commerce does not bring the contract within the prohibition of the Act.

See the Sherman Act annotations, Vol. 1, ¶ 1220.508.

Agreement Between Electrical Contractors—Insufficiency of Allegations—Motion to Dismiss Sustained.—In an indictment it is not sufficient merely to state a conclusion that the combination or agreement was in restraint of trade but such details must be given as to show in what manner interstate commerce or trade was restrained by the alleged contract. It must appear logically that the combination if carried out would restrain commerce. An arrangement whereby contractors agreed not to perform contracts for the installation of electrical equipment unless the material was supplied by them or the profit on the material was paid to them, does not, upon analysis, disclose such an effect. There is no averment which indicates any menace to the free flow of interstate commerce. Motion to dismiss sustained.

See the Sherman Act annotations, Vol. 1, ¶ 1630.210.

For plaintiff: John F. Sonnett, Assistant Attorney General; Edward R. Kenny, Special Assistant to the Attorney General; Donald O. McHugh, Special Attorney; William E. Speer, Special Attorney, Washington, D. C.; Sam M. Wear, United States Attorney, Kansas City, Missouri.

For defendants: William R. Collinson, Lancie L. Watts, Paul R. Barnett, Hugh B. Downey, Harry A. Morris, Kansas City, Missouri.

Memorandum Opinion on Motion to Dismiss Indictment

REEVES, E. L., District Judge: While many reasons for the dismissal of the indictment are enumerated in the motion to dismiss yet the several grounds are epitomized in the first averment, which is, "The indictment does not state facts sufficient to constitute an offense against the United States of America."

The indictment charges that the defendants are electrical contractors in the Springfield area (Springfield, Missouri and its environs); that the business carried on by them is the "installation, alteration or repair of electrical systems" in the said area; that the business done by them is large, exceeding for instance, $500,000 during the year 1946; that the electrical equipment used by the defendants, or at least three-fourths of it, was and is produced at factories located outside the State of Missouri and shipped in interstate commerce into said Springfield area; that such equipment was purchased both by the defendants and builders and owners using the services of the defendants; and that the "conspiracy" which began in the year 1946 is as follows:

> "* * * the defendants * * * have been engaged in a combination and conspiracy in restrain of the aforesaid trade and commerce among the several states in electrical equipment and electrical contracting services in violation of Section 1 of the act of Congress of July 2, 1890 as amended (15 U. S. C. Section 1), commonly known as the Sherman Act."

The details of the conspiracy alleged are as follows:

> "* * * a continuing agreement and concert of action among the defendants * * * that the defendant electrical contractors agree that they will not enter into contracts with owners or builders to supply only the labor required in the installation, alteration or repair of electrical systems, unless said owners or builders will pay an additional sum representing a substantial part or all of the profit said contractors would have realized if the electrical materials had been supplied by them."

This was followed by an averment that this combination or agreement was effectuated or consummated by overt acts.

[*Averments Must Be Particularized*]

1. The act alleged to have been violated is the familiar one known as the Sherman Act of 1890, found in Section 1, Title 15 U. S. C. A. and is as follows:

> "Every contract, * * * or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal; * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

It is noted from the foregoing pertinent excerpt that the offense or crime under the statute is a combination or conspiracy in restraint of trade or commerce among the several states. In an indictment it is not sufficient merely to state as a conclusion that the combination or agreement was in restraint of trade but such details must be given as to show in what manner interstate commerce or trade was restrained by the alleged contract, combination or conspiracy. *Frankfort Distilleries v. United States*, 144 F. 2d, 824. It mus appear logically and reasonably that the combination or conspiracy, if carried out, would necessarily have the effect to limit and restrain commerce.

2. An analysis of the indictment in this case does not disclose such an effect. The defendants were engaged in "installing, altering or repairing electrical systems." No inferences could be drawn from the averments of the indictment that the defendants would profit or benefit by any restriction or restraint upon the free flow of electrical equipment into the area where they carried on their activities. On the contrary, the averments of the indictment showed that they did a large business in the year 1946, and there was no suggestion that by their exactions of owners and builders the free flow of commerce in electrical supplies suffered an impairment or diminution.

3. The specific combination and conspiracy charged in the indictment was that the defendants would make no contract with any owner or builder unless such owner or builder would agree to pay "an additional sum representing a substantial part or all of the profits said contractors would have realized

if the electrical materials had been supplied by them." The meaning of this arrangement was that, if the defendants supplied all the labor for installations, alterations or repairs, then they should be paid an additional amount equal to a part or all of the profits the owner or builders would realize if such owners or builders purchased and supplied the equipment or material used in such installation, alteration or repairs. There was no averment which indicated a menace or a threat to the free flow of interstate commerce. The owner or builder had an option either to purchase the equipment necessary for the installation, etc., and then divide or pay all the profit over to the defendants or to permit the defendants to purchase and supply the equipment and material along with their labor. By such an arrangement there was no restraint upon interstate commerce and without a combination or agreement or a conspiracy to restrain commerce there can be no violation of the law.

4. Assuming that the defendants were indispensable to the installations, etc., of electrical systems in that area or community, and, assuming further, that their refusal to contract with the owners and builders unless they complied with their (defendants') demands, would impede and interefere with the free flow of interstate commerce, yet, under the express ruling of the Supreme Court in *Apex Hosiery Co. v. Leader et al.* 310 U. S. 469, l. c. 482, 483, 484, 485, 486, 490, 492, 493, 497, 498, 500 and 501, this would not be sufficient and they would not be guilty of violating the law.

[*No Effect on Free Flow of Commerce*]

As indicated in that lengthy opinion, the Sherman Anti-Trust Law was and is but an exposition of the common law and common law doctrines in restraint of trade. The national government, unlike the State of Missouri and practically all the other states in the Union, could not and did not undertake to adopt the common law as a part of the national code. It was necessary, therefore, in its manifold activities and particularly in the regulation of interstate commerce over which it had constitutional regulatory authority, to express by positive enactment the doctrines of the common law. The act, therefore, is to be interpreted in the light of the common law as it is construed. The object of both the common law and our statutory law was to prevent trusts and combinations of business and of capital organized and directed to the controlling of the market by suppression of competition in the marketing of goods and services. The reason for the law was the monopolistic tendency which had become a matter of public concern, and, "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." l. c. 493.

In the *Apex Hosiery* case, *supra,* the defendants had conducted a sit-down strike and had destroyed property and damaged merchandise intended for interstate commerce. They had refused to permit the shipment of the merchandise so that it might enter the channels of interstate commerce. The object of the defendants, however, was "to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment." l. c. 501. The court then announced a doctrine applicable here:

> "So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals v. United States, supra,* because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not effect market price."

In the *Apex Hosiery* case the Court of Appeals had reversed a judgment against the defendants in a civil proceeding and the Supreme Court affirmed the decision of the Court of Appeals.

In the *Apex Hosiery* case the court found that the effect of the demands and actions of the defendants "was to restrict substantially the interstate transportation of its manufactured product, so as to bring the acts of respondents by which the restriction was effected within the reach of the commerce power if Congress has seen fit to exercise it. Cessation of petitioner's manu-

facturing operations, which respondents compelled, indubitably meant the cessation of shipment interstate. *The effect upon the commerce resulted naturally and inevitably from the cause.*" (Italics mine.) l. c. 484.

In the instant case there is not a single averment that the free flow of commerce was affected or would have been affected in any way whatsoever by the exactions made by the defendants upon owners and builders.

5. As said in *United States v. Yellow Cab Co.* 332 U. S. 218, l. c. 225:

"Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected."

And, again, l. c. 227:

"The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce."

The acts here charged did not remotely affect interstate commerce. Whether the defendants furnished the equipment or whether the owners and builders furnished the electric materials, the flow of commerce would continue just the same. The contract of the defendants against which the indictment complains was purely and entirely intrastate. In that respect it fell squarely within the "dead chicken" case of *Schechter Corp. v. United States,* 295 U. S. 495, l. c. 547, where the court said, in differentiating between interstate and intrastate commerce:

"Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co. v. United Mine Workers,* 268 U. S. 295, 310. *But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions.*" (Italics mine.)

6. Counsel for the government rely, as do opposing counsel upon a veritable forest of citations and authorities but specific reliance is placed upon the case of *United States v. General Motors Corporation,* 121 F. 2d 376. The facts in that case do not compare with the facts alleged in the case under consideration. General Motors Corporation undertook, after it had parted with title to its products, to coerce its dealers into financing the sale of automobiles through the General Motors Acceptance Corporation and the General Motors Acceptance Corporation of Indiana, Inc. It denied to its 15,000 dealers who bought and became invested with title to the motor vehicles manufactured by it, their freedom to do business with a multitude of independent finance companies in the retail sales of motor vehicles. The exhaustive opinion in that case does not apply here.

[*Averments Insufficient*]

While it is conjectured by counsel for the government that the effect of the exactions made by the defendants upon owners and builders would limit the flow of electrical equipment and material to the ultimate consumer, yet the averments of the indictment do not justify that speculation.

In view of the above discussion it should be held that the indictment does not state, as claimed by the defendants, facts sufficient to constitute an offense against the United States of America, and, accordingly, the motion to dismiss should be and will be sustained.

[¶ 62,360] A. B. Momand v. Universal Film Exchanges, Inc. et al. Universal Film Exchanges, Inc., et al., v. A. B. Momand.

In the United States Court of Appeals for the First Circuit. Nos. 4291, 4292. December 21, 1948.

Sherman Antitrust Act

Action for Treble Damages—General Allegations—Failure to Allege Specific Damages. —In a suit for treble damages by a motion picture operator against producers and distributors complaining that the defendants conspired to violate the antitrust laws by their illegal business practices, general allegations must be specifically substantiated. Nebulous assertions by the plaintiff that his business deteriorated, that his profits would have been larger had the defendants not indulged in certain practices, that the post conspiracy

business arrangements he was forced to assume were undesirable, are too vague. Allegations and proof held insufficient to support a jury verdict.

See the Sherman Act annotations, Vol. 1, ¶ 1640.351.

Motion Picture Industry—Treble Damages Action—Proof Required.—A fair degree of certainty is essential to show the causative relation of the defendant's misconduct and the plaintiff's injury. Where a plaintiff is required to prove that damage ensued from two specific illegal practices, specific information is required, otherwise his testimony is simply unsupported opinion evidence.

See the Sherman Act annotations, Vol. 1, ¶ 1640.351.

Motion Picture Industry—Action for Treble Damages—Statute of Limitations.—A statute of limitations governing the time within which a private action may be brought for damages as a result of offences under the federal antitrust laws does not begin to run until the termination of any federal suit brought on the same set of facts. The Sherman and Clayton Acts, which create federal causes of action, have no internal statute of limitations. The applicable law therefore is the law of the state in which the suit is brought.

See the Sherman Act annotations, Vol. 1, ¶ 1640.435.

Motion Picture Industry—Action for Treble Damages—*Res Judicata*.—Where booking difficulties between a motion picture operator and a picture distributor were a major source of complaint in previous litigation, the doctrine of *res judicata* prevents the litigant from proving damage from these sources in subsequent litigation.

See the Sherman Act annotations, Vol. 1, ¶ 1640.636.

Motion Picture Industry—Parent Company and Subsidiary—*Res Judicata*.—Where a parent company is found, by a court of law, to have been involved in illegal practices in part through its wholly owned subsidiary, another action can not be brought against the subsidiary on the same ground since the issue has already been tried and can not be relitigated. In such a case the doctrine of collateral estoppel applies.

See the Sherman Act annotations, Vol. 1, ¶ 1640.636.

For A. B. Momand, George S. Ryan, Boston, Mass.

For Universal Film Exchanges, Inc., et al., Jacob J. Kaplan; Irving J. Helman and Nutter, McClennen & Fish with him on brief.

Opinion of the Court

[*History*]

GOODRICH, Circuit Judge: This is an anti-trust suit for treble damages by the assignee of ten corporations, which were at the times complained of engaged in the motion picture business in Oklahoma, against eight major motion picture producers and distributors. The plaintiff, though assignee, sues in his own right. The complaint alleges that the defendants conspired to violate the federal anti-trust laws by twenty of their business practices. After the jury had rendered a verdict for the plaintiff, the trial court directed a verdict for the defendants and entered judgment thereon. Both sides have appealed.

Prior to the commencement of any litigation, the plaintiff and his father operated motion picture theaters in twelve Oklahoma cities and towns. They later formed thirteen separate Oklahoma corporations to operate these theaters. Some of the grounds and buildings occupied by the theaters were owned by a fourteenth Oklahoma corporation called Momand Realty Corporation. A fifteenth corporation named Momand Theatres, Inc. was formed in Delaware in January, 1929, as a management company, and it acquired the stock of the thirteen operating companies referred to above. The stock of Momand Theatres, Inc. was in turn owned by the plaintiff and his father "largely, with perhaps some minor stockholders."

On April 13, 1931, and again on December 31, 1933, the plaintiff took assignments from each of these fifteen corporations of their causes of action under the anti-trust laws against a number of motion picture producers, distributors and exhibitors, among whom are the defendants in the present case.

While the plaintiff's argument covers a wide range of territory, his counsel frankly stated at the oral argument that he would be content if the verdict of the jury was reinstated. This verdict was reached after a lengthy trial in which the District Court had limited the plaintiff's proofs to two of the liability-creating business practices out of the twenty originally alleged.[1] The reason for this limitation was former litigation in Oklahoma. Another limitation was imposed by the trial judge also, and this related to the period of time for which the plaintiff was entitled to complain.

Our discussion, therefore, falls conveniently into three divisions. The first concerns the correctness of the action of the District Court in directing a verdict for the defendants because of failure of the plaintiff's proof on the two charges concerning which he was permitted (and encouraged) to offer proof. The second part of the discussion concerns itself with the question whether the plaintiff was correctly limited to proof of the two charges instead of twenty. This involves a question of *res judicata* arising out of the earlier Oklahoma litigation which will be described later. The third point which must be discussed is whether the District Court was correct in limiting the plaintiff as he did to the time during which plaintiff could claim recovery. If these three questions are resolved in accordance with the rulings of the District Court, there will be no occasion to consider any basis for appeal which the defendants may have to offer.

Was there Evidence to Support a Verdict for Plaintiff?

We turn first, therefore, to the question whether the plaintiff made out a case for recovery on the evidence he offered. Only two grounds of alleged conspiracy were left open to him. One of these had to do with recovery of loss sustained from the operation of the arbitration clauses[2] in the standard contract then in effect between distributors and exhibitors of pictures. The other had to do with certain credit practices[3] on the part of distributors followed by these defendants. All the rest of the plaintiff's twenty grounds of complaint were ruled out by the District Judge because he held that the plaintiff was precluded from recovery upon them by the action of the court in the Oklahoma litigation previously referred to. We assume for the purpose of discussion under this point that the plaintiff was properly limited to these two grounds of complaint.

Plaintiff's claim based on credit practices may be disposed of briefly. Those practices are involved in only two counts.[4] The evidence on both counts consists of testimony of the plaintiff to the effect that, had it not been for the arbitration and credit conspiracies, the receipts of these theaters would have been greater than they were. No part of the loss claimed was separately attributed to the credit conspiracy. Indeed, as will appear below, arbitration and credit practices were more often lumped with other causes which were not liability-creating. It is apparent, also, that the substance of plaintiff's claim in this part of the case is that threats of arbitration forced him to follow a course that ruined his business. The fol-

[1] These practices related to the compulsory arbitration provisions of the standard exhibition contract and the organization of credit committees and uniform enforcement of their rules. A third practice of the defendants, the fixing of a minimum admission fee of ten cents, was also open to proof. But the plaintiff has made no claim of injury based on the minimum admission fee. See footnote 7 *infra*.

[2] The clause provided for compulsory arbitration of disputes under contracts between distributors and exhibitors. Awards of the arbitration boards were to be conclusive. Upon failure of the exhibitor to submit to arbitration or abide by an award, the distributor party to that contract, and all others having like contracts with the exhibitor, were to demand security from him on every contract. If the exhibitor failed to post security within a fixed time, all distributors were to suspend service under their contracts, and after ten days' suspension could cancel the contract if by that time the exhibitor had not posted security or obeyed the award. See *Paramount Famous-Lasky Corp. et al. v. United States*, 282 U. S. 30, 37-41, (1930).

[3] Credit committees were set up by the film boards of trade in each locality. Their function was to make certain that purchasers of theaters assume and perform completely the outstanding contract obligations of their vendors. The sanction, as in the case of the arbitration clause, was a requirement that security be posted, and in addition expulsion from the film board of trade for refusal to submit credit information. See *United States v. First National Pictures, Inc., et al.*, 282 U. S. 44, 49-53 (1930).

[4] Count No. 4, Clinton, and No. 8, Alva. Both are summarized in the appended analyses to the opinion of the District Court, R. 229-231, 242-244. The reported opinion in 72 F. Supp. 469 (1947) does not contain these addenda.

lowing discussion, therefore, is applicable to the credit practices where they are involved, although reference will be made only to arbitration practices.

The plaintiff introduced in evidence twenty-one arbitration claims, totalling $10,332.35, made against him by the defendants. He never paid any of these claims, but rearrangements were worked out in each case settling the differences between the parties. No direct damage resulted, therefore, from these arbitration claims, for the plaintiff paid nothing and incurred no expenses in connection with them. Plaintiff does not controvert this, but he argues that many more than twenty-one claims must have been filed, and that he could not have been expected to remember them all. While this argument may justify an inference that the scope of the arbitration conspiracy was greater than twenty-one claims would indicate, it does not prove that other claims caused more loss than the samples produced, which showed no direct loss at all.

No evidence appears in the record to show that these arbitration claims were presented to induce any of plaintiff's assignors to enter into disadvantageous obligations. From plaintiff's own account of conversations with representatives of defendants, nothing appears from which an intention to injure plaintiff's theaters may be inferred. The subject matter of the arbitration complaints consisted of disputes arising upon contracts already made and alleged to be broken and no prospective arrangements were involved. Nor did plaintiff offer evidence of a single prejudicial new obligation which any of his assignors undertook to escape an arbitration claim or threat. In the instances where there were settlements following arbitration disputes, there is no showing of injury caused by the rearrangement, but only a general charge that the pictures were undesirable. In reviewing specific disputes, the plaintiff was at a loss to remember whether any arrangements made were undesirable to him, and could only say broadly that some arrangements made were desirable and some undesirable. Indeed the settlement of the claims resulted in reduced rentals of films to the plaintiff. This is hardly proof of specific injury resulting from defendants' illegal practices. We turn, then, from the particularized to the more general aspects of this claim.

Suppose we assume that the plaintiff did, contrary to what has been said above, incur large losses in trying to avoid the impact of the arbitration practices complained of. Is recovery for them permitted under the rules of law governing allowance of damages?

The plaintiff claims that at least ten profitable theaters were reduced to operation at a loss and then were forced out of business entirely. The jury verdict would award him a sum, when trebled, approaching $1,000,000. We think he cannot recover any sum of that magnitude for two reasons. First, the substance of his present claim is that the arbitration machinery was used to force poor pictures and late bookings upon him. But the booking difficulties of the plaintiff's theaters were a major source of complaint in the Oklahoma litigation. It was there found that the defendants had not conspired with respect to the selection or timing of motion picture bookings. Damage from these sources is, therefore, not open to proof in this case if the *res judicata* rulings are correct, and for the discussion under this head, we assume that they are. Second, even if any claim were free of the estoppel rulings (and none appears to be) the plaintiff's course of conduct must be evaluated in the light of the threatened harm which he was seeking to avoid. So far as the record shows, that harm consisted specifically of approximately $10,000 in arbitration claims and generally, perhaps, of a number of additional claims not individually proved. The basis, then, of the plaintiff's claimed loss measured in the hundreds of thousands, must, under the estoppel rulings, be found in a claim against him of some $10,000. If plaintiff, without showing any specific intent of defendants to injure him or any specific damaging transaction, proceeded voluntarily to make business arrangements which caused damages running to one third of a million dollars, that conduct was too extravagant to be charged to defendants. The point is ably and fully discussed in the District Court's opinion, 72 F. Supp. 469, 476-477. We approve what is said there, and see no need to review the question further.

We come, then, to the important question of causation. The plaintiff shows that defendants have engaged in illegal practices. He shows also that his business deteriorated for several years and was eventually dissolved. Did defendants' practices cause the

damage? What proof must plaintiff offer? What proof did he offer?

The degree of certainty required of a plaintiff in proving causation of damage is necessarily elastic. It varies with the nature of the case. Particularly in an anti-trust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless.

We are not without guidance in this matter from the opinions of the Supreme Court. In *Bigelow v. RKO Radio Pictures et al.*, 327 U. S. 251 (1945), an exhibitor was permitted to recover treble damages on a showing of conspiracy to discriminate against him in the release of films, and proof of loss of earnings in comparison with his own pre-conspiracy earnings and the post-conspiracy earnings of a comparable competitor not subject to the discrimination. In *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359 (1927), and *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555 (1931), verdicts were sustained on a similar comparison of pre-conspiracy and post-conspiracy conditions of plaintiff's business.[5] But the significant point in this case is emphasized by the statement of the Supreme Court in the *Bigelow* case, 327 U. S. 251, 264: "* * * the jury could conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs."

In the cases just cited, the illegal practices of defendants constituted the only active cause of plaintiff's injuries. Defendants did not show that other factors were substantially contributing causes. On such facts, plaintiffs in those actions, having shown harm to them from defendant's liability-creating conduct were not to be deprived of recovery by hair-splitting requirements that they prove damages exact in amount.

The case before us is different. There are a number of factors acknowledged by plaintiff to have contributed to his injury. But the usual rule in tort is that a plaintiff may recover for loss to which defendant's wrongful conduct substantially contributed, notwithstanding other factors contributed also. Restatement, Torts § 431 (1934). However, the defendant's contribution must be substantial and it must be shown by the evidence. All this is hornbook law and no one would dispute it.

The new problem in this case, however, grows out of the earlier litigation of matters here involved. In an original claim for injury allegedly caused by a number of practices in violation of the anti-trust laws, there would be no need for the plaintiff to particularize the injury caused by each illegal practice. All the practices would be responsible for all the injury, and the portion of loss due to each would be immaterial. In this case, however, the plaintiff has already litigated the issues involved in the twenty business practices charged as illegal. It was decided in the earlier lawsuit that in only two of these respects had defendants conspired as charged. If the *res judicata* rulings in this case are correct, the plaintiff is now in the position of having his shotgun replaced by a rifle. He can no longer spread his fire over the whole range of the defendants' business practices. He must concentrate on two. And if the *res judicata* rulings are to be given full effect, the injury alleged must be allocated to the illegal practices in some manner that can be reasonably measured. To put it another way, if the plaintiff in his first lawsuit seeks to collect a total loss due to all of the allegedly illegal practices of the defendants, and the court in that case finds only two practices illegal, a verdict for the plaintiff in a second lawsuit on the same grounds cannot stand without proof that the two illegal practices caused the loss. Otherwise the defendants would be obliged to pay losses caused by conduct which was determined not to be liability-creating in their particular case. What did the plaintiff show?

On all but two counts, the plaintiff offered no specific evidence at all as to the damages

[5] In the *Story* case, the court said on p. 562: "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

attributable to the arbitration conspiracy. As we have already noted, he showed no direct damage from the twenty-one arbitration claims submitted, which he did not pay, and no specific disadvantageous obligation undertaken to avoid arbitration. He said only, in effect, that his future business arrangements were made to avoid threats of arbitration, that those arrangements were undesirable, and that his business was ruined. This is obviously insufficient evidence to support a jury verdict and the trial court correctly so held.

On two counts (7 and 8), the plaintiff testified that a stated percentage or amount of loss was due to arbitration practices. If there were any specific information in the record to support this opinion testimony, we would agree that he had made out a supportable claim. But we can find no shred of specific proof which would permit a jury to infer that the plaintiff's opinion was reasonably based upon fact. On a reading of this part of the record, we reluctantly conclude that plaintiff's testimony was at best a guess in response to prodding questions directing his attention to the arbitration conspiracy. It is obvious, also, that plaintiff was attributing to the arbitration practices his losses from booking difficulties, which claims were foreclosed to him by the estoppel rulings.

To sum up: It is well appreciated that a plaintiff has a difficult task in an anti-trust suit and that adherence to strict requirements of proof as to exact quantity of damage may deprive him of the substance of his rights. The law has gone far to ease that burden by permitting proof of losses which border on the speculative, in order to implement the policy of the anti-trust laws. But a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury. Especially must this be so where a number of causes exist, and because of earlier litigation, recovery cannot be had for losses due to most of them. Moreover, a general assertion of injury will not suffice when plaintiff's own testimony fails to specify whether any of the business arrangements mentioned by him were or were not disadvantageous. The District Court properly ruled, therefore, that there was not sufficient evidence to support a verdict for plaintiff on the issues open in the case. We pass then to the question whether the *res judicata* rulings unduly restricted the issues.

Res Judicata Effect of the Oklahoma District Court Judgments

The present state of facts raising questions of *res judicata* developed in the following manner. It will be remembered that the plaintiff and his father organized the various corporations who are the assignors of the plaintiff in this lawsuit. These corporations made their assignments to him on April 13, 1931 and again on December 31, 1933.

The first suit was commenced April 17, 1931, in the United States District Court for the Western District of Oklahoma against the present defendants and others. That action was dismissed without prejudice on April 19, 1937.

The plaintiff then split the litigation into three parts. The present action was commenced June 7, 1937. Also in 1937, the plaintiff brought two actions in the United States District Court for the Western District of Oklahoma—Nos. 6516 and 6517. In Oklahoma 6516, the defendants are the same as here except Metro-Goldwyn-Mayer Distributing Corporation (Metro) which is a defendant here but was not a defendant in 6516. In 6517, plaintiff named other defendants than those in the present action. Vitagraph, however, one of the defendants here, was and is a wholly-owned subsidiary of Warner Bros., a party defendant in 6517.

In all three actions—the present one and Oklahoma suits 6516 and 6517—the plaintiff first alleges what he has characterized in this litigation as the "generic conspiracy," a combination on the part of the defendants to monopolize and restrain interstate commerce in motion pictures by twenty of their business practices.[6] In the present action, plaintiff then sets out in ten counts the alleged effect of this conspiracy upon ten of the assignor corporations. In Oklahoma 6516 he complained of injury to five other assignor corporations and two of ten involved here. In 6517 he complained of injury to all fifteen of the assignor corporations.

The Oklahoma actions (6516 and 6517) were consolidated for trial and concluded before the present case came to trial on the merits. From the findings in the Oklahoma consolidated trial, this much is clear and

[6] These practices are summarized in the District Court's opinion, 72 F. Supp. 469, 472 (1947).

pertinent to the *res judicata* rulings: the defendants were found to have conspired in violation of the anti-trust laws only by (1) using standard exhibition contracts and taking concerted action to enforce the compulsory arbitration provisions therein, and (2) adopting and enforcing credit committees' rules concerning the credit statement and rating of vendees of theaters who had not assumed the licensing contracts of their vendors.[7] Defendants were found not to have conspired in the other respects charged. In the suit numbered 6516 it was found that the plaintiff had suffered no injury from the defendants' unlawful conduct. In the suit numbered 6517, the plaintiff recovered judgments against two corporations not parties here and lost as against the others named.

In order to give *res judicata* effect to the Oklahoma judgments, two problems must be resolved. The first concerns the relationship of the parties. The second involves issues of the compulsory joinder of causes of action and suggests interesting excursions into the codifiers' hunting ground where elusive concepts like "cause of action" are tracked down.

The problem as to the parties concerns principally Metro. In all the cases the plaintiff is the same.[8] All the defendants in the present case except Metro were defendants in Oklahoma 6516. In 1936, however, one year before Oklahoma 6516 was instituted, Loew's Inc. acquired all the assets and assumed the liabilities of Metro. Lowe's Inc. was a defendant in Oklahoma 6516. It is clear, therefore, that Loew's and Metro are in privity.[9]

The plaintiff's argument against the application of the doctrine of *res judicata* to his claim against Metro in the present case leads us into the second problem. He contends that he has a separate claim against Metro for its conduct before the merger of Metro with Loew's. He argues further that the cause of action he asserted against Loew's in Oklahoma 6516 was for the tortious conduct of Loew's itself. Therefore, says the plaintiff, the cause of action against Metro has never been prosecuted and the merger of Metro with Loew's should not destroy that cause of action.

Fortunately we need not resolve the interesting questions of the separate identity of causes of action and their compulsory joinder which are raised by the plaintiff's argument.[10] The reason we are relieved from doing so is that, whether or not the causes of action, if separate, had to be joined, they were not in fact joined. Metro's part in the alleged conspiracy was set out in Oklahoma 6516, and the court there expressly found that Loew's was a party to the illegal practices " * * * through the agency of Metro-Goldwyn-Mayer Distributing Corporation * * * ." The conspiracy issues were thus litigated with respect to Metro in Oklahoma 6516, and the plaintiff in the present case may not relitigate those issues.

The same analysis applies to Vitagraph, which is a party defendant here but was not named in Oklahoma 6517. All the named defendants in 6517 were different from those named in the present case. Warner Bros., however, was a party defendant in 6517, and Vitagraph was and is a wholly owned subsidiary of Warner Bros. The consolidated

[7] It was also found in the Oklahoma cases that the defendants had conspired to fix a minimum admission fee of ten cents. The trial judge in the present case ruled that the plaintiff also had the benefit of this finding, but the plaintiff has made no claim based on this practice of the defendants.

[8] As the assignee of the total claim of each assignor corporation, the plaintiff is the real party in interest in each action. Fed. R. Civ. P., 17 (a). He is not suing in a representative capacity. He is, therefore, not merely the same representative or formal party as, for example, a trustee of two separate estates. See *Restatement*, Judgments, §§ 80, 81, (1942).

[9] *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294 (1917).

[10] The problem may be illustrated by the following hypothetical situation: In year 1 corporation A causes injury to P in violation of the anti-trust laws. In year 2 corporation A merges with corporation B. In year 3 corporation B injures P in violation of the anti-trust laws. Both injuries arise out of a continuing conspiracy to which A and B, when separate, were parties. In year 3, P sues corporation B for the second injury, and a judgment is rendered in that case. May P later sue corporation B for the first injury done by corporation A before the merger? If the causes of action are separate, nothing in the Federal Rules appears to compel their joinder. Only counterclaims arising out of the same subject matter must be asserted under Rule 13 (a). The broad concept of "cause of action" as including all the operative facts which might reasonably have been litigated in the first lawsuit would indicate that the plaintiff here was obliged to state all his claims in the Oklahoma litigation. But this we need not decide. See Clark, *Handbook of Code Pleading* § 19, p. 137 (2d ed. 1947); 1 Moore, *Federal Practice*, § 2.04, especially p. 160 *et seq.* (1938); *Restatement*, Judgments, § 62, comments c-j inclusive (1942).

findings in Oklahoma 6516 and 6517 expressly state that Warner Bros. was involved in the illegal practices in part through Vitagraph. The same rule, therefore, applies to the Warner-Vitagraph as applies to the Loew's-Metro relation and the rule of collateral estoppel, as that phrase is used in the Restatement of Judgments, applies.[11]

What has been said thus far establishes a proper relationship of the parties for the application of the doctrines of *res judicata.* A further problem, however, takes us back to the questions of separate identity and joinder of causes of action. The plaintiff contends that he is asserting a separate cause of action for the injury alleged to have been caused by the defendants to each operating company. He contends also that Momand Realty Corporation, which was in the position of lessor to a number of the operating companies, and Momand Theatres Inc., which was the management head of all the operating companies, had as many separate causes of action for the injuries done to them as there were operating companies.

The resolution of these questions will be material only to determine whether the plaintiff is barred by the earlier judgments from asserting any cause of action at all, or whether only the matters of fact found for or against him in the earlier litigation will be foreclosed to him in the present case. Assuming, therefore, without deciding, that as to the operating companies the plaintiff had separate causes of action, it is clear that collateral estoppel is properly applied in this case to prevent the plaintiff from relitigating questions of fact which were decided against him in the earlier lawsuits. It is clear, also, that as to Momand Realty Corporation and Momand Theatres Inc., collateral estoppel applies. Furthermore, as to these two corporations no claim of damage can be supported if, as we have already decided, there is no proof that damage to the operating companies was caused by the illegal practices of the defendants. The trial court's ruling that proof of the claims of the operating companies could not involve relitigation of fact issues decided in the earlier Oklahoma case was, therefore, correct. Whether or not the trial court was correct in ruling that suit on any claim of Momand Realty or Momand Theatres was barred by the earlier litigation, the claims of these companies fall for lack of proof of damage to the operating companies.

Plaintiff's final contention in this phase of the case is that the law as the federal court in Oklahoma applied it has been changed by recent United States Supreme Court decisions and that, therefore, the doctrines of *res judicata* should give way to a more favorable climate of judicial opinion than that existing at the time of the Oklahoma litigation. We do not think they should. The plaintiff had a full trial in Oklahoma of all the issues arising out of his dealings with the defendants. He could have appealed from the judgments of the Oklahoma District Court, but he did not do so. He took no part in creating the more favorable climate of opinion in the appellate courts, if such exists, although he had an opportunity to do so. We think that the policy that there be an end to litigation prevents him from now asserting that changed climate as a basis for relitigation of issues once decided.

Two further points merit brief mention. First, the trial court in the present case ruled that certain practices which the Oklahoma District Court had found defendants had followed and which that court declared illegal were to be treated conclusively as illegal practices here. In Oklahoma 6516, however, it was further found that no damage resulted to the plaintiff, despite the illegal practices, and final judgment was

[11] *Restatement,* Judgments, Ch. 3, Introductory Note: "* * * If a valid and final judgment for money is rendered in favor of the plaintiff, the cause of action is merged in the judgment, and he cannot thereafter maintain an action on the original cause of action (see § 47). If a valid and final person judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see § 48)."

* * * * *

"Where, however, the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case only as to matters actually litigated and determined by the judgment. The judgment is not conclusive as to matters which might have been but were not litigated and determined in the prior action. (See § 68).

"A judgment, therefore, has not only a direct effect upon the cause of action upon which the action in which the judgment is rendered was based, by way of merger or bar, but also has a collateral effect upon other causes of action involving the same parties, by way of what in the Restatement of this Subject is called 'collateral estoppel.' See § 45, Comment *C.*)"

entered for the defendants. That left the defendants with no grounds for appeal, unless, as has happened here, the plaintiff had appealed. Under the principle of Restatement, Judgments, § 69 (2), comment c, defendants should not have been collaterally estopped from relitigating the issues decided against them. But this point would be material only if this case were to go back for a new trial.

Second, assuming the correctness of the *res judicata* rulings, the plaintiff argues that he was prevented from proving a new conspiracy not previously charged, a conspiracy to destroy the plaintiff's business. This is of a piece with the too generalized character of the plaintiff's proof. Of course a new conspiracy would be open to proof in this case and the trial judge said so over and over again. But a conspiracy to destroy a business must take specific forms to achieve that end. Attention must be directed to the practices and conduct by which the defendants sought to accomplish their purpose. At no point does the plaintiff present, nor does the record reveal offers of evidence to show that anything beyond the twenty already familiar business practices is involved.

The *res judicata* rulings, so far as they are material to the disposition of the case, are correct. We go on to the issue of time limitation.

Time Limitation

A separate trial was held in this case in 1942 on the issue of time limitation. (43 F. Supp. 996.) The trial judge ruled "that no recovery could be had against any defendant for alleged wrongs before May 6, 1928, or subsequent to December 31, 1933." [12] He also ruled that action against Loew's was completely barred, and that action against Columbia was barred for wrongs alleged to have occurred before August 27, 1931. The correctness of these rulings is now before us.

Our first inquiry is what statute or statutes of limitations apply. The Sherman and Clayton Acts, which create the federal causes of action, have no internal statute of limitations. The applicable law, therefore, is the law of the state in which the suit is brought, Massachusetts.[13]

Massachusetts has a six-year tort statute of limitations [14] which would close the period prior to June 7, 1931, six years before the commencement of the present action. But Massachusetts also has a borrowing statute of limitations which provides: "No action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein." [15] This provision applies to the plaintiff who has been continuously a resident of Oklahoma.

The Oklahoma statute of limitations applying to "an action upon a liability created by statute other than a forfeiture or penalty" is three years.[16] Another section of the Oklahoma statute states that if a plaintiff who brings a timely lawsuit fails in that action otherwise than upon the merits and the period of limitations has run, he has one year more within which to renew the suit.[17]

The present plaintiff on April 17, 1931, instituted a suit against the defendants here and others in the United States District Court for the Western District of Oklahoma which was dismissed without prejudice on April 19, 1937. Commencement of the Massachusetts action in June, 1937, gave the plaintiff the advantage of the Oklahoma one year extension as to those counts in the Massachusetts action which may be taken to have been set out in the original Oklahoma complaint. This applies to the first eight counts and the tenth count of the original complaint, but not to the ninth count which was first set out in an amendment to the complaint, filed August 27, 1934.[18] The matters in this count are, therefore, open only from August 27, 1931.

[12] The terminal date of December 31, 1933 is the date of the second set of assignments from the various assignor corporations to the plaintiff. The assignments did not purport to cover any period after that date, and the plaintiff does not seriously argue that they did. Any causes of action accruing to the assignor corporations after that date, therefore, never came into the plaintiff's hands.

[13] *Cope v. Anderson,* 331 U. S. 461, 463 (1947).

[14] Mass. G. L. (Ter. ed.) c. 260, sec. 2.

[15] Mass. G. L. (Ter. ed.) c. 260, sec. 9.

[16] 12 Okla. Stat. Ann. § 95, par. 2. The defendants contended in the trial court that the two year bar of paragraph 3 of the above section applied. The trial judge, however, applied the three year provision quoted. Since this ruling was favorable to the plaintiff, we do not stop to discuss the question whether the two or three year provision is applicable.

[17] 12 Okla. Stat. Ann. § 100.

[18] These counts are analyzed in the District Court's opinion, 43 F. Supp. 996, 1002 (par. 16), 1004 (par. 29), 1009 (pars. 16-19 incl.) (1942).

A further limitation is occasioned by the time lapse between the two sets of assignments from the theater companies to the plaintiff. The first set was made April 13, 1931, the second December 31, 1933. The causes of action arising after April 13, 1931, were not transferred to the plaintiff until December 31, 1933, and were first pleaded in the final amended complaint of August 27, 1934. Since, even with the one year saving clause of the Oklahoma statute of limitations, the period not limited to the plaintiff is three years prior to the time the causes were first pleaded, the cut-off date for matters first pleaded on August 27, 1934, is August 27, 1931. Therefore, the period from April 13, 1931, to August 27, 1931, was correctly held closed to the plaintiff as to the causes of action passing to him under the second set of assignments.

As to Loew's which was dropped as a defendant in the pleading of August 27, 1934, the action is barred. The Oklahoma extension does not apply and no other provision preserves the cause of action against Loew's.

The effect of the tolling provision of the Clayton Act remains to be considered. Section 5 of the Clayton Act, 15 U. S. C. A., § 16, provides: "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws the running of the statute of limitations in respect of each and every right of private action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof." Two relevant government anti-trust suits [19] were pending against all the defendants in this action, except Loew's and Columbia, from June 20, 1928, to July 21, 1931, a period of three years, one month and one day. Adding that period to the six year Massachusetts period we have nine years, one month and one day, which, as to the matters in the present suit which were also involved in the government prosecutions, preserves plaintiff's causes of action back to May 6, 1928. This is measuring from June 7, 1937, the day this action was begun. The government prosecutions concerned credit practices, uniform contracts and the arbitration provisions thereof which were the same issues open to plaintiff after the *res judicata* rulings discussed in the second section of this opinion. As to these matters, plaintiff was permitted to go back to May 6, 1928.

The tolling provision does not apply, however, to defendant Loew's nor to Columbia, which were not defendants in the government prosecutions. As to Columbia, therefore, plaintiff may not go back of August 27, 1931, three years prior to the date of the first pleading in which the December 31, 1933, assignments were included. And as to Loew's, action is barred completely, as noted above, by the operation of the Massachusetts borrowing statute of limitations and the applicable Oklahoma statutes.

One more minor limitation is occasioned by the fact that we are dealing with two sets of assignments. The time during which the government anti-trust suits were pending when added to the Massachusetts six year period of limitation, takes us back to May 6, 1928. The trial court gave the plaintiff the benefit of this earlier starting date as to those causes of action which were not barred by the operation of the shorter Oklahoma period of limitation, as applied by the Massachusetts borrowing statute. The bar of the three year Oklahoma statute, as we said above, falls at August 27, 1931, as to those causes of action first set out in the final amended pleading of August 27, 1934. Since the causes of action passing to the plaintiff under the second set of assignments of December 31, 1933, could not have been set out until the filing of the 1934 pleading, the bar of the Oklahoma statute cuts off those which accrued before August 27, 1931. But here the tolling provision of the Clayton Act suspends the running of limitation until July 21, 1931, the date when the government suits terminated. Therefore, those causes of action arising after April 13, 1931 (the date of the first set of assignments) and before July 21, 1931, are preserved by the Clayton Act. But those arising after July 21, 1931, and before August 27, 1931, are not preserved, and the Oklahoma statute bars them. This is what the trial judge held, and if there was any error in it, it was in the plaintiff's favor, and not a matter of which he can complain.

[19] *United States v. First National Pictures*, 282 U. S. 44 (1931) and *United States v. Paramount Famous-Lasky Corp.*, 282 U. S. 30 (1931).

To summarize in the words of the trial judge " * * * Loew's does not have to respond to any cause of action here alleged; Columbia may have to respond for causes of action which accrued between August 27, 1931, and December 31, 1933; and the other defendants may have to respond for as long a period as Columbia and also * * * for such causes of action as arose out of credit policies and uniform contracts * * * between May 6, 1928, and July 21, 1931 * * *."

As to this phase of the case, the plaintiff raises a number of objections, only three of which merit discussion here: (1) that the amended pleading of August 27, 1934, should relate back to April 13, 1931, as to all matters pleaded, thus opening the period from April 13 to August 27, 1931, which the trial judge had ruled closed as to matters first pleaded on August 27, 1934; (2) that a statute of limitations should not be taken to run against claims for injuries caused by a continuing conspiracy until the commisson of the last overt act causing damage; and (3) that the claim against Loew's as successor to Metro for Metro's alleged wrongful conduct should not be barred along with the claim against Loew's for its own conduct.

The answer to the first objection is set out in the trial judge's finding 19. Assuming that damages were occurring to the plaintiff's assignors day by day after the assignment of April 13, 1931, new causes of action were accruing. They came into the plaintiff's hands by the assignment of December 31, 1933. But these causes of action were first pleaded August 27, 1934, and could not relate back to a pleading made in 1931 when the plaintiff did not possess them. Having been first pleaded on August 27, 1934, the three year bar of the Oklahoma statute of limitations falls at August 27, 1931, and the trial judge correctly so ruled.

The plaintiff's second objection as to when the statute of limitations begins to run in a conspiracy case is based on a misreading of criminal cases [20] in which it was said that the continuance of a conspiracy depended upon the commission of overt acts, and that the statute of limitations did not begin to run against a criminal prosecution until the last overt act performed in compliance with the original agreement had been accomplished. It is another and greatly different thing to say, as the plaintiff impliedly does, that a private right of action for damages arising out of a conspiracy does not accrue until the conspiracy is ended, irrespective of the time when the injury is inflicted. On this theory a single act of damage in an antitrust case would be subject to no period of limitation so long as the conspiracy continued, although no further injury was done to the plaintiff. Nor could the plaintiff, on this reasoning, sue in the meantime. All the conspirators would need to do to escape suit is to keep the conspiracy in operation. We have found no authority to support this view. We think the trial court properly ruled that a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion and that the applicable statute of limitations ran from that time.

The third objection is that Loew's was erroneously excluded from responding to the plaintiff's cause of action against Metro, whose assets and liabilities Loew's had acquired in 1936. It may be that the plaintiff is correct in his contention that Loew's should have been required to respond for the part of plaintiff's claim asserted against Metro. The amendment to the plaintiff's complaint which first set out the claim against Loew's for the alleged torts of Metro was filed after the findings in the separate trial on the limitations issues but before the entry of the order in that trial. The order barring suit against Loew's technically barred the claim set out in the amendment referred to. But, in any event, Metro continued as a defendant in this case. Proof of any claim against Metro was not restricted on this ground, and presumably a recovery against Metro would have had to be paid for by Loew's. The plaintiff, therefore, has not been prejudiced by the trial court's disposition of this question, for he has failed to prove that Metro caused him any loss, and has not reached the problem of executing a judgment against a corporation now merged with another corporation.

The judgment of the District Court will be affirmed.

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[20] See *United States v. Kissell*, 218 U. S. 601 (1910); *United States v. Johnson*, 165 F. 2d 42 (C. C. A. 3, 1947); *Eldredge v. United States*, 62 F. 2d 449 (C. C. A. 10, 1932).

[¶ 62,361] Empire State Camera Exchange, Inc., v. Reynolds.

New York Supreme Court, New York County. Special Term, Part III. 121 N. Y. L. J. 334, January 27, 1949.

New York State Fair Trade Act

Motion for Injunction Denied—Defendant Entitled to Hearing.—In an action alleging violation of the New York Fair Trade Law, where the defense was that all cut price sales were of used, deteriorated or display articles, the plaintiff's motion for a temporary injunction was denied on condition that the defendant accept short notice of trial since the issue raised by the defendant entitled him to a hearing before an injunction was issued.

See the New York State Fair Trade Act, Vol. 2, ¶ 8604.40.

LEVY, J.: Plaintiff moves for temporary injunction in this action based upon claimed violation of the New York State Fair Trade Law. Defendant vehemently denies violation and claims all cut price sales were of used, deteriorated or display articles. This claim seems inconsistent with the legend "Famous for Prices" contained in all the advertisements comprising exhibit 1. If defendant is not violating the act an injunction would seem to be harmless. On the other hand, continued violation as charged, would likely work irreparable and incalculable damage to plaintiff. However, the issue as raised by defendant entitled him to a hearing prior to issuance of any injunction which would afford to plaintiff, in fact, the full relief sought in the action, provided plaintiff may have an early trial of the issue. The motion is therefore denied on condition defendant accept short notice of trial and plaintiff serve and file a note of issue for the February, 1949, term. Upon payment of appropriate fees the clerk is thereupon directed to accept a note of issue and to place the cause upon the Ready Numbered Day Calendar of Special Term, Part III, for trials, for February 9, 1949. Order signed.

[¶ 62,362] Palmer v. Angert.

New York Supreme Court, Kings County. Special Term, Part I. 121 N. Y. L. J. 356, January 28, 1949.

New York Fair Trade Act

Issuance of Cash Receipts with Merchandise Not an Offense—Contempt Order Denied.—The plaintiff complains that the defendant, by issuing cash receipts redeemable for merchandise valued at $1.00 with every $10.00 purchase, violates a judgment which enjoined him from selling merchandise below the minimum price. It was held that this practice does not violate the New York Fair Trade Act and the application for a contempt order was dismissed.

See the Resale Price Maintenance Commentary, Vol. 2, ¶ 7314, and the New York State Fair Trade Act, Vol. 2, ¶ 8604.45.

NORTON, J.: Application to punish defendant for contempt for allegedly violating the provisions of a judgment of this court dated August 2, 1941.

Pursuant to said judgment the defendant was permanently enjoined and restrained from directly or indirectly selling or offering for sale merchandise produced by manufacturers, wholesalers and distributors at prices lower than the minimum retail price as fixed in the fair trade contracts. Plaintiff claims that the defendant is willfully and knowingly violating the decree by engaging in a practice whereby upon the sale of merchandise at its store it issues to its customers cash register receipts which are redeemable for merchandise valued at $1 upon the presentation of receipts evidencing a total purchase by the customer of $10.00 worth of miscellaneous merchandise.

The defendant justifies the practice by its reliance on the determination in the case of *Nechamkin v. Picker* (67 N. Y. Supp., 2d, 60). In that case the court refused

to hold that a practice similar except as to the instrumentality used, to that disclosed herein, constituted a violation of the Fair Trade Act. In reaching such determination the court in the *Nechamkin* case, *supra,* approved the conclusions reached in the case of *Weco Products Co. v. Mid-City Cut Rate Drugstores* (55 California App., 2d, 684, 131 Pacific Reporter, Second Series, 856). The facts in the *Weco* case, *supra,* were similar to those in the case at bar, except that trading stamps were used instead of cash register receipts; and in construing the California Fair Trade Act, which is identical with the Fair Trade Act of this state, the court held that such practice did not violate the statute in question.

The State of Pennsylvania has a Fair Trade statute similar to the California statute, and also similar to the New York statute; and in the case of *Bristol Meyers v. Litt Bros., Inc.* (336 Pa., 81, 6 Atl. (2), 843) the Supreme Court of Pennsylvania, in a case in which trading stamps were issued to the amount of purchases of miscellaneous merchandise which were later redeemable, held that such a practice did not violate the Pennsylvania statute. I cannot find any difference between a practice wherein trading stamps were used rather than cash register receipts, as in the case at bar.

I am in accord with the conclusions reached in all of the above cases, and it is my opinion that there was no violation of the Fair Trade statute of this state by reason of the indulgence by the defendants in the practices complained of herein.

Furthermore, the defendants herein had a right to rely upon the Special Term decision in the case of *Nechamkin v. Picker, supra,* there having been no review by an appeals court of this case or any contrary holding by the Appellate Division or Court of Appeals on the question involved herein. Therefore, I cannot find that the defendants were guilty of a willful or deliberate contempt herein. The motion will be in all respects denied. Settle order on notice.

[¶ 62,363] Albert Hill et al., v. Jerry D. Kusy.

In the Nebraska Supreme Court. No. 32506. January 21, 1949.

Nebraska Unfair Sales Act

Cigarette Wholesalers—Prices below Minimum—Attacks on Validity of Act.—Cigarette wholesalers alleged that their competitor sold cigarettes at less than cost with the intent, effect, and result as set out in Section 59-1203 of the Unfair Sales Act of Nebraska. The defendant admitted the violations but attacked the validity of the Act. In ruling against the defendant's contentions the court held that intent was a requirement of the act, that constitutional inhibitions are not infringed by the act, that although some of its terms may be difficult to apply, the act is not for this reason unconstitutional. The trial court decree was upheld as it was competent to restrain the defendant from committing "further" like violations of the act.

See the Nebraska Unfair Sales Act, Vol. 2, ¶ 8508.

For appellant: Paul E. Haberlan.

For appellees: Spear & Lamme, Michael T. McLaughlin, Bernard S. Gradwohl, George R. Springborg, Walter R. Johnson, Attorney General, and Bert L. Overcash.

[*Pleadings*]

SIMMONS, C. J.: Plaintiffs, alleging violations of the Unfair Sales Act by defendant, brought this action and prayed for a declaratory judgment that the act (sections 59-1201, R. S. 1943, 59-1202, R. S. Supp., 1947, and 59-1203 to 59-1206, R. S. 1943) is constitutional, and for a determination of the rights, status, and legal relations of the parties in the matters set forth in their petition. They also prayed that defendant be enjoined from further advertising, offers to sell or sales in violation of the act, for damages and for equitable relief.

Defendant demurred for the reason that the petition did not state facts sufficient to constitute a cause of action against him. The trial court overruled the demurrer and

gave the defendant time to further plead. Defendant declined to do so. The trial court decreed that the act was not in conflict with any of the provisions of the Constitution of this state or of the United States and enjoined the defendant from "further advertising, offers to sell or sales in violation" of the act, and taxed costs to defendant. Defendant appeals. We affirm the judgment of the trial court.

Section 59-1201, R. S. 1943, provides that the act shall be cited as the Unfair Sales Act. Section 59-1202, R. S. Supp., 1947, defines various terms and phrases used in the act. Section 59-1203, R. S. 1943, provides: "It is hereby declared that any advertising, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor, or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or substantially to lessen competition, or unreasonably to restrain trade, or to tend to create a monoply in any line of commerce." Section 59-1204, R. S. 1943, relates to the non-liability of the owner of a newspaper for the publication of advertisements in contravention of the provisions of the act. Section 59-1205, R. S. 1943, provides: "Any person damaged, or who is threatened with loss or injury by reason of a violation of this act shall be entitled to sue in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this act." Section 59-1206, R. S. 1943, relates to sales to which the act does not apply.

Plaintiffs alleged that they and the defendant were competitors in the business of selling cigarettes at wholesale in certain cities of the state, and alleged in detail that defendant had advertised, offered to sell, and had sold cigarettes at less than cost and with the intent, effect, and result set out in section 59-1203, R. S. 1943, and by allegations removed their cause from the excepting provisions of the act. Plaintiffs further alleged that damages had resulted from defendant's acts; that defendant threatens to continue said acts; that a controversy exists between the parties as to whether or not defendant's acts constituted a violation of the act, and as to whether or not the act is constitutional and enforceable.

[*Attacks on Constitutionality*]

In substance defendant admitted by his demurrer that he had violated the act and plaintiffs were entitled to the relief prayed if the act is valid and enforceable.

By assignments of error, defendant presents these questions: "(a) Whether Sections 59-1201 to 59-1206, C. (sic) S. Neb. 1943, as amended by L. B. 474, Session of 1947, known as the 'Unfair Sales Act,' define any sort of an offense or wrongful act, even if the act itself is constitutional"; "(b) Whether the act is constitutional under the personal liberty and due process clauses of the State and Federal Constitutions"; and "(c) Whether the decree, in its present general form, can be sustained."

Defendant's contention is that the act neither states nor defines any unlawful act, is merely a statement of public policy, and contains no definite standards by which infractions can be measured and no provision to execute its alleged purpose. The attack is upon the act as a whole.

The provisions of section 59-1203, R. S. 1943, fall into two groups.

The first group contains three elements: (1) The acts of "advertising, offer to sell or sale of any merchandise, * * * at less than cost as defined in" the act; (2) the doing of one or more of those acts "with the intent, or effect, of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor, or otherwise injuring a competitor"; and (3) the doing of one or more of those acts with the intent or effect "where the result * * * is to tend to deceive any purchaser or prospective purchaser, or substantially to lessen competition, or unreasonably to restrain trade, or to tend to create a monopoly in any line of commerce."

The second group contains the legislative declaration of the results following from the first, to wit, "impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of" the act. The "unfair competition" is the result of

the unlawful acts which the Legislature condemns and constitutes the ultimate unlawful act.

Section 59-1203, R. S. 1943, must be construed in connection with section 59-1205, R. S. 1943, which provides a remedy for enforcement.

Defendant, however, contends that the statute does not make intent an element of the unlawful act. This contention is based upon the phrase "with the intent or effect" and defendant argues that the use of "or" avoids "intent" and requires only the "effect" or "result."

[*Effect or Result Interpreted*]

We have held that intent denotes the purpose to use a particular means to effect a certain result. *Williams v. State,* 113 Neb. 606, 204 N. W. 64. In *Lynch v. Tilden Produce Co.,* 282 F. 54 (affirmed in 265 U. S. 315, 44 S. Ct. 488, 68 L. Ed. 1034), the court was dealing with a statute which provided: "'Or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.'" The court in construing the words "with intent or effect" held:

> 'whatever is effected is the consequence of a specific design. It always requires, therefore, a rational agent to effect anything. So that the words 'intent' and 'effect,' as used in the statute, mean practically the same thing."

The same construction applies here. It follows that intent is a requirement of the act. Decisions where intent is not an element of the statute are accordingly beside the issue and need not be discussed.

[*Constitutionality Upheld*]

This conclusion brings the statute fairly within our holding in *Nelsen v. Tilley,* 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, wherein we held that where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition or to create a monopoly or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. In fact, the Legislature in the act here involved placed an additional element in the act by specifically requiring that a certain result or results must follow.

Defendant further argues that the use of the word "tend" in two of the "result" provisions of the act renders the statute void, and relies on *State ex rel. English v. Ruback,* 135 Neb. 335, 281 N. W. 607. It is sufficient to point out that the same word is used in subdivision (i) of section 60-912, C. S. Supp., 1937, held constitutional in *Nelsen v. Tilley, supra.*

[*Mere Difficulty in Application*]

It further is urged that there is a lack of clarity, which renders the act void, in the meaning of terms used in the act, such as "replacement cost," "proportionate part of the cost of doing business," and "unfairly diverting trade from a competitor." The terms may present difficulties in application when the sufficiency of evidence in fact questions is presented. Mere difficulty of application in the processes of litigation is not enough to enable a court to say that a statute is unconstitutional. *McElhone v. Geror,* 207 Minn. 580, 292 N. W. 414.

[*Legitimate Use of State Police Power*]

It next is argued that the means adopted are inadequate and bear no relation to the object sought, the argument being that the act applies to a small fraction of the business community and is discriminatory because of the limitations of the mark-up provisions as to costs, as between merchants selling classes of merchandise involving quick sales and small margins of profit and sales involving greater margins of profit. In the exercise of and within the limits of its police power, the Legislature may forbid that which it deems to be an existing evil and it may limit its prohibitions to the matters which in its judgment menace the public welfare. *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 33 S. Ct. 66, 57 L. Ed. 164; *Placek v. Edstrom,* 148 Neb. 79, 26 N. W. 2d 489.

It follows that the act is not subject to the constitutional attack here made and that the trial court did not err in overruling the demurrer.

[*Related Acts Restrained*]

This brings us to the contention that the injunctive language used in the decree cannot be sustained because it purports to enjoin any future violations of the act of whatever character rather than a repetition of the specific acts alleged in the petition. The decree enjoined the defendant from "further" advertising, offers to sell, or sales

in violation of the act. When one has been found to have committed acts in violation of a regulatory law he may be restrained from committing other related unlawful acts. *Labor Board v. Express Publishing Co.,* 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930. We construe the language objected to in the decree to mean further like violations of the act. So construed it is not subject to criticism. *New Haven R. R. v. Interstate Commerce Commission,* 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515.

The judgment is affirmed.

AFFIRMED.

[¶ 62,364] Fogel v. Bolet.

New York Supreme Court, New York County. Special Term, Part II. 121 N. Y. L. J. 411, February 2, 1949.

New York Fair Trade Act

Photographic Suppliers Retail Business—Suit not a Conspiracy—Hardship in Application not a Defense.—A motion by a photographic supply retailer for an injunction against his competitor to enjoin him from participating in unfair business practices was granted. While not denying the violations charged, the defendant raised the defense that the plaintiff's suit was a conspiracy to put him out of business. It was held that if enforcing the statute had this result, then his business was illegal. The sporadic enforcement provided by the act may work a grevious hardship, but until this is alleviated by the legislature, the act must be enforced and obeyed.

See the New York Fair Trade Act, Vol. 2, ¶ 8604.

STEURER, J.: Motion for a temporary injunction in an action for a permanent injunction pursuant to the Feld-Crawford Law (chap. 976, Laws 1935). The defendant operates a photographic supply store; the plaintiff is his nearest (in point of location) competitor. Defendant does not deny violating fair trade agreements, in fact he rather insists that the repeated ignoring of these contracts is an integral part of his business. The statute received an intensive interpretation from shortly after its enactment until about 1942, when economic conditions were such that violations were unheard of. Its popularity as an economic control is now reviving. It was noted at that time that no matter how often the invalidity of certain defenses was adjudicated the same defenses continued to be urged (*Calvert Distillers Corp'n v. Fox,* 1941, 105 N. Y. L. J., 211). It would therefore serve no purpose to repeat these holdings. Defendant does advance one theory which is novel. It claims that this action is the result of a conspiracy of his competitors to put him out of business and hence constitutes an illegal price fixing. As to the first part, if it is legal for the plaintiff to enforce the statute and if enforcing the statute will put defendant out of business then his business and not the conspiracy is what is illegal. Furthermore the agreement among his competitors is not price fixing. The prices are fixed by the contracts, the agreement is to enforce these. The statute makes that legal. The real defense is the same in all these cases—that the inability to enforce universal adherence to fixed prices under conditions of economic stress makes the sporadic enforcement provided by the statute grossly unfair. And the answer to that argument is that the Legislature within constitutional limits is the sole authority in such matters. If this act is an unfortunate essay at business regulation, the error is susceptible of correction only by the source from which it emanates. It must meanwhile be obeyed and, if necessary enforced.

Defendant also claims that plaintiff is in no position to enforce the statute because he is himself a violator. Defendant's proof as to that points leaves something to be desired. It refers to a single transaction under circumstances which indicate a breach of duty by a salesman rather than a violation by the plaintiff. Of course, a practice by plaintiff's employees of the same tactics would put a different complexion on the interpretation. In view of this possibility the order herein may contain a provision for trial at an early date.

Settle order.

[¶ 62,365] North American Philips Company, Inc., v. Milton L. Brownshield.

In the United States District Court for the Southern District of New York. Civil 45-633. January 31, 1949.

Sherman Antitrust Act, Clayton Act

Private Patent Action—Insufficient Allegation under Antitrust Laws—No Extra-territorial Jurisdiction Obtained.—A counterclaim in a private action does not state a claim under the antitrust laws when it alleges that the Sherman and Clayton Acts have been violated and fails to allege that the conspiracy restrains trade or is damaging to the plaintiff. Since the counterclaim is defective under the antitrust laws, the provision they make for service beyond the jurisdiction of a state can not operate.

See the Sherman Act annotations, Vol. 1, ¶ 1660.315.

For plaintiff: Thomas R. Naughton, Attorney; Arthur G. Connolly, Delavan P. Smith, of Counsel.

For defendant: Harry Price.

[*Nature of Action*]

KAUFMAN, D. J.: The complaint alleges that during the war plaintiff designed, developed, manufactured and sold to the United States of America a electronic device, known as a loop assembly, under a contract between plaintiff and the United States of America; that during the period of the contract, plaintiff employed defendant as a mechanical design engineer; that defendant, during his employment by plaintiff, and by the use of information and material supplied by plaintiff, designed said loop assembly jointly with other employees of plaintiff; that plaintiff sold many of the loop assemblies to the government and, in accordance with the terms of its contract with the government, furnished the government and an independent contractor for the government with complete information on said loop assembly; that defendant's employment was terminated after the completion of the development of said loop assembly and that thereafter defendant wrongfully caused a patent covering said loop assembly to be issued to him as the sole inventor thereof; that defendant has threatened to sue plaintiff on the ground that, prior to the issuance of said patent, plaintiff made use of, and disclosed to others, information concerning the loop assembly, and on the further ground that plaintiff infringed said patent after the issuance thereof.

The complaint further alleges that defendant was not the original inventor of any material part of the device; that defendant misappropriated the subject matter thereof from plaintiff during his employment with plaintiff; that the alleged invention constituted nothing but the application of well known technical skill and judgment and was used by others in this country before defendant made his alleged invention; and that by reason thereof the patent is invalid and unenforceable.

Plaintiff sues for a declaratory judgment (1) that defendant has no right to the subject matter of the loop assembly; (2) that in obtaining the patent, defendant violated the relationship of trust and confidence existing between him and plaintiff, and (3) that the patent is invalid.

Plaintiff also seeks a decree compelling the assignment of the patent to it; that the patent be held to be unenforceable as against it; that defendant be restrained from charging that plaintiff has violated any right of defendant, and for an accounting.

Defendant counterclaims for a judgment declaring (1) the patent to be valid; (2) that the plaintiff infringed the patent; and (3) that plaintiff is guilty of unjust enrichment in using, selling and disposing of property of defendant, and in receiving large profits which in justice and in equity belong to defendant. Defendant asks for damages in the sum of $50,000.

Defendant filed a demand for a trial by a jury as to all the issues involved.

Five motions are now presented for consideration.

BY PLAINTIFF

1. To strike defendant's demand for a jury trial;
2. For summary judgment as to part of defendant's counterclaim;
3. To terminate the deposition of one Homer G. Boyle.

BY DEFENDANT

4. To bring in Harvey-Wells Electronics, Inc. as party defendant;

5. To compel Homer G. Boyle to answer certain questions propounded to him in the taking of his deposition.

The complaint is framed along equitable lines. Plaintiff is seeking injunctive relief, both prohibitory and mandatory in character, as well as an accounting together with declaratory relief as incidental thereto. This, as Judge Clark said in *Beaunit Mills, Inc. v. Eday Fabrics Sales Corporation,* 124 F. (2d) 563, 565, "appears to stamp [the suit] as presenting equitable issues only".

On the questions thus raised, plaintiff would not be entitled to a trial by jury and has not sought one.

The counterclaim interposed by defendant seeks a declaration that the patent is valid and infringed by plaintiff, and damages by reason of plaintiff's unjust enrichment in using, selling and disposing of defendant's property. The issues raised by the answer to the complaint may be completely determinative of all of the questions involved. If, however, issues raised by the counterclaim, of a legal nature, survive the issues raised by the complaint and answer, such issues may be the subject of a jury trial. *Beaunit Mills, Inc. v. Eday Fabrics Sales Corporation, supra,* at p. 566; see *Bellavance v. Plastic-Craft Novelty Co.,* 30 F. Supp. 37; 35 U. S. C. § 70.

Plaintiff's motion to strike the cause from the jury calendar is granted, without prejudice to an application by defendant at the appropriate time for a trial by jury of any legal issues arising under the counterclaim, which are not tried by the court as incidental to any equitable issues which may be raised by the counterclaim, and which are not finally determined upon the issues raised by the answer to the complaint.

Defendant's motion to bring in Harvey-Wells Electronics, Inc. (hereinafter referred to as Harvey-Wells) as an additional and third party defendant is made under Rules 13 (h) and 14 (a) of the Federal Rules of Civil Procedure. The counterclaim does not seek to hold Harvey-Wells liable for all or part of the claim asserted against defendant by plaintiff. Under these circumstances, Rule 14 (a) is inapplicable. *King v. Edward B. Marks Music Corporation,* 56 F. Supp. 446, 448; 1 Moore's Federal Practice § 13.09, p. 730.

Allegation under Antitrust Laws

As to the proposed defendant Harvey-Wells, the counterclaim alleges that jurisdiction arises by virtue of diversity of citizenship and that it is a suit under the Sherman and Clayton Acts [28 U. S. C. §§ 41(1), 41(23)], and that Harvey-Wells is a Massachusetts corporation doing business at 161 West 16th Street, New York, New York. An affidavit by the vice-president of Harvey-Wells, denying this allegation, states that Harvey-Wells is a Massachusetts corporation, whose only office and factory is at Southbridge, Massachusetts; that it never qualified to do business in New York, and that it has never conducted any business in New York, and that it has never maintained any office or factory in New York; that although the New York telephone directory lists a telephone under its name at 161 West 16th Street, that address is the residence of an independent distributor of products manufactured by Harvey-Wells; that authorization was given to this distributor to list the name of Harvey-Wells in the phone book inasmuch as the corporation maintains no offices in New York; that no part of the rent or other expenses in connection with the apartment is paid by Harvey-Wells, and that the corporation has no employees within this state.

Defendant has made no attempt to deny the allegations contained in that affidavit, although a copy thereof was served on the attorneys for the plaintiff nearly a month prior to the hearing of the motion.

In the circumstances, I accept these allegations as true, and since it is evident therefrom that service of process on Harvey Wells within this jurisdiction cannot be effected, jurisdiction over the corporation, in so far as it is predicated on diversity of citizenship, cannot be obtained.

Defendant contends also, that since jurisdiction as to the counterclaim arises under 28 U. S. C. § 41(23), it would be proper to add Harvey-Wells as a party defendant inasmuch as 15 U. S. C. § 22 permits service to be made on the corporation "in the district of which it is an inhabitant, or wherever it may be found."

[*Allegations Insufficient*]

This, however, presupposes that the counterclaim states a claim under the Anti-Trust Laws. The only allegation in the

entire counterclaim with reference to the Anti-Trust Laws is paragraph 47, which reads as follows:

> "Said plaintiff, in conjunction with Harvey-Wells Electronics, Inc. and others has conspired to and has sought to exclude defendant from commercializing and merchandising the subject matter of Patent No. 2,381,334 and has succeeded in setting up a monopoly in the subject matter thereof, wherefor defendant and his associates have been barred and prevented from entering such field and commercializing and merchandising the subject matter thereof, wherefore plaintiff and Harvey-Wells Electronics, Inc. have been guilty of violation of the Sherman and Clayton Acts."

It is plain that no claim under the Anti-Trust Laws is stated in the counterclaim. Mere allegation by the pleader that the Sherman and Clayton Acts have been violated is not sufficient to constitute a sufficient statement of claim. It does not appear from the pleadings that the alleged conspiracy was in restraint of trade or commerce, nor is there any allegation that the defendant has been damaged by the alleged conspiracy.

It is clear that jurisdiction over Harvey-Wells cannot be obtained and, therefore, the motion to add it as an additional defendant is denied (Rule 13 (h), Federal Rules of Civil Procedure).

Plaintiff's motion for summary judgment as to part of defendant's counterclaim is denied.

The motion to terminate the examination of Homer G. Boyle and the cross-motion to compel answers to questions propounded to him during the course of the deposition have been disposed of at a hearing in Chambers on January 28, 1949.

Settle order on notice.

[¶ 62,366] Bernhard v. Savall Drug Store, Inc.

New York Supreme Court, Nassau County. 82 N. Y. Supp. (2d) 122. July 6, 1948.

New York Fair Trade Act

Gifts To Customers—Attracting Customers—Retail Druggists.—Offering a free box of face powder with every purchase of $2 or more is illegal. However an advertisement offering a gift to every person entering the store regardless of the amount of his purchase is unobjectionable.

See the Resale Price Maintenance Commentary, Vol. 2, ¶ 7314, and the New York Fair Trade Act, Vol. 2, ¶ 8604.45.

For plaintiff: Joseph J. Hammer, New York, N. Y.

For defendant: William Gitelman, Long Island, N. Y.

Hooley, J.: Motion for an injunction restraining the defendant from directly or indirectly by any means, device, combination, sale, trading stamp, coupon, rebate or other allowance, concession or giving of a thing of value or otherwise whatsoever advertising, offering for sale or selling certain commodities at less than those stipulated in contracts entered into by the manufacturers, wholesalers or distributors, pursuant to chapter 976 of the Laws of 1935. Cross-motion to dismiss the complaint pursuant to Rule 106 of the Rules of Civil Practice on the ground that it appears on the fact thereof that it does not state facts sufficient to constitute a cause of action. There is no dispute about the facts. The defendant denies that it sold any of the articles in question below the contract price, but concedes that it advertised that it would give away free with every purchase of $2 or more a box of face powder. The court is of the opinion that a transaction in this form is illegal. However, in order to meet the objections of the other druggists in the vicinity, the defendant has started to advertise that a gift would be given to all persons entering the store regardless of the amount of their purchase. Defendant claims that this is merely advertising for the purpose of bringing people to the store and that the gift is in no way dependent on the sale of articles covered by fair trade contracts. Neither party has submitted any cases precisely in point. The authorities furnished, involving the giving

of coupons with purchases, are not analogous. In the opinion of the court, the transaction, involving a gift to all persons entering the store, is not illegal. The motion for the injunction will be granted except that the order will provide that nothing contained therein shall be deemed to restrain the defendant from making a gift of merchandise to any person entering its store provided that such gift is in no way dependent on whether or not the recipient of such gift makes a purchase at the store. The motion to dismiss the complaint is denied. Undertaking is fixed at $250. There should be an early trial herein and the case is placed as the number 3 case on the next Special Term Calendar of this court on the filing of the proper note of issue and the paying of necessary fees.

[¶ 62,367] U. S. v. The Metropolitan Leather & Findings Association, Inc., et al.

In the United States District Court for the Southern District of New York. Cr. No. 128-277. January 14, 1949.

Sherman Antitrust Act

Leather and Shoe Findings—Motion to dismiss—Multiple Punishment.—Conspiracy to restrain trade and conspiracy to monopolize are two separate and distinct offenses. The fact of intent in each of these crimes is not the same. When a defendant is convicted and punished on both counts, he is being punished for the different acts. Motion to dismiss on grounds of double jeopardy denied.

See the Sherman Act annotations, Vol. 1, ¶ 1021.341, 1630.501.

Leather and Shoe Findings—Motion to Dismiss—Venue.—Venue is established when the indictment alleges that the conspiracy has been formed in part and carried out in part within the jurisdiction of the court.

See the Sherman Act annotations, Vol. 1, ¶ 1630.375.

Leather and Shoe Findings—Continuing Conspiracy—Statute of Limitations.—The conspiracy being a continuing one, the allegation as to time which dates the commencement of the acts in question at 1930 is not barred by the Statute of Limitations. If any of the defendants withdrew from the conspiracy long enough before the commencement of the prosecution for the Statute of Limitations to be a bar, such fact may be proven at the trial.

See the Sherman Act annotations, Vol. 1, ¶ 1630.445.

Leather and Shoe Findings—Motion to Dismiss—Adequate Description of Individual Defendants.—Two individual defendants move to dismiss the indictment on the ground that its allegations as to them are insufficient. Each defendant is named in the body of indictment only once as being associated with other of the named corporate defendants by virtue of their managerial functions in the specified companies. It was held that while the information as to these moving defendants is meagre, it is not so meagre as to justify quashing the indictment as to them. Their relationship to the other defendants is sufficiently disclosed.

See the Sherman Act annotations, Vol. 1, ¶ 1630.271.

Leather and Shoe Findings—Motion to Dismiss—Vague Allegations.—Motion to dismiss for vague and indefinite allegations in the indictment is denied. The terms "leather and shoe findings" are not so indefinite as to justify quashing the indictment.

See the Sherman Act annotations, Vol. 1, ¶ 1630.351.

Request for Particulars—Federal Criminal Prosecution.—Specific overt acts were ordered to be set out in a bill of particulars since withholding them until trial would

prejudice the defendant in the preparation of his defence. It can not be assumed that no refutation exists. Such information as to the date of the earliest documentary evidence to be used against the defendant was ordered to be included.

See the Sherman Act annotations, Vol. 1, ¶ 1630.355.

For plaintiff: J. Francis Hayden, Irving B. Glickfeld, John D. Swartz, Special Assistants to the Attorney General.

For defendants: Breed, Abbott & Morgan, Attorneys for Defendants, Griffin Manufacturing Co. Inc. and William F. Smith; (William L. Hanaway, Of Counsel); Kaye, Scholer, Fierman & Hays, Attorneys for Defendants, The United States Leather Company and Robert L. Lerch; (James S. Hays and Jack L. Ratzkin, Of Counsel); Simon E. Sobeloff, Attorney for Defendants, Cat's Paw Rubber Company, Inc. and Morris Eisen; Hirleman, Vaughan & Ecker, Attorneys for Defendants, The ITS Company and Jacob Goldstein; (David Ecker, Of Counsel); Morris D. Reiss, Attorney for Defendants, Isaac Lippman and Max Perlstein; Robert W. Meserve, Dudley L. Miller, Attorneys for Defendant, Henry F. Keating; James E. Ingram, Attorney for Defendants, O'Sullivan Rubber Corp. and Warren S. Winterson; Cahill, Gordon, Zachry & Reindel, Attorneys for Defendants, the Goodyear Tire & Rubber Company, Inc. and Harry L. Post; (Mathias F. Correa and George Nebolsine, Of Counsel); Corcoran & Kostelanetz, Attorneys for Defendants, The Linen Thread Co. Inc. and Samuel Barbour; (Rexford E. Tompkins, Of Counsel).

MEDINA, D. J.: On November 15, 1948 Isaac Lippman and Max Perlstein, two of the defendants in this criminal antitrust action moved to dismiss the indictment as not stating facts sufficient to constitute an offense against the United States. They asserted that the allegations of venue in paragraph 16 of the indictment were insufficient and that the indictment failed to allege the commission of any acts in furtherance of the conspiracy. I denied this motion on November 23, 1948, without opinion.

On November 30, 1948 certain other of the defendants moved to dismiss the indictment, and, along with defendants Lippman and Perlstein, requested bills of particulars. Fed. R. Crim. P., 7 (f), 12(b). After argument, the case was adjourned for a further hearing on December 15 and 16. At that time, certain other defendants moved to dismiss and requested bills of particulars.

I. Motions To Dismiss

A. Multiple Punishment

The defendants were indicted in two counts for conspiracies in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1, 2. The charging paragraph (13) of count one alleges a violation of Section 1 and the charging paragraph (18) of count two a violation of Section 2, each substantially in the words of the statute. Both charging paragraphs are followed by identical paragraphs (14 and 19) which state the substantial terms of the conspiracies. Defendants The United States Leather Company and Robert L. Lerch have moved to dismiss counts one and two as violative of the Fifth Amendment in that they "allege conspiracies which are not reciprocally distinguishable from and independent of each other," citing such cases as *Blockburger v. United States,* 284 U. S. 299 (1932), and *Albrecht v. United States,* 273 U. S. 1 (1927). Defendants contend that, if convicted on each count, they will be punished twice for the same acts, since every ingredient of a violation of Section 1 is, by the terms of the indictment, present in a violation of Section 2.

The problem of multiple punishment or double jeopardy in connection with a course of conduct that violates more than one statute is complex, and the criteria for determining just how much criminal liability may constitutionally be pressed from the defendant's course of conduct are not wholly satisfactory. See Notes, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L. J. 132 (1947); Identity of Offenses: A Study in Judicial Method, 45 Harvard L. Rev. 535 (1932). The complexity increases when the offenses charged are conspiracies, especially when their "possibilities for miscarriage of justice to particular individuals" increase as the number involved "is broadened to include more and

more, in varying degrees of attachment to the confederation." *Kotteakos v. United States,* 328 U. S. 750, 776 (1946).

Antitrust cases, however, lay down a sufficiently clear rule as to indictments charging violations of Sections 1 and 2 of the Sherman Act based on the same evidence. *American Tobacco Co. v. United States,* 147 F. 2d 93, 116-117 (6th Cir. 1944), cert. granted on other grounds, 324 U. S. 836 (1945), rehearing denied, 324 U. S. 891 (1945), aff'd on other grounds, 328 U. S. 781 (1946); *Montrose Lumber Co. v. United States,* 124 F. 2d 573, 575-576 (10th Cir. 1941); *United States v. Shapiro,* 103 F. 2d 775 (2d Cir. 1939); *United States v. Buchalter,* 88 F. 2d 625, 628 (2d Cir. 1937, cert. denied *sub nom. Shapiro v. United States,* 301 U. S. 708 (1937); *United States v. MacAndrews & Forbes Co.,* 149 Fed. 836 (C. C. S. D. N. Y. 1907), writ of error dismissed, 212 U. S. 585 (1908; *United States v. A. B. Dick Co.,* 7 F. R. D 437, 439-41 (N. D. Ohio 1947); cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 224 n. 50, at 226 (1940). I am not persuaded that *American Tobacco Co. v. United States,* 328 U. S. 781, 787-8, 815-6 (1946), is to the contrary. See *United States v. A. B. Dick Co.,* 7 F. R. D. 437, 439-41 (N. D. Ohio 1947).

True it is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v. United States,* 284 U. S. 299 (1932); *Albrecht v. United States,* 273 U. S. 1 (1927); *Morgan v. Devine,* 237 U. S. 632 (1915). But a monopoly may well be the consummation of a restraint of trade or a series of restraints of trade; and a conspiracy to restrain trade a mere preliminary or step in a conspiracy to monopolize. Moreover, and in any event, intent forms a radical ingredient of each crime and the fact of intent to restrain trade under Section 1 is not the same as the fact of intent to monopolize under Section 2.

The motion is denied.

B. *Venue—Statute of Limitations*

Defendants The Goodyear Tire & Rubber Company and Harry L. Post have moved to dismiss on the ground that "The indictment does not contain a sufficient allegation that the combination and conspiracy alleged was formed in part and carried out in part within the Southern District of New York within the applicable period of limitations."

Count one of the indictment is similar, in the respects challenged, to count two. The pertinent paragraphs of count one are:

"1. Whenever the term 'Metropolitan area' is used herein, it shall mean the State of New Jersey, except the City of Camden, and the Counties of New York, Kings, Queens, Bronx, Richmond, Nassau, Suffolk and Westchester in the State of New York.

"11. More than 6,000 shoe repairmen are located within the Metropolitan area, and their total annual volume of trade amounts to approximately $50,000,000. Nearly all said shoe repair shops purchase leather and shoe findings from approximately 200 finders within the Metropolitan area. The total annual volume of trade done by finders within the Metropolitan area is approximately $20,000,000.

"13. Beginning in or about the year 1930, the exact date being to the Grand Jurors unknown, and continuing to the time of the presentment of this indictment, the defendants and other persons to the Grand Jurors unknown, have been engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce among the several states in leather and shoe findings, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, (15 U. S. C. Sec. 1), commonly known as the Sherman Act.

"14. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been and are that:

"(a) The prices, terms and conditions of sale at which leather and shoe findings be sold by finders be established, fixed and maintained; * * *

"16. The combination and conspiracy hereinbefore described has been formed in part and carried out in part within the Southern District of New York during all or part of the period covered by this indictment and within the period of the applicable statute of limitations, in the following manner: the defendants and others, to the Grand Jurors unknown, have during said periods of time attended

meetings of the Association in New York City, at which the substantial terms of the combination and conspiracy hereinabove alleged have been discussed and agreed upon."

Frankfort Distilleries v. United States, 144 F. 2d 824 (10th Cir. 1944), approved counts of an indictment similar to those above quoted over a ruling of the lower court, *United States v. Safeway Stores* (Maryland, 51 F. Supp. 448, 455-9 (D. Kan. 1943), and objections from the dissenting judges, 144 F. 2d at 835-6, 840-2, similar to those the defendants now urge. *United States v. New York Great Atlantic & Pacific Tea Co.*, 137 F. 2d 459, 463-4 (5th Cir. 1943), approved similar language in an indictment, again over similar objections. 137 F. 2d at 467-70. See also *American Tobacco Co. v. United States*, 147 F. 2d 93, 120 (6th Cir. 1944). Paragraphs 13 and 16 of the present indictment must, of course, be read together. *United States v. Armour & Co.*, 137 F. 2d 269, 270 (10th Cir. 1943).

The conspiracy being a continuing one, the allegations of time are unobjectionable. *United States v. Borden Co.*, 308 U. S. 188, 202 (1939); *United States v. Kissel*, 218 U. S. 601, 607-10 (1910); *Patterson v. United States*, 222 Fed. 599, 630-631 (6th Cir. 1915; *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 830 (C. C. S. D. N. Y. 1906). The absence of allegation of overt acts is unobjectionable. *Nash v. United States*, 229 U. S. 373 (1913). Venue is properly laid in this district if any part of the conspiracy was formed or if any acts in furtherance of it were carried out here. *United States v. Trenton Potteries Co.*, 273 U. S. 392, 402-4 (1927); *Hyde v. United States*, 225 U. S. 347 (1912). Paragraph 16 alleges the conspiracy was formed here; paragraph 13, by alleging the conspiracy was a continuing one, charges that it was "in effect renewed during each day of its continuance," *United States v. Borden Co.*, 308 U. S. 188, 202 (1939), until the time of the indictment. Paragraph 14 indicates the connection of this continually renewed conspiracy with the Metropolitan area in subparagraphs (b), (c), (d), and (f) not quoted above.

If any of the defendants withdrew from the conspiracy long enough ago for the statute of limitations to bar prosecution now, they may show that upon the trial. *United States v. Kissel*, 218 U. S. 601, 610 (1910); *Boyle v. United States*, 259 Fed. 803, 807 (7th Cir. 1919).

The motion is denied.

C. *Robert L. Lerch and Harry L. Post*

Defendants Robert L. Lerch and Harry L. Post have moved to dismiss the indictment on the further ground that its allegations as to them are insufficient. Each is named in the indictment only once, in paragraph 10(a), the former as associated with the corporate defendant U. S. Leather with the "Title or Position" of "Sales Manager" at New York, New York, and the latter as associated with the corporate defendant Goodyear with the "Title or Position" of "General Manager Shoe Products Div." at Akron, Ohio. They rely upon *United States v. New York Great Atlantic & Pacific Tea Co.*, 137 F. 2d 459, 464-5 (5th Cir. 1943). That was a prosecution of food and food products dealers for a conspiracy to restrain and monopolize trade in food and food products. The only connection between the group of dealers and the defendants Business Organization, Inc., and the chairman of its board, Carl Byoir, was that Business Organization, Inc. was public relations counsel for the group. The indictment was dismissed as to Business Organization, Inc. and Carl Byoir. But the Court went on to say, 137 F. 2d at 465: "As to the individual defendants, members of the A & P group who are accused, but as to whom it is not alleged when they came into the conspiracy or what particular part they had in it, while the information is meager, it is not so meager as to require quashing of the indictment as to them."

Similarly here, while the information as to these moving individual defendants in the present indictment is meager, it is not so meager as to require quashing the indictment as to them. Their relationship to U. S. Leather and Goodyear is here sufficiently disclosed.

The motions are denied.

D. *Vagueness and Indefiniteness—In General*

Defendants The United States Leather Company, Robert L. Lerch, Henry F. Keating, The Goodyear Tire & Rubber Co., and

Harry L. Post have moved to dismiss the indictment for not stating offenses against the United States, and as vague and indefinite contrary to the Fifth and Sixth Amendments and Rule 7 (c) of the Federal Rules of Criminal Procedure.

Frankfort Distilleries v. United States, 144 F. 2d 824, 830-2 (10th Cir. 1944), and *United States v. New York Great Atlantic & Pacific Tea Co.,* 137 F. 2d 458, 462-3 (5th Cir. 1943), are all the authorities I need cite in holding the indictment is not vague and indefinite. The term "leather and shoe findings" is not any more indefinite than the term "food and food products" in the A & P case, which apparently no one objected to. Further discussion seems unnecessary.

The motions are denied.

II. Requests for Particulars

The defendants who moved to dismiss, as well as certain other defendants, have submitted about ten separate requests for bills of particulars.

The precedents furnish little help in disposing of requests for bills of particulars in criminal cases. On the one hand, many cases affirm the right of the defendant to particulars to enable him to prepare his defense; on the other, just as many refuse defendants particulars which would compel the government to disclose its evidence. How one can light upon particulars which help a defendant prepare his case but do not compel disclosure of evidence, or, contrariwise, do not compel disclosure of evidence but help a defendant prepare his case, the authorities do not say. The answer is of course that each has somewhat of the nature of the other, and passing on requests for particulars requires drawing a line in a continuum. But if, as has been said, the drawing of the line "is in art and not a science," *United States v. Aluminum Co. of America,* 41 F. Supp. 347, 348 (S. D. N. Y. 1941), the authorities cannot be expected to be too helpful.

The complexity and uncertainty in disposing of requests for particulars probably derive from our not as yet having articulated the philosophy underlying disclosure and discovery procedures in criminal cases, despite the progress made in civil cases under the Rules of Civil Procedure. For the time being, passing on requests for particulars in federal criminal cases remains difficult, and solutions when reached are hardly ever wholly satisfactory.

If the court possessed some divining rod by which it might determine the area of probable actual surprise, the problem would be greatly simplified. The difficulty, however, particularly in antitrust cases, is that the government is generally overfearful that it may be curtailed in its proof while counsel for the defendants, perhaps from bitter experience in other cases, are overfearful that they will be caught unawares at the trial by evidence of specific instances of alleged wrongdoing, when it is too late to conduct an investigation sufficiently thorough to develop all that might otherwise be produced in refutation or extenuation of the charge. In cases where practically an entire industry is involved and the defendants are located in all parts of the country, it would seem almost inevitable that some prejudice would result if the generality of the terms of the indictment were not to some extent made more specific. Perhaps this may all come down to a question of the amount of money to be expended in preparation for trial by the various defendants. But it is hard to see the reasonableness of requiring the interviewing of hundreds and perhaps thousands of miscellaneous employees, when perhaps a dozen or so, in the case of a single corporate defendant, would suffice, if the charge were particularized.

The lengthy oral argument of these motions developed another circumstance which may serve somewhat to clarify the problem. Evidently it was formerly the practice in conspiracy cases such as this to set forth a certain number of overt acts in the indictment. In many instances the courts very naturally required particulars of these specific charges, sufficient to make it possible for defendants to prepare to meet them at the trial. This led to the abandonment of the practise, as it was clearly the law, as stated in the foregoing part of this opinion, that it was not necessary in conspiracy cases of this character to allege any overt acts whatever. But the charge here is of a combination and conspiracy consisting "of a continuing agreement and concert of action among the defendants." Under the allegation of "concert of action" the government will doubtless offer proof of the very sort of specific price fixing, or

refusals to sell to particular firms or individuals, or boycotts and so on which were formerly set forth as overt acts. I cannot perceive the fairness of withholding such charges from defendants until the trial on the ground that "there would be sufficient time after the government introduces a witness" to investigate the matter and adduce the necessary explanation or refutation. Certainly it will not do to assume that there is no explanation or refutation, as defendants in antitrust cases are presumed to be innocent of the crimes charged, just as are defendants in other cases.

Where a conspiracy may or may not be inferred from numerous details and circumstances of one kind or another, which may be found to constitute a significant pattern of actual or prospective conduct in violation of the Sherman Act, I can readily see how the direction of a bill of particulars may serve merely as a source of embarrassment to the government, while accomplishing little else to the advantage of defendants. For this reason most of the particulars here requested by the various defendants will be denied, except insofar as the government has consented to give them. Thus the geographical extent of the conspiracy here charged will be limited to the "Metropolitan area," as defined in the indictment. The government will also, in the bill to be served, inform each corporate and individual defendant of the earliest date of any documentary proofs connecting or tending to connect each such corporate and individual defendant with the alleged conspiracy. The list of those who are claimed to have attended meetings of the Metropolitan Leather & Findings Association, Inc., to the extent known to the government, will be furnished.

On the other hand, where the government will at the trial rely upon proof of specific acts of price fixing, refusals by producers to sell to finders and wholesalers not approved by the defendant Association, refusals by producers and wholesalers to sell to shoe repairmen, refusals by wholesalers to sell to finders, refusals by finders to sell to any person not approved by the Association, refusals to accept persons as members of the Association, and boycotts of producers and wholesalers supplying finders not approved by the Association, I shall direct that at least 30 days before the trial there be furnished to the defendants claimed to have participated in such alleged acts, a statement identifying each separate occasion relied on, with sufficient detail fairly to apprise defendants of the transactions to be proved. It should be possible to do this in most cases without giving the names of any prospective witnesses or disclosing the government's evidence. The purpose of this direction is solely to afford defendants a reasonable opportunity to meet the charges of doing these specific acts.

If counsel for the government and counsel for the respective defendants will confer together in an endeavor to implement these instructions in a reasonable way, I feel sure that the ends of justice will be met and the trial greatly expedited.

Settle order on notice.

[¶ 62,368] Daniel L. Gardella, v. Albert B. Chandler, individually and as Commissioner of Baseball, Ford C. Frick, individually and as President of the National League of Baseball Clubs, an unincorporated voluntary association, William Harridge, individually and as President of the American League of Professional Baseball Clubs, a voluntary unincorporated association, George M. Trautman, individually and as President of The National Association of Baseball Leagues, a voluntary unincorporated association, and The National Exhibition Company.

In the United States Court of Appeals for the Second Circuit. No. 21133. February 9, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Treble Damages — Professional Baseball — Interstate Commerce. — In an action for treble damages as a result of alleged violations of the Sherman and Clayton Acts instituted by a professional baseball player against the club which employed him, an order allowing a motion to dismiss the complaint for lack of jurisdiction was reversed and the case remanded for trial. In deciding that the complaint averred enough to present an issue upon trial, the court held that the transmission of narratives and motion pictures

of games throughout the country, an interstate activity in itself, was not a mere incident of the defendant's business but a part of it. The game itself took on an interstate aspect.

See the Sherman Act annotations, Vol. 1, ¶ 1021.539.

Reversing and remanding the decision of the United States District Court for the Southern District of New York, reported at ¶ 62,281.

For appellant: Frederic A. Johnson, Frederic A. Johnson, Edward H. Beck, of Counsel.

For appellee William H. Harridge: Baker, Hostetler & Patterson.

For appellee George M. Trautman: Hedges, Hoover & Tingley.

For appellee National Exhibition Company: Edgar P. Feeley.

Judge Chase's Opinion

[*Facts*]

CHASE, Circuit Judge: The appellant brought this suit to recover treble damages under Secs. 1, 2 and 3 of the Sherman Act (26 Stat. 209, 15 U. S. C. A. §§ 1, 2 and 3) and under, as stated in the complaint, Secs. 13 and 14 of the Clayton Act (15 U. S. C. A. §§ 13 and 14). Apparently he relies upon Sec. 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. A. § 15) and we shall so treat his complaint.

He is a professional baseball player who, while under contract to play exclusively with the ball club popularly called the New York Giants which is owned and operated by one of the appellees, the National Exhibition Company, a New York corporation, violated the terms of the hereafter mentioned reserve clause of that contract by playing professional baseball in Mexico. He was consequently barred for a period of years from playing with baseball clubs in what is known as "organized baseball" in accordance with the provisions of his contract with the National Exhibition Company and thus deprived *pro tanto* of his means of livelihood. This suit followed and the first issue presented by this appeal is whether the district court had jurisdiction of the cause of action under the Sherman and Clayton Acts. The complaint was dismissed solely on the ground that the court had no such jurisdiction and no other is claimed now. 79 F. Supp. 260.

The appellant undertook to allege three causes of action against the appellees who are Albert B. Chandler, individually and as the Commissioner of Baseball; Ford C. Frick, individually and as President of the National League of Professional Baseball Clubs, an unincorporated association; William Harridge, individually and as president of The American League of Professional Baseball Clubs, an unincorporated association; George M. Trautman, individually and as president of The National Association of Professional Baseball Leagues, an unincorporated association; and National Exhibition Company, before mentioned.

He alleged generally in support of each cause of action that "organized baseball" comprised two so-called major leagues known respectively as the National and the American and the so-called minor leagues made up of clubs composing leagues of eight grades based upon the respective abilities of the players in the several clubs in each of such leagues. There are eight clubs in each of the major leagues and each club plays during a season games at its home grounds and games at the home grounds of each of the others until each club has played approximately one hundred and fifty games. The winning club in each major league plays a series of games with the winning club in the other at the close of the season for what is called the world championship, and during the season selected players from the clubs in each league perform as a team in playing a similarly selected team in what is called an "all stars" game. The clubs in the National League are located in the following places where each owns or leases a baseball park where games are played. Boston, Mass.; New York, N. Y.; Brooklyn, N. Y.; Philadelphia, Pa.; Pittsburgh, Pa.; Cincinnati, Ohio; Chicago, Ill., and St. Louis, Mo. The clubs of the American League own or lease parks where games are played in the following places. Boston, Mass.; New York, N. Y.; Philadelphia, Pa.; Washington, D. C.; Cleveland, Ohio; Detroit, Mich.; Chicago, Ill.; and St. Louis, Mo. The individual clubs are owned by corporations organized under the laws of the respective states in which their parks are located. The minor leagues are composed of clubs in a similar way and these clubs play games in various cities in this country and Canada.

These leagues and the clubs comprising them have entered into agreements, designed to control the manner in which "organized baseball" shall be conducted, which require players to be bound to their respective clubs by what is known as the standard contract. The so-called major league agreement, among other things, gives to appellee Chandler supervisory and disciplinary power over the major leagues, their clubs and their players. The so-called major-minor league agreement gives him similar powers over the minor leagues, their clubs and their players. The standard player contract includes what is known as a reserve clause which requires a player who is under contract to play with any club to refrain, at the expiration of the period of his employment, from contracting to play for, or playing for, any other club other than the one to which he has been under contract or its assignee. Thus, and in other particulars which need not be presently described, the agreements in "organized baseball" have created a closely knit organization which was intended to, and does, dominate and control to a large extent the playing of professional baseball in this country, Canada, Cuba, Puerto Rico and Mexico.

In playing their games the teams of the various clubs perform in the ball parks already referred to and each game is ended in the park where it is begun. But in order to get to the park where the game is played some or all of the players, managers, coaches, and employees have to travel across state or foreign boundaries; and the equipment necessary for the traveling club, consisting of uniforms, bats, gloves, mitts, masks, chest protectors, shin guards, baseballs and the like is similarly transported.

The club owners charge admission fees for all games played and divide them with the other contesting clubs as agreed. They, or most of them, also sell for valuable consideration the right to broadcast play-by-play descriptions of the games over the radio and thus across state lines, and some of them sell the right to broadcast the games by television. Some of those to whom these broadcast rights are sold get, and use, the opportunity so provided to advertise goods, articles and commodities which are sold and distributed nationally and internationally.

Since my brothers agree that the judgment should be reversed I will now state what are but my own reasons for believing that it should be affirmed; (1) because a controlling decision of the Supreme Court requires it and (2) because, even if that decision is distinguishable, the allegations in the complaint fail to state a cause of action over which the district court had jurisdiction.

[*Federal Baseball Case Followed*]

The issues here presented are, as the district judge recognized, decidedly not of first impression. This record is with the possible exception of the allegations as to the sale of broadcasting rights for radio and television, not different in any essential from that before the Supreme Court in *Federal Base Ball Club v. National League,* 259 U. S. 200 in which it was held that major league ball clubs were not engaged in interstate trade or commerce within the scope of the anti-trust laws. Even the possible exception just mentioned exists only if the sale of these radio and television broadcast rights differs in some material way from the sale of the exclusive right to send "play-by-play" descriptions of the games interstate over telegraph wires, for that feature was present in the previous case before the Supreme Court. In each instance by what is called the sale of rights the appellees made it possible for others to transmit information interstate. The playing of baseball games then created the subject matter concerning which information was sent by symbols carried by telegraph wires and translated into words just as such play now creates the subject matter concerning which information is sent through the air by impulses which are transformed either into words or pictures. So far as I can perceive, the difference in the method of transmission is without significance.

These appellees do not themselves broadcast anything nor do they do anything more by way of production of what is broadcast than was shown to have been done in the former case to "produce" what was described. Since the sellers of the rights to broadcast through the air do only what the sellers of the rights to send descriptions over telegraph wires did in the former case I can find no sound basis on the facts for distinguishing that case from this. It seems to me to have decided the precise question here presented and that it controls our decision.

It has never been expressly overruled, and I do not think it has been overruled by necessary implication by *United States v. South-Eastern Underwriters Ass'n,* 322 U. S. 533, which reflected a trend in decision not apparent in *Hooper v. California,* 155 U. S. 648, on which the court relied somewhat in deciding *Federal Base Ball Club v. National League, supra.* That decisions like *Wickard v. Filburn,* 317 U. S. 111 and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U. S. 219 show a wide reach of Congressional power under the Commerce Clause when Congress chooses to exert it cannot be gainsaid. And *United States v. South-Eastern Underwriters Ass'n, supra,* reiterates that Congress intended to put within the coverage of the Anti-Trust Acts everything which was interstate or foreign trade or commerce. But in none of these decisions mentioned nor in any others of the Supreme Court of which I am aware, save only *Federal Base Ball Club v. National League, supra,* has there been a definite holding that "organized baseball" is, or is not, trade or commerce within the meaning of those words in the Sherman and Clayton Acts. Moreover, the rule there stated has since been applied by analogy in another field. *Hart v. B. F. Keith Vaudeville Exchange,* 2 Cir., 12 F. 2d 341, cert. denied, 273 U. S. 704; *Neugen v. Chautauqua Co.,* 10 Cir., 70 F. 2d 605. Furthermore, the case was recently cited and distinguished in *North American Co. v. S. E. C.,* 327 U. S. 686, 694. See *Sears v. Hassett,* 1 Cir., 111 F. 2d 961, 965; cf. *Perkins v. Endicott Johnson Corp.,* 2 Cir., 128 F. 2d 208, 218.

Under these circumstances it seems to me that our duty as a subordinate court is to follow the *Federal Base Ball Club* case. I find no necessary implication among the cases to which I have previously alluded or in any others that it has been overruled. All of them relate to activities quite unlike organized baseball and, though general language can be found in the opinions to indicate changes in methods of approach to decision, there is no actual decision so incompatible with that in *Federal Base Ball Club v. National League, supra,* as to displace the latter by mere weight of its authority. The interpretation of the anti-trust laws has hitherto been accomplished in a case by case manner which has given due effect to the particular facts and circumstances shown. I cannot find any authoritative definition of the words "trade or commerce" or "affecting trade or commerce" as used in the cases which is so comprehensive that this method can be dispensed with. The intricate nature of the various questions involved makes it apparently impossible to devise a formula which will automatically, so to speak, put any and all situations either within or without the coverage of the acts.

In dealing with such a unique aggregate as organized baseball and with a decision in respect to it which seems to be directly in point on the facts, we should not be astute in seeking to anticipate that the court which has the power to do so will change that decision. To do so would not only be an unwarranted attempt to usurp the authority of that court but would make its task in general much more difficult since it would lead to a constant alteration in the lower courts of its decisions on specific fact situations in the light of what would appear to be differing rules stated in the course of deciding later cases on different facts. We relied on *Federal Base Ball Club v. National League, supra,* in our recent decision in *Conley v. San Carlo Opera Co.,* 163 F. 2d 310, and until, and unless, we are advised by competent authority that it is no longer the law we should continue to abide by it.

[*Beyond Scope of Antitrust Laws*]

On the second point, it seems to me that cases which involve more than the regulation of trade and commerce *per se,* and rest upon the explicit control by Congress in other statutes of the production of goods for commerce or the control of labor relations, furnish but very slippery ground on which to base decision here. What those statutes have in common with the anti-trust acts which is now material, as I see it, is only that all were within the power of Congress to enact under the Commerce Clause. When it is said that Congress has exerted all the power it possessed in the anti-trust acts, *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, 435, it is meant only that within the field there dealt with Congress meant to act fully, leaving other phases of its power under the Commerce Clause outside their scope.

The field covered was "restraint of trade" which had a well known meaning at common law and the words "or commerce between the several states" were added to put the restraints prohibited within constitu-

tional limitations on Congressional power. The Supreme Court has never, so far as I know, applied the Sherman Act in any case unless it was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods and services in interstate commerce which was within the category of restraints which were illegal at common law, though expressions may be found in opinions which seem to make adherence to this concept somewhat elastic. In any event, as recently as *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 500, 501, Mr. Justice Stone said, in speaking for the majority of the court, "In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price.[1] It is in this sense that it is said that the restraints actual or intended, prohibited by the Sherman Act, are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. *Chicago Board of Trade v. United States,* 246 U. S. 231, 238; *United States v. United States Steel Co.,* 251 U. S. 417; *Cement Manufacturers Assn. v. United States,* 268 U. S. 588; *United States v. International Harvester Co.,* 274 U. S. 693; *Appalachian Coals v. United States,* 288 U. S. 344, 375 *et seq.*"

In the *Mandeville* case, *supra,* the Court was dealing with a situation which did have a substantial effect upon the prices of goods in the market and did deprive purchasers or consumers of advantages which would have been theirs under free competition. While the test of indirectness of effect was somewhat muted, and perhaps discarded, the substance or the so-called "rule of reason" was not. Whatever the activity and how it may be conducted, it is not within the prohibition of the anti-trust laws unless in some substantial way the prices of goods in interstate commerce are controlled to the detriment of the purchaser or consumer.

The complaint in this case shoots wide of that mark. The wrong alleged as the end result of the monopoly, or conspiracy to create a monopoly, in restraint of trade or commerce is the deprivation of the appellant of the opportunity to play baseball as a means of earning his livelihood. His services, or ability to work, are not subjects of trade or commerce within the anti-trust acts. Indeed, in Sec. 6 of the Clayton Act (15 U. S. C. A. Sec. 17) it is stated that, "The labor of a human being is not a commodity or article of commerce." Although this, to be sure, was inserted for a purpose not here germane it shows nevertheless that Congress did not intend in the anti-trust acts to cover restraints upon employment. Moreover, Congress has expressly dealt with that subject in other statutes like the National Labor Relations Act and the Fair Labor Standards Act.

[*Insufficient Allegations*]

Nor are there any allegations as to any monopoly to control, or any conspiracy to create one to control, the prices at which the rights to send descriptions of the games, visually or otherwise, are sold; and as much is true as to the advertising by the purchasers of those rights. Nor as to what effect, if any, such by-products of the games have upon the prices at which goods are sold in commerce or upon the purchasers and consumers of those goods. Nor that what is done in respect to broadcasting or telecasting the games has any causal connection with the damage the appellant alleges. See, *K. & K. Co. v. Special Site Sign Co.,* 9 Cir., 85 F. 2d 742, cert. denied, 299 U. S. 613.

I would affirm the judgment but as my brothers hold otherwise it is, for the reasons stated in their separate opinions, reversed and the cause is remanded for trial.

Judge Hand's Opinion

[*Television and Radio in Baseball*]

L. HAND, Circuit Judge: The complaint alleges that the defendants make contracts with broadcasting and television companies by which these companies send across state

[1] See e. g. *Ethyl Gasoline Corp v. United States,* 309 U. S. 436; *United States v. Socony-Vacuum Oil Co., ante* p. 150, especially Note 59 and cases cited.

lines play-by-play narratives, or moving pictures, of the games; and, although in *Federal Baseball Club v. National League*,[1] the record contained evidence that it was the custom to broadcast accounts of the games by telegraph, that was an incident of so little importance that the Court of Appeals merely mentioned it without comment and the Supreme Court did not even allude to it. Besides, the difference between the telegraphing of that time and present-day radio or television, even though it were no more than a difference of degree—which it is not—would be so great as for practical purposes to make a difference in kind. I shall not labor the argument that the transmission of these narratives and moving pictures is itself interstate commerce; the only debatable question is whether the defendants' connection with these activities makes them a part of their business, and enough a part of it to color the whole. As I understand it, they enter into contracts with broadcasting and television companies, by which for large payments they allow the companies to install suitable apparatus in the "ball-parks," by means of which the companies transmit the narratives and pictures to the outside public. It is not necessary to say whether one, who sells goods indifferently to all comers, is *pro tanto* engaged in interstate commerce, because a part of his customers come from another state and carry their purchases home. In such cases the seller's indifference to the destination of the goods may isolate him from their eventual destination; at least he cannot be said to have joined with the buyers in the interstate part of their purposes. True, the sale is a condition *sine qua non* of the buyers' ability to carry the goods out of the state; but, if that be enough, there is no apparent reason to end the regression of causes with the sale. Whether every department store is engaged in interstate commerce is a question I shall not undertake to answer; and this I may do, because the defendant's relation to broadcasting and television is quite different. The contracts with the companies are mutual arrangements in which each contributes its share to a common venture; the defendants furnish the spectacle and give the companies leave to enter and set up their apparatus on the grounds, by means of which they transform for transmission the air and light waves, which come from the playing-grounds and the players, or from the narrator who reports the game; and the transformed waves they send abroad either in a form for direct reception or otherwise. This interposition is of course necessary, when the auditory is at a distance; but for our purposes the result seems no different from direct transmission; and the situation appears to me the same as that which would exist at a "ball-park" where a state line ran between the diamond and the grandstand. Nor can the arrangements between the defendants and the companies be set down as merely incidents of the business, as were the interstate features in *Federal Baseball Club v. National League, supra*.[2] On the contrary, they are part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audiences; together they form as indivisible a unit as do actors and spectators in a theatre. I am therefore in accord with my brother Frank that the defendants are *pro tanto* engaged in interstate commerce.

[*Scope of Anti-Trust Acts*]

On the other hand, I cannot go along with his opinion, if I understand it, that these features of the business, no matter how insignificant they may prove, necessarily subject it as a whole to the Anti-Trust Acts. The plaintiff is asking damages for excluding him from his calling; and to succeed he must show that the defendants' conduct, by which he was injured, was itself subject to the law that he invokes. I do not mean that he must show that he was injured by the broadcasting and television; but he must show that those activities together with any other interstate activities mark the business as a whole. Certainly that was implied in *Federal Baseball v. National League, supra*,[3] itself; nobody questioned that many interstate activities were in fact involved in professional baseball; the Court merely thought them not important enough to fix the business—at large—with an interstate character. I can find nothing in the books since then, which leads me to think otherwise. *Mabee v. White Plains Publishing Co.*[4] did indeed hold that, *quoad* those newspapers which crossed a state line, the publisher was engaged in the "production of goods for commerce"; and it may

[1] 259 U. S. 200.
[2] 259 U. S. 200.
[3] 259 U. S. 200.
[4] 327 U. S. 178.

be that employees concerned in the production of even so small a part of a total output are within the Fair Labor Standards Act. However that may be, I cannot believe that that decision was intended to overrule the repeated decisions that the Anti-Trust Acts do not cover all persons who engage to any degree whatever in interstate commerce. If so, we are wasting our time over the *Baseball* case for it was overruled *sub silentio.* When the case goes back for trial—assuming that it does so upon our opinions—it will be necessary, as I view it, to determine whether all the interstate activities of the defendants—those, which were thought insufficient before, in conjunction with broadcasting and television—together form a large enough part of the business to impress upon it an interstate character. I do not know how to put it in more definite terms.

As I understand my brother Chase, he thinks that, even though the defendants' business be in general subject to the Anti-Trust Acts, the "reserve clause" is not in violation of them. For this he relies principally upon *Apex Hosiery Co. v. Leader,*[5] a case in which the Court found it unnecessary to decide whether labor unions were within the Acts. The Court thought that, although the strike in question might well have had an effect upon the price of stockings which passed into interstate commerce, the purpose of the strikers was not that, and the result, if any, was only an incident. Be that as it may, whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids anyone to practice his calling. I do not think that at this stage of the action we should pass upon the "reserve clause"; and therefore I do not join in my brother Frank's present disposition of it, although I do not mean that I dissent from him. All that I wish now to decide is that the complaint avers enough to present an issue upon a trial. I think that the judgment should be reversed and the cause should be remanded for trial.

Judge Frank's Opinion

[*Monopoly Conditions*]

FRANK, Circuit Judge: 1. No one can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed the vitality of *Federal Baseball Club v. National League,* 259 U. S. 200 (decided twenty-seven years ago) and have left that case but an impotent zombi. Nevertheless, it seems best that this court should not so hold.[1] However, in *Ring v. Spina,*

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[5] 310 U. S. 464.

[1] I reach that conclusion somewhat hesitantly. For, while the Supreme Court has never explicitly overruled the *Federal Baseball Club* case, it has overruled the precedents upon which that decision was based; and the concept of Commerce has changed enough in the last two decades so that, if that case were before the Supreme Court *de novo,* it seems very likely that the Court would decide the other way. This court cannot, of course, tell the Supreme Court that it was once wrong. But "one should not wait for formal retraction * * * in the face of changes plainly foreshadowed"; this court's duty is "to divine, as best it can, what would be the event of the appeal in the case before it." (L. Hand, *C. J.,* dissenting in *Spector Motor Service Co. v. Walsh,* 139 F. (2d) 809, 823). In *Perkins v. Endicott Johnson Corp.,* 128 F. (2d) 208, 217-218 (C. C. A. 2), we said: "Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." In *Picard v. United Aircraft Corp.,* 128 F. (2d) 632, 636 (C. C. A. 2), we said (per L. Hand, *J.*): "In this we recognize 'a pronounced new docrtinal trend' which it is our 'duty cautiously to be sure, to follow not to resist.' "

In *Barnette v. West Virginia State Board of Education,* 47 F. Supp. 251, 252-253 (S. D. W. Va.) Judge Parker, sitting in a three-judge court, said: "Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. * * * The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika,* 316 U. S. 484. The majority of the court in *Jones v. City of Opelika,* moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would [be] recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

148 F. (2d) 647, 651, referring to that case and another similar case,[2] this court said that, because of "the steadily expanding content of the phrase 'interstate commerce' in recent years, * * * there is no longer occasion for applying those cases beyond their exact facts." For reasons stated later, I think that, on its facts, we can properly distinguish the suit now before us from the *Federal Baseball* case.

I think it should be so distinguished, if possible, because (assuming, as we must, at this stage of the litigation, the truth of the statements in the complaint) we have here a monopoly which, in its effect on ballplayers like the plaintiff, possesses characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning "involuntary servitude," and by subsequent Congressional enactments on that subject.[3] For the "reserve clause," as has been observed, results in something resembling peonage of the baseball player. By accepting the "reserve clause"—and all players in organized baseball must "accept" it—a player binds himself not to sign a contract with, or play for, any club other than the club which originally employs him or its assignee. Although many courts have refused to enforce the "reserve" clause,[4] yet severe and practically efficacious extra-legal penalties are imposed for violation. The most extreme of these penalties is the blacklisting of the player, so that no club in organized baseball will hire him. In effect, this clause prevents a player from ever playing with any team other than his original employer, unless that employer consents. Since the right to play with organized baseball is indispensable to the career of a professional baseball player, violations of the clause by such players are infrequent. The violator may perhaps become a judge (with a less exciting and often less remunerative occupation) or a bartender or a street-sweeper, but his chances of ever again playing baseball are exceedingly slim.

As one court, perhaps a bit exaggeratedly, has put it,[5] "While the services of these baseball players are ostensibly secured by voluntary contracts, a study of the system as * * * practiced under the plan of the national agreement, reveals the involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country. * * * There is no difference in principle between the system of servitude built up by the operation of this national agreement, which * * * provides for the purchase, sale, barter and exchange of the services of baseball players —skilled laborers—without their consent, and the system of peonage brought into the United States from Mexico and thereafter existing for a time within the territory of New Mexico. * * * The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the national agreement." I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.

In what I have said about the nature of the contracts made with the players, I am not to be understood as holding that they violate the Thirteenth Amendment or the statutes enacted pursuant thereto. I mean simply to suggest that those contracts are so opposed to the public policy of the United States[5a] that, if possible, they should be deemed within the prohibitions of the Sherman Act.

[*Federal Baseball Case Distinguished*]

2. On a motion to dismiss, the complaint must be liberally construed in plaintiff's favor. So construing this complaint, I think that the facts in the instant case significantly

[2] *Hart v. B. F. Keith Vaudeville Exchange*, 12 F. (2d) 341 (C. C. A. 2).

[3] 8 U. S. C. A. § 56 and 18 U. S. C. § 1581; see *United States v. Reynolds*, 235 U. S. 133; *Bailey v. Alabama*, 219 U. S. 219; *Clyatt v. United States*, 197 U. S. 207; *Taylor v. George*, 315 U. S. 25; *Pollock v. Williams*, 322 U. S. 4.

[4] *Allegheny Baseball Club v. Bennett*, 14 Fed. 257 (C. C. W. D. Pa.); *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198 (C. C. S. D. N. Y.); *Brooklyn Baseball Club v. McGuire*, 116 Fed. 782 (C. C. E. D. Pa.); *Weegham v. Killefer*, 215 Fed. 289 (C. C. A. 6); *American League Baseball Club v. Chase*, 86 Misc. 441; *Cincinnati Exhibition Co. v. Johnson*, 190 Ill. App. 630; *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779.

[5] *American League Baseball Club v. Chase*, 86 Misc. 441, 465, 466.

[5a] Cf. *Hurd v. Hodge*, 334 U. S. 24, 34.

differ from those in the *Federal Baseball* case, because here the defendants have lucratively contracted for the interstate communication, by radio and television, of the playings of the games.[5b] In that earlier case, the Court held that the traveling across state lines was but an incidental means of enabling games to be played locally—i. e., within particular states—and therefore insufficient to constitute interstate commerce.[5c] Here, although the playing of the games is essential to both defendants' intra-state and interstate activities, the interstate communication by radio and television is in no way a means, incidental or otherwise, of performing the intra-state activities (the local playings of the games).

True, in the *Federal Baseball Club* case, there was present in the record the fact that the defendants had sold the exclusive right to send "play-by-play" descriptions of the games over interstate telegraph wires. But the brief of the plaintiff filed in the Supreme Court in that case did not contend that that interstate communication was interstate commerce; it merely called attention to the telegraph service as one of several factors tending to show the popularity and national character of "organized baseball." Moreover, the Supreme Court in its opinion in that case did not note the fact concerning the telegraph service; and it has often been held that a decision is not to be regarded as a precedent concerning a question clearly not considered by the Court, because "to make it so, there must have been an application of the judicial mind to the precise question. * * * "[5d]

Accordingly, as the Court in the *Federal Baseball* case, in deciding that interstate features were absent, discussed nothing but the traveling of the teams and their paraphernalia between states, as a means to the local playing of the games, I think that decision, as above indicated, should be deemed to hold no more than that such traveling does not give rise to interstate commerce for Sherman Act purposes. That such was the ruling appears from the way in which the Supreme Court there dealt with the facts: "A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the leagues are in different cities and for the most part in different states. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its league and another club has won the pennant of the other league, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the states. But we are of opinion that the Court of Appeals was right. The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that in order to give the exhibitions the leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California,* 155 U. S. 648, 655, the transport is a mere incident, not the essential thing."

I think the foregoing will serve alone to distinguish the incidental-means rationale of the *Federal Baseball* case: There the traveling was but a means to the end of playing games which themselves took place intra-state; here the games themselves, because of the radio and television, are, so to speak, played interstate as well as intra-state.

[5b] That the defendants' radio contracts are lucrative, see, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.,* 24 F. Supp. 490; *Mutual Broadcasting System, Inc. v. Muzak Corp.,* 177 Misc. 489.

[5c] In passing. I note that that ruling is difficult to reconcile with the Mann Act cases; *Caminetti v. U. S.,* 242 U. S. 470; *Martensen v. U. S.,* 322 U. S. 369, 375; *Cleveland v. U. S.,* 329 U. S. 14, 19-20.

[5d] *St. Louis R. v. Terre Haute R. Co.,* 145 U. S. 393, 403-404; *Webster v. Fall,* 266 U. S. 507, 511; *KVOS, Inc. v. Associated Press,* 299 U. S. 269, 279; *Teft, Weller & Co. v. Munsuri,* 222 U. S. 114, 119-120; *United States v. Mitchell,* 271 U. S. 9, 14; *United States v. More,* 3 Cranch 159, 172; *The Edward,* 1 Wheat. 261, 275-276; *Mutual Benefit Health & Accident Association v. Bowman,* 99 F. (2d) 856, 858 (C. C. A. 8); *United States v. Dunbar,* 154 F. (2d) 889, 891 (C. C. A. 9).

There is, however, another important distinction on which I think we might rely, were another distinction necessary: In that earlier case, persons in other states received, via the telegraph, mere accounts of the games as told by others, while here we have the very substantially different fact of instant and direct interstate transmission, via television, of the games as they are being played, so that audiences in other states have the experience of being virtually present at these games. That degree of difference, known to anyone who has ever sat at the receiving end of a television set, is so great as to constitute a difference in kind. To be sure, no one can draw a sharp line between differences of "degree" and "kind." However, to the question whether the difference between a difference of kind and difference of degree is itself a difference of degree, the sage answer has been given that it is a difference of degree, but a "violent" one.[6] "Courts of justice," said an English judge some sixty years ago, "ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail,' at some time."[7]

In the *Federal Baseball* case, the Court assigned as a further ground of its decision that the playing of the games, although for profit, involved services, and that services were not "trade or commerce" as those words were used in the Sherman Act. But I think that such a restricted interpretation of those words has been undeniably repudiated in later Supreme Court decisions concerning medical services[7a] and motion pictures.[7b] I believe, therefore, that we will not trespass on the Supreme Court's domain if we hold that the rationale of the *Federal Baseball* case is now confined to the insufficiency of traveling, when employed as a means of accomplishing local activities, to establish the existence of interstate commerce.[7c]

I conclude, then, that here there is substantial interstate commerce of a sort not considered by the Court in the *Federal Baseball* case. These questions remain: (a) May Congress constitutionally regulate the interstate portion of such a business as that done by defendants? (b) If so, has Congress in the Sherman Act sufficiently exercised its constitutional power to include that portion of that business? I shall consider those questions in turn.

[*Constitutional Power*]

3. Supreme Court decisions relative to the Fair Labor Standards Act leave little doubt that the Constitutional power of Congress, under the commerce clause, extends to such a situation. In *Roland Co. v. Walling,* 326 U. S. 657, an action to enjoin an alleged violation of that Act, the defendant was engaged in commercial and industrial wiring, electrical contracting, and dealing in electrical motors and generators. One of its customers was admittedly engaged in interstate telephony, others in the repair of ships intended for movement in interstate commerce, or in the production of goods for commerce. This the Court said (in an opinion by Justice Burton) brought the defendant within the Act, which "does not require the employee to be directly 'engaged in commerce'" or even "employed in the production of an article which itself becomes the subject of commerce. * * * It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'article or subject of commerce of any character' which are produced for trade, commerce or transportation among the several

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[6] Williams, *Language and The Law,* 61 Law. Q. Rev. (1945) 179, 184.

[7] Chitty, *J.,* in *Lavery v. Pursell* (1888) 39 Ch. D. at 517.

Holmes, *J.,* often discussed this matter of line-drawing. Holmes, *The Common Law* (1881) 68, 110, 127; Holmes, *Law in Science—Science in Law,* 12 Harv. L. Rev. (1899) 443, reprinted in Holmes, *Collected Legal Papers* (1920) 210, 232-233; *Hudson County Water Co. v. McCarter,* 209 U. S. 349, 355; *Irwin v. Gavit,* 268 U. S. 161, 168; *Superior Oil Co. v. State of Mississippi,* 280 U. S. 390; *Empire Trust Co. v. Cahan,* 274 U. S. 473, 478; *Haddock v. Haddock,* 201 U. S. 562, 631, 732; *Schlesinger v. State of Wisconsin,* 279 U. S. 230, 241; *Louisville Gas & Elec. Co. v. Coleman,* 277 U. S. 32, 41; *Quaker City Cab Co. v. Commonwealth of Pennsylvania,* 277 U. S. 389, 403; *Nash v. United States,* 229 U. S. 373, 376; *Bullen v. State of Wisconsin,* 240 U. S. 625, 630, 631.

[7a] *American Medical Association v. U. S.,* 317 U. S. 519; cf. the reference to that case in *United States v. Underwriters Association,* 322 U. S. 533, 546 and note 25.

[7b] *Binderup v. Pathe Exchange, Inc.,* 263 U. S. 291; *Paramount Famous Lasky Corp. v. United States,* 282 U. S. 30; *United States v. First Natl. Pictures,* 282 U. S. 44; *Interstate Circuit, Inc. v. United States,* 306 U. S. 208; *Bigelow v. R. K. O. Radio Pictures,* 327 U. S. 251.

[7c] Cf. *North American Co. v. S. E. C.,* 327 U. S. 686, 694.

states." *Roland Co. v. Walling* was followed in *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, where the employer was an independent contractor engaged in washing windows, painting and similar maintenance work entirely within the State of Michigan on premises used in the production of goods for commerce. This the Court said constituted "the production of goods for commerce," under the Fair Labor Standards Act. Several circuit courts, including this court, have in like manner widely interpreted Congress' constitutional power under the commerce clause. See *N. L. R. B. v. Cleveland Cliffs Iron Co.*, 133 F. (2d) 295 (C. C. A. 6); *Culver v. Bell & Loffland*, 146 F. (2d) 39 (C. C. A. 9); *Walling v. Connecticut Co.*, 154 F. (2d) 552 (C. C. A. 2); *Consumers Power Co. v. N. L. R. B.*, 113 F. (2d) 38 (C. C. A. 6); *N. L. R. B. v. Gulf Public Service Co.*, 116 F. (2d) 852 (C. C. A. 5).

Nor is Congressional exercise of the commerce power barred with respect to a particular business enterprise because of its activities in or affecting interstate commerce constitute but a small percentage of its total activities. Thus in *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, the Court held within the Fair Labor Standards Act a publisher of a daily newspaper only ½ of 1% of whose circulation (about 45 daily copies of the paper out of a total of 10,000) was regularly out-of-state. So here: The complaint, liberally construed, imports that the radio and television contracts yield defendants a substantial, not a trifling, sum. On that basis, I think the defendants and the ball-players are engaged in interstate commerce, regardless of whether or not that sum is but a small percentage of defendants' total earnings.

It seems to me, therefore, that Congress had the Constitutional power to include defendants' interstate business in the Sherman Act. I turn now to the question whether Congress there exercised that power.

[*Full Use of Constitutional Powers*]

4. The Supreme Court has said that (with an exception as to labor unions not relevant here) Congress in the Sherman Act intended to use all the constitutional power conferred on it by the commerce clause. The Court (per Sutherland, *J.*) so stated for the first time in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 435. The Court (per Stone, *J.*) repeated that statement in *Apex Hosiery Co. v. Leader*, 310 U. S. 460, 496, adding (at p. 498) that the Sherman Act is aimed at restraints "comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce." 310 U. S. 469, 498. This idea was repeated in *United States v. Frankfort Distilleries*, 324 U. S. 294, 297: "And with reference to commercial trade restraints such as these, Congress in passing the Sherman Act, left no area of its Constitutional power unoccupied; it 'exercised all the power it possessed.'"

The most striking statement, however, is in the *Southeastern* case, 322 U. S. 533, where the argument was pressed that although the Constitutional commerce power empowered it to do so, Congress in the Sherman Act did not intend to cover insurance. The Court found that "all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy."

The comprehensive sweep of the Sherman Act is also shown by the Supreme Court's reliance, in several Sherman Act cases, upon cases construing the National Labor Relations Act and other statutes. For instance, in the *Associated Press* case, 326 U. S. 1, 14, the Court disposed, in one sentence, of the argument that that enterprise was not subject to the Sherman Act: "We need not again pass upon the contention that trade in news carried on among the states is not interstate commerce, *Associated Press v. Labor Board*, 301 U. S. 103." Justice Frankfurter, concurring, agreed, saying (p. 27): "Since the Associated Press is an enterprise engaged in interstate commerce, *Associated Press v. Labor Board, supra*, these plainly are agreements in restraint of that commerce."

In the more recent case of *Mandeville Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 236, the Court discussed the scope of the Sherman Act and of the Constitutional commerce power as if they were identical, citing *United States v. Darby*, 312 U. S.

100 (a Fair Labor Standards Act case), *Consolidated Edison Co. v. Labor Board,* 305 U. S. 197 (a National Labor Relations Act case), and *United States v. Walsh,* 331 U. S. 432 (a Food and Drug Act case). Moreover, the discussion in the *Mandeville* opinion of the effect of the *Shreveport Rate Cases,* 234 U. S. 342, goes to show that, as the Court has come to construe the commerce clause more widely in connection with the coverage of other statutes, such as the Interstate Commerce Act, it has equivalently interpreted the Sherman Act's coverage.[8] And certainly the *Mandeville* opinion demonstrates that the Sherman Act covers activities wholly within a state but which affect commerce.

5. In the light of our previous discussion, and having particularly in mind *Mabee v. White Plains Pub. Co.,* 327 U. S. 178, I think we must, for purposes of deciding the applicability of the Sherman Act, consider this case as if the only audiences for whom the games are played consist of those persons who, in other states, see, hear, or hear about, the games via television and radio. The question here is, then, I think, the same as that which we would face if a similar alleged monopoly related to the production of stage-plays in radio and television studios. I believe the producers of such plays would clearly come within the Fair Labor Standards Act.[8a] If so, they would be within the Sherman Act. And I would so hold concerning the defendants, if their conduct is as plaintiff describes it.

As the playing of the games is essential both to defendants' interstate and intrastate activities, the players' contracts relate to both. But that, as a consequence, necessary relief with respect to the interstate activities will thus unavoidably affect those which are intrastate does not preclude the granting of such relief.[9] Nor, I venture to repeat, do I think such relief is dependent upon a showing that the illegally monopolized interstate activities, if more than trifling, represent a substantial proportion of defendants' total activities.[9a] See *Mabee v. White Plains Pub. Co.,* 327 U. S. 178; *cf. Apex Hosiery Co. v. Leader,* 310 U. S. 469, 485; *United States v. Yellow Cab Co.,* 332 U. S. 218, 225. In *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 224 note 59, the Court said that "the amount of interstate * * * trade is not material," citing with approval *Montague & Co. v. Lowry,* 193 U. S. 38; *Steers v. United States,* 192 F. 1, 5 (C. C. A. 6); *Patterson v. United States,* 222 F. 599, 618-619 (C. C. A. 6). I consider adequate the allegations concerning damages.[10]

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[8] The *Mandeville* opinion explains that, in *United States v. E. C. Knight Co.,* 156 U. S. 1, the Court had decided that manufacturing was not commerce; the Sherman Act thereby became a "dead letter," and was not finally reborn until 1911 "with the decisions in *Standard Oil Co. v. United States,* 221 U. S. 1, and *United States v. American Tobacco Co.,* 221 U. S. 106"; it was the doctrine of the *Shreveport Rate Cases,* 234 U. S. 342 (*i.e.,* that activities within a state may be federally regulated if they affect interstate commerce) as extended by later decisions, which made it no longer "necessary to search for some sharp point or line where interstate commerce ends and intrastate commerce begins. * * *" As late as the 1930's (the Court continued in the *Mandeville* opinion) the old ideas persisted in specific applications, but a growing number of decisions had rejected the idea that manufacturing was purely local simply because that phase of a combination restraining trade was carried on within a single state. It "is the effect upon that commerce, not the moment when its cause arises, which the doctrine [of the *Shreveport* cases] was fashioned to reach."

[8a] Cf., as to the National Labor Relations Act, *Marcus Loew Booking Agency, Inc.,* 3 N. L. R. B. 380; *Los Angeles Broadcasting Co.,* 4 N. L. R. B. 443; *KMOX Broadcasting Station,* 10 N. L. R. B. 479; *Louis G. Baltimore,* 57 N. L. R. B. 1611; *Miami Valley Broadcasting Corp.,* 70 N. L. R. B. 1015.

In *Fisher's Blend Station v. Tax Commission,* 297 U. S. 650, 655, the Court said: "By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."

[9] *Minnesota Rate Cases,* 230 U. S. 352, 399; *Shreveport Rate Cases,* 234 U. S. 342; *United States v. New York Central R. Co.,* 272 U. S. 457; *Currin v. Wallace,* 306 U. S. 1; *Mandeville Farms v. American Crystal Sugar Co.,* 334 U. S. 219, 236; *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, 119; *Santa Cruz Fruit Packing Co. v. Labor Board,* 303 U. S. 453, 466; *United States v. Darby,* 300 U. S. 100, 118-123; *Wickard v. Filburn,* 317 U. S. 111, 122-124.

[9a] If proportions were important, the following would be pertinent: Presumably with little increased expense to the defendants, earnings from the radio and television contracts are something added to what defendants theretofore earned net, so that these added earnings are "velvet" which therefore may (in the Sherman Act context) be regarded as contributing entirely, or almost entirely, to defendants' net profits. Accordingly, in determining proportions, the radio and television net profits should be compared with defendants' other net, not their gross, profits.

[10] *Package Closure Corp. v. Sealright,* 141 F. (2d) 972 (C. C. A. 2); *Bigelow v. RKO Pictures,* 327 U. S. 251.

6. Defendants suggest that "organized baseball," which supplies millions of Americans with desirable diversion, cannot exist without the "reserve clause." Whether that is true, no court can predict. In any event, the answer is that the public's pleasure does not authorize the courts to condone illegality, and that no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.

I think we should reverse and remand.

[¶ 62,369] Charles J. Riedley, trading and doing business as Riedley Motor Company v. Hudson Motor Car Company and Koster Swope Motors, Incorporated.

In the United States District Court for the Western District of Kentucky. Civil Action No. 1482. February 7, 1949.

Sherman Antitrust Act

Action for Treble Damages—Termination of Dealership Agreement—Private Injury.—By terminating an agency contract with a dealer, an automobile manufacturer does not violate the antitrust laws. A car dealer's action for treble damages for injury received by the defendant's termination of their dealership agreement was dismissed since the allegation of private wrong, without any injury to the public, was insufficient to bring the matter within the Sherman Act, whose main purpose is to protect the public and only incidentally to give a private right of action.

See the Sherman Act annotations, Vol. 1, ¶ 1640.125.

For plaintiff: Fred J. Karem, Karem & Karem.

For defendant Koster-Swope Motors Inc.: Stuart E. Lampe.

For defendant Hudson Motor Car Company: Chas. I. Dawson.

Memorandum

Shelbourne, R. M., District Judge: The plaintiff, Chas. J. Riedley, a resident of Kentucky, is engaged in business under the trade name of Riedley Motor Company.

He filed his complaint in this action May 5, 1948. The first count alleges that the defendants, Hudson Motor Car Company a Michigan corporation, and Koster-Swope Motors Inc., a Kentucky corporation, conspired to restrain and monopolize Interstate Commerce by agreeing to refuse renewal of a dealership contract in motor cars and accessories, which the plaintiff had with the defendant Hudson Motor Car Company.

The second count of the complaint alleged that the defendants, Hudson Motor Car Company and Koster-Swope Motors failed and refused to renew a dealership contract with him and by such failure and refusal breached an alleged implied contract of renewal.

As damages on account of the claims set forth in count 1, plaintiff claimed damage in the sum of $153,850., alleged to have been suffered in the following respect:

Loss on real estate, buildings and equipment	$25,000.00
Loss of revenue from real estate taken over for improvement of buildings	3,600.00
Cost of Hudson sign and damage to building	250.00
Loss of prospective profits reasonably anticipated	75,000.00
Loss of good will and value as going concern	50,000.00
Total	$153,850.00

Under the provisions of Section 15, Title 15 U. S. C. A. plaintiff sought treble this amount, with interest and attorneys fees.

As his jurisdictional ground, he alleged that his action was brought under Section 15, Title 15 U. S. C. A., by reason of wrongful acts done by the defendants in violation of Section 1 of that title and section.

Under the second count of the complaint, he claims additional damages in the sum

of $100,000.00 and seeks recovery of that amount, alleging that for many years prior to July 31, 1947, he was a dealer in new Hudson automobiles and accessories and that in the year 1946, defendants required plaintiff, in order to continue as a Hudson dealer, to enlarge his show rooms, parts department, service department and to obtain new equipment and otherwise to improve and increase his facilities sufficient to qualify him a "Hudson Master Dealership".

He states that he was "led to understand" by the defendants that if such improvements were made, his contract as a Hudson dealer would be renewed, but that defendants failed and refused to so renew said contract, which, by its terms, expired on the 31st day of July, 1947, resulting in the damage complained of.

Service of process was had upon the Hudson Motor Car Company by the deputy marshal in the Eastern District of Michigan. Kostor-Swope Motors was served by the marshal within this District.

Defendants have filed their separate answers, in which there is included motions to dismiss count 1 because—

> 1. The restraint of trade attempted to be alleged does not constitute such restraint as is prohibited or condemned by the Sherman Act.
>
> 2. Each had the full right to select the dealers whom it wished to represent it.
>
> 3. The clause in the contract of dealership provided for its termination on July 1, 1947, and contained no provisions giving either party a right of renewal.
>
> 4. The facts alleged in count 1 (conceded to be true for the purpose of consideration of the motion) show only a private wrong to plaintiff and no restriction of any public right in trade or commerce and therefore no violation of the Sherman Anti-Trust Act.

With respect to Count 2, the defendants contend that this Court has no jurisdiction, because there is lacking diversity of citizenship between the plaintiff and both defendants, in that plaintiff and defendant Koster-Swope Motors are each residents of the State of Kentucky.

It is apparent that the cause of action upon which plaintiff relies in count 1 sounds in tort and that contained in count 2, for the alleged breach of an implied contract to renew a contract, is *ex contractu.*

[*Allegation of Private Injury Insufficient*]

It will be observed that the plaintiff makes no allegation that the termination of his dealership contract will affect the public in the ability to purchase Hudson automobiles and accessories. No claim is made that the elimination of plaintiff as a dealer will result in lessening the supply of Hudson automobiles, parts and accessories through their dealerships or to the market generally.

The contention is that the threat to cancel, and the consummation of the threatened termination, affect only the plaintiff.

Plaintiff's counsel, in his brief, makes the contention that the restraint of interstate commerce resulted solely and only in the cancellation of plaintiff's contract.

Such allegations do not constitute a valid claim under the Sherman Anti-Trust Act.

In the case of *United States v. Colgate & Company,* 250 U. S. 300, the Court said—

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

In the case of *A. B. Aboual et al. v. J. D. and A. B. Spreckles Company,* 26 Fed. Supp. 831 (D. C. Cal.), the Court said—

> "The main purpose of the Anti-Trust Act was to provide protection for the public from monopolies and restraint of trade; and the individual right of action was incidental and subordinate. A complaint to state a cause of action must show that only damages sustained by the individual plaintiff, *but even more importantly* a violation of public rights prohibited by the Act. Therefore, it is not sufficient that the declaration shows a good cause of action at common law, for the action is wholly statutory." (Italics supplied).

The main purpose, therefore, of the Anti-Trust Act is to protect the public from monopolies and restraint of trade and the right accruing to an individual, by reason of such monopoly affecting the public, is incidental. *Glen Coal Co. v. Dickinson Fuel Co.,* 72 F. (2d) 885 (CCA 4); *Weinberg v. Sinclair Refining Company,* 48 Fed. Supp. 203 (D. C. N. Y.) 48 Fed. Supp. 203; *Maltz v. Sax,* 134 F. (2d) 4.

In *Arthur v. Kraft-Phenix Cheese Corporation*, 26 Fed. Supp. 824 (D. C. Md), the plaintiff charged the defendant with conspiracy to refuse continuing to sell the plaintiff cheese. The petition was dismissed for the reason that the Sherman and Clayton Acts were held to be for the public benefit and not primarily to redress personal wrongs.

Of that situation that Court said—

"Taken as a whole the declaration discloses only what seems to be a private controversy rather than one affecting the public as such. It is well established that the principal purpose of enacting the Anti-Trust Laws, 15 U. S. C. A. Sec. 1 et seq., was to protect the public; and the right of an individual to sue for personal damages sustained is incidental and subordinate. * * * private suits are maintainable only when the defendant's conduct prejudicially affects the public generally as distinct from purely personal or private damage."

The case of *Shotkin v. General Electric Company* (CCA 10), decided December 2, 1948, 17 Law Week p. 2257, — F. (2d) —, is relied upon by defendants and is in point. The complaint, as amended in that case, was held to be fatally infirm and was dismissed, because there was no allegation that the defendants combined and conspired to refrain from competing with each other in the manufacture, sale and distribution of electric lamps, fixtures, and apparatuses and electrical goods, and did not allege the defendants conspired to raise prices, divide trade territory or furnish to the public inferior quality merchandise.

The Court said—

"While it was alleged that the refusal to furnish merchandise to plaintiff for sale in connection with the conduct of his business was in furtherance of the conspiracy and that the public was injured, it was not charged generally or specifically that as the result of that refusal the prices of such merchandise were enhanced or that the volume thereof in the competitive markets were diminished. In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce."

[*Right To Terminate Agency*]

With respect to the right of the defendants to select the dealers by whom they wished to be represented in their sales efforts, there can be little doubt that the defendants had the right to terminate the contract of agency. Similar contracts have been upheld by the Court of Appeals of Kentucky and the right of the manufacturer to terminate its contract of dealership has been upheld in contracts very similar to that here involved. See *Ford Motor Company v. Alexander Motor Company*, 223 Ky. 16; *Business Mens Assurance Company v. Eads*, 290 Ky. 553.

In the case of *Bushwick-Decatur Motors v. Ford Motor Company*, 116 F. (2d) 675, the Court said—

"* * * generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies; the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact, one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy."

It therefore appears, from the allegations and from statements of counsel for plaintiff in the argument, that the alleged wrong complained of in this action is a private wrong to plaintiff, and therefore not one within the prohibition of the actions authorized by Section — Title 15 U. S. C. A.

It is therefore concluded and held that the allegations of Count 1 of plaintiff's complaint are not sufficient to show or establish a claim or cause of action upon which the relief sought, or any relief, could be granted.

[*Action ex Contractu*]

This leaves for consideration Count 2 of the complaint—that is the action *ex contractu*—arising out of the alleged breach of the implied contract to renew the contract of dealership.

The plaintiff's residence and citizenship in Kentucky and the citizenship of the defendant Koster-Swope Motors, Inc., be-

ing in Kentucky, eliminate one of the essentials necessarily present to confer jurisdiction under Title 28, Section 41 (1) in the Revised Judicial Code, Title 28, section 1332.

Counsel for plaintiff recognizes this absence of diversity and contends that under the doctrine of *Hurn v. Ousler,* 289 U. S. 232, the Court has jurisdiction, his contention being that while a Federal Court may not assume jurisdiction of a separate and distinct non-Federal cause of action because it is joined in the same complaint with the Federal cause of action, yet, where two distinct grounds in support of a single cause of action are alleged, only one of which presents a Federal question, and the Federal question is not plainly wanting in substance, the Federal Court even though the Federal ground be not established, may nevertheless retain and dispose of the case on the non-Federal ground.

The Court of Appeals of the Sixth Circuit considered the case of *Hurn v. Ousler,* as late as December 1, 1948, in the case of *The French Renovating Company v. The Ray Renovating Company and Albert B. Beitman,* involving an analogous jurisdictional question, arising out of claims on patent infringement.

Chief Judge Hicks, writing for the Court said—

> "The District Court has jurisdiction over suits for patent and copyright infringement, as provided in Title 28 USC, Ch. 2, Sec. 41, par. (7), but as an original proposition it has no jurisdiction over suits for breach of contract or breach of trust where there is, as here, a lack of diversity of citizenship and of an allegation that the value of the relief sought is in excess of $3000.00, exclusive of interest and costs. Title 28 USC Ch. 2, Sec. 41, Par. (1). Such units are non-Federal in their nature and the District Court does not acquire jurisdiction over them merely because they are joined in the complaint with other causes of action which are within its jurisdiction. *Hurn v. Ousler,* 289 U. S. 238, 248.
>
> "Before the District Court in such a case may accept jurisdiction of such non-federal causes of action, it must appear that both federal and non-federal causes rest upon substantially identical facts. *Hurn v. Ousler, supra,* (p. 246). * * * Plaintiff's non-federal claims are entirely independent of its federal claims and it does not appear with any appreciable degree of certainty that the facts necessary to support them would also support the federal claims." (Italics added.)

See also *Armstrong Paint & Varnish Work v. New Enamel Corporation,* 305 U. S. 315; *General Furniture Company v. Karper,* 238 U. S. 254.

The fallacy in the contention of counsel for plaintiff is that the two distinct causes of action sued on in this action are not stated in support of a single cause of action, but in Count 1, he seeks to recover treble the sum of $153,850.00 for damages carefully itemized in the complaint and in Count 2, the sum of $100,000.00 damages to his business, and monies expended and none of his items of damage in Count 2 are included in the itemization of damages in Count 1.

[*Complaint Dismissed*]

It is therefore the opinion of the Court that there is a misjoinder of causes of action, and that the defendant's motion to dismiss Count 1 of the complaint should be sustained, because the the facts stated, fairly considered, are not sufficient to constitute a cause of action or authorize any of the relief sought in the petition and that the Court lacks jurisdiction, because of the absence of diversity of citizenship between plaintiff and the defendant Koster-Swope Motors, Inc., as to Count 2, and that accordingly plaintiff's complaint should be dismissed.

An order providing for such dismissal will be tendered by counsel for defendant, on notice.

[¶ 62,370] Sun Cosmetic Shoppe, Inc., v. Elizabeth Arden Sales Corporation; Mirror Cosmetic Shoppe, Inc., v. Elizabeth Arden Sales Corporation.

In the United States District Court for the Southern District of New York. Civil Nos. 47-258, 47-259. February 9, 1949.

Robinson-Patman Act

Treble Damages Action—Intrastate Sales by Company Engaged in Interstate Activity. —In an action for treble damages taken by cosmetic retailers against a cosmetic manufacturer for alleged price discrimination when the latter furnished the services of demonstrators to the plaintiffs' competitors but not to the plaintiffs, the defendant's motion for summary judgment on the ground of lack of jurisdiction was allowed. All the transactions between the plaintiffs and the defendant were in intrastate commerce only. The cosmetics sold to the plaintiffs were manufactured, sold, and delivered in the same state. The plaintiffs' contention that the transactions were part of the overall picture of interstate commerce engaged in by the defendant was not sustained. A manufacturer may have both interstate and intrastate sales; it may violate the law with respect to one and not with respect to the other.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2215.202, 2216.10.

For plaintiffs: Morris Siegel.

For defendant: Townley, Updike & Carter (J. Howard Carter and John S. Bainbridge, of Counsel).

[*Nature of Motion*]

COXE, D. J.: These are motions by the defendant, prior to answer, for summary judgment dismissing both of the above actions on the ground that there is no genuine issue as to any material fact and that the court lacks jurisdiction of the subject matter. The motions are based upon the amended complaints and supporting affidavits, and are opposed by affidavits of the presidents of the plaintiffs. The papers in the two cases are identical, except for the names of the plaintiffs. The motions were argued together, and will be disposed of in one opinion.

[*Nature of Suit*]

Plaintiffs seek to recover treble damages under the Robinson-Patman Act (15 U. S. C. A., §§ 13, 15) because of alleged price discrimination by defendant in sales of its cosmetics to plaintiffs and to their competitors. The only specific discrimination alleged is that defendant furnished to some, but not to all, of plaintiffs' competitors, and not to plaintiffs, "services and facilities of special personnel known and described in the cosmetic and toilet goods preparations industry and trade as "demonstrators' * * * used for the purpose of fostering and pushing the sale of the products distributed by this defendant".

[*Facts*]

Plaintiffs have conducted for a number of years retail cosmetic establishments in the City of New York. They allege that many of their customers reside in the States of New York, New Jersey and other States of the United States; that defendant sold its cosmetics to competitors of plaintiffs, also located in the States of New York, New Jersey and other States of the United States; that defendant was engaged in the sale and distribution in interstate commerce of cosmetic and toilet goods preparations; and that its sales were "in the course of commerce".

It appears from the affidavit of defendant's vice-president, without contradiction, that, until January 1, 1948, all the cosmetics were manufactured, packed in containers and made ready for sale by Elizabeth Arden Inc., at its plant in Long Island City, N. Y. (Long Island City is a part of the City of New York), which sold them only to defendant; that on January 1, 1948 defendant leased the plant and thereafter manufactured, packed and made ready for sale all the cosmetics at the same plant; that defendant is a Delaware corporation, with its offices and principal place of business in the City of New York; that all the sales and deliveries to plaintiffs were made by defendant in the City of New York upon receipt, also in the City of New York, of

orders from them, and were filled from its stocks in Long Island City, and that defendant never made any sales to wholesalers. Defendant admits that some of the raw materials used in the manufacture of the cosmetics were acquired from sources outside the State of New York. Defendant does not deny that it furnished "demonstrators" to plaintiffs' competitors and did not furnish them to plaintiffs.

[*Discrimination*]

It is clear that, if these transactions with plaintiffs were in interstate commerce, defendant has discriminated against plaintiffs within the meaning of Sections 13(d) and (e) of the Act. These Sections provide that

> "(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person *in the course of such commerce* as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the * * * sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale * * * by contracting to furnish or furnishing * * * any services or facilities connected with the * * * sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The amended complaints do not indicate which of these two Sections plaintiffs claim defendant has violated. In *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 8 Cir., 150 F. (2d) 988, it was held, under a similar state of facts, that both Sections might be considered as having been violated. It was also held that the Robinson-Patman Act itself applies only to those engaged in interstate commerce.

[*Intrastate Sales*]

In *Lewis v. Shell Oil Co.*, D. C., N. D., Ill., 50 F. Supp. 547, 549, it was held that "In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce", and not merely that they only affect interstate commerce. Clearly, all the transactions between plaintiffs and defendant were in intrastate commerce only. The fact that some of the ingredients used in the manufacture of the cosmetics came from out of the State is of no significance. The cosmetics sold to plaintiffs were manufactured here, were sold here, and were delivered here. Plaintiffs' contention that the transactions were part of the overall picture of interstate commerce engaged in by the defendant cannot be sustained. A manufacturer may have both interstate and intrastate sales; it may violate the law with respect to one and not with respect to the other.

The motions of the defendant for summary judgment in both cases are granted.

[¶ 62,371] Opinion of the Attorney General of Minnesota.

No. 510-B-9, addressed to John F. Bonner, City Attorney, Minneapolis, by J. A. A. Burnquist, Attorney General. February 15, 1949.

Minnesota Unfair Trade Practices Act

Drawing Lucky Ticket—No Intent to Injure—No Violation Disclosed.—When a proprietor displays in his place of business a container holding tickets for the purpose of awarding $1.00 to anyone entering his premises who draws a lucky ticket therefrom, he does not violate Section 325.04 of the Minnesota Unfair Trade Practices Act, if such practice is carried on without any intent of injuring competitors or destroying competition.

See the Minnesota Unfair Practices Act, Vol. 2, ¶ 8428.30.

[*Question*]

You submit the question as to whether the trade practice herein outlined would be a violation of the laws prohibiting gambling, lottery, or gift enterprises.

[*Facts*]

The proposed plan is described as follows:

"The proprietor of a place of business maintains in conspicuous display a jar or some other container in which are kept tickets.

"All persons entering the place of business are permitted, without any charge or consideration whatsoever and without being required to make any purchase, to draw a ticket from the jar or container. If the ticket ends in a '00', the holder of the ticket receives One Dollar."

[*Opinion*]

In accordance with the decision in the case of *State v. Stern,* 201 Minn. 139, 145, every scheme, to be construed as a lottery, must include three essential elements, namely: chance, reward, and consideration for the chance. As the plan in question does not require that a consideration be paid for the chance, and the proposed scheme does not appear to be a "gift enterprise" as defined in and prohibited by NSA 623.25 or "gambling" within the meaning of our anti-gambling statutes, I am of the opinion that, if the plan here considered is carried on as herein outlined and is not conducted with an intent of injuring competitors or destroying competition, as prohibited by MSA 325.04, the operation of such plan would not constitute a violation of any state law.

[¶ 62,372] Opinion of the Attorney General of Minnesota.

No. 417-E, addressed to James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. February 4, 1949.

Minnesota Unfair Trade Practices Act

Selling at Less than Cost—When Permissible.—Selling below cost is permissible by virtue of Section 325.06 (4) of the Minnesota Unfair Trade Practices Act if done in good faith to meet the legal prices of a competitor selling the same commodity in the same locality.

See the Minnesota Unfair Practices Act, Vol. 2, ¶ 8428.40.

In your letter of February 1, you state these

Facts:

"Creamery 'A' wholesales 'Brand A' milk to retailer 'X' at an invoice price which makes it possible for this retailer to retail milk for fifteen cents or more per quart and meet all provisions of Section 325.04.

"Creamery 'B' wholesales 'Brand B' milk to retailer 'Y'. This milk is the same in all respects to the milk wholesaled by Creamery 'A' with the exception of the brand name. Retailer 'Y' can meet all provisions of Section 325.04 if he retails 'Brand B' milk for sixteen cents per quart or more."

You ask the

Question:

"Does Section 325.06 (4) permit retailer 'Y', who is located in retailer 'X's' trade area, to meet the legal competition of retailer 'X' by retailing 'Brand B' milk at fifteen cents per quart?"

Opinion:

Your question calls for the application of M. S. A., Sec. 325.04.

This statute forbids a retailer or a wholesaler to sell goods in this state at less than the cost thereof to the vendor for the purpose or with the effect of injuring competitors or destroying competition. "Cost" is defined in Sec. 325.01, Subd. 5. Cost includes the cost of doing business. The cost of doing business is defined in Subd. 7.

Sec. 325.06 makes the provisions of Sec. 325.04 inapplicable to a sale in an endeavor made in good faith to meet the legal prices of a competitor selling the same commodity or goods in the same locality or trade area.

The facts here considered show that A sold milk to X in conformity with the pro-

visions of Sec. 325.04. So the price involved in A's sale was legal. If B in an endeavor and good faith, to meet this legal price made by A, who is his competitor, sells the same quality of milk that A sells in the same community or trade area, it is my opinion that he does not violate Sec. 325.04.

[¶ 62,373] Empire State Camera Exchange Inc., v. Reynolds.

New York Supreme Court, New York County. Special Term, Part IV. 121 N. Y. L. J. 651, February 21, 1949.

New York State Fair Trade Act

Price Cutting Enjoined—Damaged Articles—Device to Avoid Law.—If an article becomes actually damaged it may be sold at less than list prices provided the customer knows that it is damaged and is being sold below list price and the discount is proportionate to the damage. Unless the article in fact has become damaged, the mere fact that it is out of its original package and in a show case and has been handled by prospective customers cannot be made the excuse for price cutting. A retailer is entitled to an order enjoining his competitor from selling cameras below prices established by fair trade agreements when the evidence establishes that the articles were not in fact damaged and the sale of such "demonstrator" articles is simply a ruse to cover indiscriminate price cutting.

See the New York State Fair Trade Act, Vol. 2, ¶ 8640.40.

[*Facts*]

WALTER, C. G., J.: Plaintiff sells at retail in a store in the Empire State Building at No. 5 West Thirty-third street photographic equipment and supplies and similar articles which, or the labels of which, bear the trade mark, brand or name of the manufacturer thereof, and which are in fair and open competition with commodities of the same general class manufactured by others. The manufacturers of these articles have established so-called fair trade agreements which fix the prices at which such articles are to be retailed.

Defendant sells at retail in a store at No. 251 East Thirty-fourth street photographic equipment and supplies and similar articles, some of which are manufactured by the manufacturers who manufacture the articles sold by plaintiff.

Plaintiff claims that in the past few months defendant has been and is now, willfully and knowingly, advertising, offering for sale and selling such articles at less than the prices stipulated in the so-called fair trade agreements as established by the manufacturers, and it brings this action to enjoin defendant from continuing such price-cutting.

Such agreements are specifically authorized, and the statute specifically enacts that such price-cutting is unfair competition and actionable at the suit of any person damaged thereby (General Business Law, sections 369-a to 369-e).

[*Right of Action*]

I think it obvious that plaintiff, a dealer bound by fair trade agreements and subjected to competition by defendant, is a person damaged so as to give it a right to maintain the suit, and the evidence abundantly establishes that defendant has been and is, willfully and knowingly, advertising, offering for sale and selling some of such articles at less than the prices so stipulated in the contracts.

[*Defense*]

The one question in the case, therefore, is whether defendant's sales fall within the provision in subdivision 2 (b) of section 369-a of the General Business Law that such commodities may be resold without reference to such agreement when the goods "are damaged or deteriorated in quality and notice is given to the public thereof."

Defendant's claim in that regard is that at least some of the articles (principally cameras) which he sold at a discount were so sold because they were "store demonstrators" and were so designated on the sales slip given to the buyer at the time of the sale, and, in some instances, had been, in fact, rented out.

[*Requisites for Legal Price Cutting*]

I entertain no doubt that even under such fair trade agreements a retailer bound thereby may and should advise his customer of any actual damage or deterioration in

any particular article which is the subject of the sale, and that he may sell below the list price any particular article which is, in fact, damaged or deteriorated, provided he makes known to the customer the fact of the damage or deterioration and the fact that he is selling below the list price because of such damage or deterioration, and provided that the discount below the list price is fairly proportioned to the nature and extent of the damage or deterioration.

[*Indiscriminate Discounts*]

The trouble with defendant's case is that the evidence convinces me that that is not what defendant did. He offered discounts freely on any camera, and then, when he became suspicious that he was "being shopped" by some fair trade detective, he adopted the "store demonstrator" idea as a device to cover himself.

[*Actual Damage Required*]

The notion that any and every camera becomes a "store demonstrator" and salable at less than list price merely because it has been taken out of its original package and placed in a show case or show window and handled by prospective customers who did not buy it, is wholly untenable and nothing more than a ruse to defeat the law. Exhibiting the camera in the show case or show window, and even the handling of it by prospective customers, may or may not damage or deteriorate it. If and when a particular article becomes actually damaged or deteriorated, it may, I repeat, be sold at less than list price, provided the fact of the damage or deterioration and the fact that it is being sold below list price because of such damage or deterioration are made known to the customer, and provided the discount below list price is fairly proportioned to the nature and extent of the damage or deterioration. But unless the article in fact has become damaged or deteriorated, the mere fact that it is out of its original package and in a show case or show window and has been handled by prospective customers cannot be made the excuse for price-cutting.

[*Fiction of the Store Demonstrator*]

I find that in this case the fiction of "store demonstrators" has been resorted to as just such an excuse, and I accordingly conclude that plaintiff is entitled to judgment enjoining defendant as prayed for in the complaint, with costs, and I direct the entry of judgment accordingly.

The foregoing constitutes the decision required by the Civil Practice Act, and judgment is to be entered thereon.

[¶ 62,374] Western Association of Lumbermen & Loggers, a corporation and George E. Owen, v. Julius A. Krug, as Secretary of the Department of the Interior of the United States; C. Girard Davidson, Assistant Secretary of the Department of the Interior of the United States; Walter H. Horning, Regional Administrator of the Bureau of Land Management, Region I of the Department of the Interior of the United States; Travis M. Tyrrell, Chief Forester, Oregon and California Revested Lands Administration, General Land Office of the Department of the Interior of the United States, and Fischer Lumber Company, a corporation.

In the United States District Court for the District of Oregon. Civil No. 4007. August 16, 1948. Filed August 18, 1948.

Sherman Antitrust Act

Logging Industry—Monopolistic Terms of Contract—Action Dismissed.—An action brought under the Declaratory Judgment Act seeking to enjoin a government administrator and his assistants from entering into a contract on grounds of its monopolistic terms and repugnancy to the antitrust laws is dismissed because the Declaratory Judgment Act does not apply to executory contracts.

See the Sherman Act annotations, Vol. 1, ¶ 1640.689.

For plaintiff: Frank B. Reid, Ray G. Brown.

For defendant Fischer Lumber Company: Charles P. Duffy, Carl E. Davidson. For defendants Krug, Davidson, Horning, Tyrrell: Floyd D. Hamilton, Assistant U. S. attorney.

Opinion

By BIGGS, Circuit Judge:* The individual plaintiff, George E. Owen, the owner of forest lands located within the Mohawk River Sustained-Yield Forest Unit, part of the revested Oregon and California River and reconveyed Coos Bay Wagon Road grant lands situated in the State of Oregon,[1] and the owner of a saw mill at Eugene, Oregon, and the corporate plaintiff, Western Association of Lumbermen and Loggers, a voluntary, non-profit corporation, seek by the civil action at bar to obtain a declaratory judgment that a proposed contract which may be entered into by the United States and the defendant, Fischer Lumber Company, is illegal and in derogation of the individual plaintiff's rights. By their amended complaint the plaintiffs seek to enjoin the defendants, Julius A. Krug, as Secretary of the Department of the Interior of the United States and officers of the Department of the Interior and of the Bureau of Land Management of that Department, and Fischer Lumber Company from entering into a cooperative marketing agreement for the management of the Mohawk River Sustained-Yield Forest Unit whereby for a long period of time, perhaps for one hundred years, Fischer Lumber Company will acquire the exclusive right, allegedly without competitive bidding, to purchase and harvest all timber and forest products from the Unit.

The plaintiffs allege that the proposed contract by its terms is monopolistic, contrary to the anti-trust laws of the United States, is against public policy and is not in accord with but is contrary to the intent of Congress as exemplified by the Acts of Congress referred in in the footnote,[2] save only the Act of August 28, 1937, 50 Stat. 874, referred to inmmediately hereinafter, and that if the contract be executed the individual plaintiff will be deprived of his livelihood and the employees at his saw mill will be deprived of their means of support. The plaintiffs assert also that the Act of August 28, 1937, pursuant to which it is alleged the Secretary of the Department of the Interior will enter into the proposed contract, is unconstitutional for various reasons which need not be detailed in this opinion. The corporate plaintiff states that one of its primary purposes is to oppose monopolies in the sale of public timber.

An answer was filed by Fischer Lumber Company. This alleges as a first defense that the amended complaint fails to state a claim against the Lumber Company on which relief can be granted. The defendants Krug, Davidson, Horning and Tyrrell filed a motion to dismiss the amended complaint as to them for various reasons; only the last of which (5) need be mentioned. The fifth ground for dismissal is that the action "is prematurely brought since the plaintiffs have not exhausted their administrative remedies and no justiciable controversy has been presented for determination."[3]

The plaintiffs then filed a motion for an interlocutory or preliminary injunction to restrain the defendants from entering into the proposed marketing agreement until the final determination of the issues raised in the instant proceeding. If the questions presented by the amended complaint be substantial, the disposition of the motion would require the convening of a three-judge court pursuant to Section 3 of the Act of August 24, 1937, 50 Stat. 752, U. S. C. Title 28, Section 380a, since the constitutionality of stat-

* The present writer, a Circuit Judge of the Third Judicial Circuit, was designated to the Ninth Circuit by order of Mr. Chief Justice Vinson and subsequently designated to the District Court of the United States for the District of Oregon by Senior United States Circuit Judge Garrecht. See U. S. C. Title 28, §§ 17, 18, 19, 21, 22 and 23.

[1] See the Act of August 28, 1937, 50 Stat. 874 and, by way of general information, *Oregon & Cal. R. R. Co. v. United States,* 243 U. S. 549.

[2] See the Act of July 25, 1866, c. 242, 14 Stat. 239; the Act of March 3, 1869, c. 150, 15 Stat. 340; the Act of April 10, 1869, c. 27, 16 Stat. 47; the Act of February 26, 1919, c. 47, 40 Stat. 1179; the Act of July 13, 1926, c. 897, 44 Stat. 915; and the Act of August 28, 1937, c. 876, 50 Stat. 874.

See also the Regulations of the Department of the Interior pertaining to the sale of timber from the lands here involved. 43 CFR 115.25 *et seq.*, and in particular §§ 115.26 to 115.34.

See also CFR. Cum. Supp., § 115.36 *et seq.*, and in particular §§ 115.94 to 115.113, regulations dealing with the exchange of revested and reconveyed lands, and 43 CFR, 1945 Supp., 115.2 *et seq.*, and in particular § 115.10, the section last cited relating to cooperative sustained-yield agreements.

[3] Secretary Krug and Assistant Secretary Davidson further moved the court for an order dismissing the action as to them on the ground that they are residents of the District of Columbia and the jurisdiction of district courts of the United States in actions *in personam* is limited to the district of which the defendant is an inhabitant. In the view that we take of the case it is unnecessary to discuss or dispose of this motion.

utes of the United States is attempted to be put in issue. No order pursuant to the provisions of the section last cited has been entered by the Senior United States Circuit Judge of the Ninth Circuit (or by any presiding circuit judge thereof) designating two other Judges to hear the application for an interlocutory or preliminary injunction with the Judge to whom it was presented.[4] It is fundamental that the statutory procedure for the intervention of a three-judge court under Section 380a of Title 28 should not be invoked unless a substantial constitutional question is involved. *Jameson & Co. v. Morgenthau,* 307 U. S. 171, 172. Cf. the analogy presented where the challenge to the constitutionality of a State statute under Section 266 of the Judicial Code, U. S. C. Title 28, § 380 is deemed to be unsubstantial. See *Ex parte Bransford,* 310 U. S. 354; *California Water Service Company v. Redding,* 304 U. S. 252; and *Ex parte Poresky,* 290 U. S. 30. In the case at bar the substantial constitutional question or questions raised by the individual plaintiff cannot be reached by the court for the suit must be dismissed for the reasons set out hereinafter. It follows, therefore, that the convening of a statutory three-judge court to pass on the plaintiffs' application for an interlocutory injunction in the case at bar would be contrary to the principle of law enunciated by the Supreme Court in the *Jameson* decision. The instant case therefore may be disposed of by a single judge sitting in the District Court of the United States for the District of Oregon.

The plaintiffs[5] have not stated a cause of action under the Declaratory Judgments Act, Section 274d of the Judicial Code, U. S. C. Title 28, § 400. They seek to have a projected contract, one not yet entered into, declared illegal. The Declaratory Judgments Act will not reach so far. The Act, of course, may be employed to determine the rights and liabilities of the parties to an existing contract and to procure a judicial interpretation of the provisions thereof as applicable to the parties. See *Dickinson v. General Acc. Fire & Life Assur. Corp.,* 9 Cir., 147 F. 2d 396; *Chicago Pneumatic Tool Company v. Ziegler,* 3 Cir., 151 F. 2d 784; *Sanders v. Louisville & N. R. Co.,* 6 Cir., 144 F. 2d 485. But there must be a case or controversy and a justiciable issue must be presented. Assuming a most liberal interpretation of the circumstances at bar and bearing in mind the remedial character and the congressional purpose of the Declaratory Judgments Act no justiciable controversy can be deemed to be present here. *Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123,* 5 Cir., 137 F. 2d 176, affirmed 321 U. S. 590.

Under the circumstances of the instant case, as the plaintiffs must admit, there can be no certainty that the proposed marketing agreement will ever be entered into by the United States or by Fischer Lumber Company. Final administrative action has not yet been taken and no contract or agreement has as yet been submitted to Fischer Lumber Company or, so far as appears, even finally drafted. Indeed, it is clear from the record that some of the provisions of a contemplated contract were still under consideration by the Department of the Interior on January 20, 1948, when the suit at bar was filed, for as late as January 21, 1948 an official hearing was held[6] at Eugene, Oregon, respecting a proposed marketing agreement for the Mohawk River Unit. Official administrative action respecting the substance of the contract had not been taken at the time of the commencement of the instant suit, or even at the time of the hearing before this court on May 7, 1948. We are unaware of any final action taken by the Department of the Interior to cause a contract to be executed. The term of the contract when finally submitted for execution may not be for a hundred years as the plaintiffs fear, but may be for a much shorter period. Perhaps, if the term is only three or five years, the objections voiced by the plaintiffs may disappear. The contract in its final form may contain provisions which the plaintiffs may deem to be entirely unobjectionable. The whole subject matter is one which remains conjectural until some final and conclusive action is taken by the Department of the Interior.

Congress has seen fit to confide the management and conservation of the forest lands of the United States to the Department of the Interior. The disposition of forest products from the Mohawk River Unit lies peculiarly within the purview of the Department of the Interior which, as a matter of law, is charged with its administration and conservation. The plaintiffs propose that

[4] The Honorable Claude McColloch, one of the Judges of the District Court of the United States for the District of Oregon.

[5] I will assume *arguendo* that the corporation plaintiff has *locus standi.*

[6] See 12 F. R. 8701.

this court should enjoin an administrative process not yet brought to fruition. Only when circumstances demonstrate that irreparable harm and injury will occur to an individual by reason of the application of an unconstitutional law or by the illegal application of a statute otherwise valid will a district court of the United States, sitting in equity, restrain an executing agency of the United States acting within the scope of apparent authority. This principle was enunciated by the Supreme Court of the United States in *Natural Gas Co. v. Slattery,* 302 U. S. 300, 311 and is applicable here. The possibility of irreparable harm and injury occurring to the plaintiffs in the case at bar is presently remote. If and when a marketing agreement relating to this or other forest lands of the United States within the State of Oregon, which the plaintiffs conceive to be illegal and of such a character that it will endanger their interest, is actually executed by the United States and a lumber company, it will then be an appropriate time for the plaintiffs to move to enjoin its consummation and to test its legality.

The remaining questions raised by the parties do not require discussion.

The action must be dismissed. An order to such effect will be entered.

[¶ 62,375] United States v. The New York Great Atlantic & Pacific Tea Company, Inc., et al.

In the United States Court of Appeals for the Seventh Circuit. No. 9221. October Term, 1948, January Session, 1949. February 24, 1949.

Appeal from the judgment of the District Court of the United States for the Eastern District of Illinois.

Sherman Antitrust Act

Foods Products Business—Sufficiency of Evidence—Finding of Guilt Undisturbed.— The motion of a food chain store and its subsidiaries for acquittal, made at the conclusion of all the evidence, is held to have been rightly denied by the trial court on the ground that there was substantial evidence to support a finding of guilt. The appeal court holds that the evidence shows that the defendants abused the power flowing from a system completely integrated both vertically and horizontally; that they obtained an exclusively advantageous position by controlling the terms and conditions upon which the defendants and their competitors might do business: by threatening and pressuring the supplier with boycotts, blacklists and competition; by compelling payment of seller's brokerage fees that went into the coffers as a reduction in price; by employing such marketing techniques as "direct buying" and "net buying" and otherwise eliminating competitors. The individual appeal of the defendants' public relations counsel on the grounds of lack of evidence is dismissed. Although his knowledge of the conspiracy can not be proved directly, the court holds that it can fairly be inferred from his participation.

See the Sherman Act annotations, Vol. 1, ¶ 1220.192, 1660.592.

Affirming 67 Fed. Supp. 626, reported at 1946-1947 Trade Cases ¶ 57,491.

For plaintiff-appellee: Holmes Baldridge, Richard B. O'Donnell, Horace T. Flurry, Earl A. Jinkinson.

For defendants-appellants: William M. Acton, William J. Donovan, George S. Leisure, James V. Hayes, Ralstone R. Irvine, Otto C. Doering, Jr., Breck P. McAllister, Henry H. Bond, Roy W. McDonald, Michael J. O'Neill.

Before Major, Chief Judge, and Kerner and Minton, Circuit Judges.

[*Grounds of Appeal*]

Minton, Circuit Judge: This case comes to us on appeal from the Eastern District of Illinois. The defendant The New York Great Atlantic & Pacific Tea Company, Inc., herein called A&P, several of its subsidiary and affiliated companies, and certain officers of the A&P chain were found guilty by the District Court of a conspiracy to restrain and to monopolize trade, in violation of Sections 1 and 2 of the Sherman Act. The defendants Carl Byoir, the pub-

lic relations counsel of A&P, and Business Organization, Inc., a corporation through which Byoir conducted such public relations, were also found guilty. The last two defendants have filed separate briefs, while all the other defendants have filed a joint brief. The appeals, however, are separate appeals. We will consider first the appeal of all the defendants except Byoir and Business Organization, Inc.

The first question raised by these defendants is whether the alleged standard of proof employed by the District Court was erroneous. The District Court filed a memorandum opinion in the case, which is published in 67 Fed. Supp. 626-680. In that memorandum the District Court, after describing the general position of the Government, stated that the Government insisted that under the evidence it had proved beyond all reasonable doubt that the defendants were guilty as charged, "while defendants insist that proper analysis of the evidence can lead only to a conviction that they never at any time intended to violate the law"; that their studied policy was to obey the law, to meet competition fairly, and to sell their merchandise cheaply at a low profit. After stating the contentions of the parties, the District Court said: "It is obvious, therefore, that determination of which is the correct view, or a reconciliation of one with the other, involves the issue of whether the evidence points inevitably, beyond all reasonable doubt, to guilt, or whether it discloses such facts as are consistent only with innocence." This is the statement complained of by the defendants and which they assert shows that the District Court employed an erroneous standard of proof.

[*Sufficiency of Evidence*]

This contention of the defendants seems quite unsubstantial to us. As we understand Judge Lindley, he was not laying down any *standard of proof*. He was simply stating that the *issue* was whether the defendants were guilty or innocent as the parties had respectively contended. We do not think Judge Lindley was attempting to instruct himself as to the burden of proof in a criminal case and did so erroneously. Especially when we remember what we know judicially, that Judge Lindley is one of the ablest of trial judges, with more than twenty-five years of experience. He was not talking about standard of proof; he was talking about the contention or issue between the parties of guilt on the one hand, and the contention of innocence on the other. Undoubtedly, the attorneys for the defendants in the trial court were contending, as they did here, for the complete innocence of the defendants. When the statement complained of is considered in its context, we think it is not subject to the attack leveled at it by the defendants. Furthermore, even if we were to concede that Judge Lindley was discussing standards of proof, an examination of his entire memorandum clearly indicates that he applied the correct standard, namely, that the defendants could not be convicted unless their guilt was established by the evidence beyond all reasonable doubt.

The most important question presented in this case arises upon the motion of the defendants for acquittal, made at the conclusion of all the evidence. This raises the question as to the sufficiency of the evidence to support the finding of guilt made by the court, which tried the case without a jury. It needs the citation of no authority to support the proposition that if there is any substantial evidence to support the court's finding, it must be sustained. In this consideration, we look only to the evidence which is favorable to the court's finding and such reasonable inferences as may be drawn from the mere facts proved. Furthermore, we consider the case here as a whole and not piecemeal. If viewing the evidence as a whole there emerges an overall pattern of guilt as charged, the finding must be sustained.

This is a charge of a conspiracy to restrain trade and to monopolize. Some of the things done by the defendants, when examined and considered separately may be perfectly legal, but when used to promote or further a conspiracy to do an unlawful thing, that which when considered alone is lawful, when used to further the conspiracy becomes unlawful. *American Tobacco Co. v. U. S.*, 328 U. S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575; *Associated Press v. United States*, 326 U. S. 1, 14, 65 S. Ct. 1416, 89 L. Ed. 2013.

The issue is whether there is substantial evidence to show a conspiracy by the defendants to restrain and monopolize trade in commerce in food and food products by controlling the terms and conditions upon which the defendants and their competitors might do business and by oppressing com-

petitors through the abuse of the defendants' mass buying and selling power. The Government insists that this case is not an attack upon A&P because of its size or integration and the power that may rightly go with such size and integration, but it is an attack upon the abuse of that power.

[*Review of Evidence*]

There is substantial evidence in this voluminous record to show the following. The A&P system is comprised of fourteen corporations, twelve of which were named defendants and three of which defendants were ultimately acquitted. The system is completely integrated, both horizontally and vertically. A&P is engaged in the food industry as buyer, manufacturer, processor, broker, and retailer. It operates 5,800 retail stores in forty states and the District of Columbia, and thirty-seven warehouses serve these stores.

The top holding company is the defendant A&P, a New York corporation. The George H. Hartford Trust, of which John A. and George L. Hartford are trustees, owns approximately ninety-nine per cent of A&P. This top holding company owns and controls the whole hierarchy, with very tight control in the hands of the Hartfords. The wholesale warehouses and retail operation of the A&P system are divided up into divisions, units, and stores. The division presidents control the policy of the system, but the Hartfords control the appointment of the division presidents. The Hartfords sit with them in the quarterly division policy making meetings and are a dominating influence at these meetings. On the whole, it is a well disciplined organization, from top to bottom. Ultimate control of buying, with unimportant exceptions, is centralized in headquarters of A&P. In this way, A&P controls the buying policy for the entire system and hence the purchase price of its merchandise. This centralized control also gives A&P control of such things as advertising allowances and label and bag allowances, which are related to the buying.

The buying policy of A&P was to so use its power as to get a lower price on its merchandise than that obtained by its competitors. This policy, as implemented by "direct buying," was referred to by the top officers of A&P as a two-price level, the lower for A&P and the higher for its competitors. It used its large buying power to coerce suppliers to sell to it at a lower price than to its competitors on the threat that it would place such suppliers on its private blacklist if they did not conform, or that A&P would go into the manufacturing business in competition with the recalcitrant suppliers.

The following are some of the techniques used by A&P to get a lower price than its competitors. As early as about 1925, A&P sent its buyers into the field to buy merchandise for it under strict control of headquarters. These buyers were on A&P's payroll and were operating out of its establishments, in offices mostly under their individual names. Their primary object was to get the merchandise for A&P as cheaply as they could, and for this the supplier was compelled, if he obtained the business, to pay A&P a seller's brokerage of from one to five per cent. These so-called brokerage fees went into the coffers of A&P as a further reduction in price. Except on brokerage received from meat packers, which was outlawed in 1934,[1] this system continued until 1936, when it was made illegal by the Robinson-Patman Act. In 1935, gross revenues from this source amounted to $2,500,000.

After 1936, the buyers, instead of getting credit for alleged brokerage, induced their suppliers to reduce their price further to A&P by the amount of the brokerage fee. Thus the allowance became a markdown of the price on the invoice. This was called net buying. When this was outlawed by a decision of the Third Circuit upholding a cease and desist order of the Federal Trade Commission directed at this practice,[2] A&P adopted a policy of direct buying. It thereafter would buy from no one who sold through a broker. Not only would it not buy from suppliers who offered to sell to it through brokers; it would not buy from a supplier who sold to anyone else through brokers. This clearly affected the business of brokers, who resisted as best they could, and as one of the defendant officers said, "these brokers are dieing *(sic)* hard." This policy also affected the trade that was unable to buy directly. Suppliers were in effect told that if they did not sell

[1] *Trunz Pork Stores v. Wallace*, 70 F. 2d 688.

[2] *Great Atlantic & Pacific Tea Co. v. Federal Trade Com'n*, 106 F. 2d 667.

direct to all customers, A&P would withdraw its patronage. This policy of direct buying was broadcast to all the trade in a national press release by A&P, and A&P continued to get its usual lower price, which was supposed to be justified by cost savings in such direct buying and because A&P bought in large quantities. This system continued until the trial.

A substantial amount of the discounts A&P received rarely bore a relationship to cost savings. A&P got the largest discount on the basis of "large quantities" purchased, but as pointed out by A&P's attorney, the use of the expression "large quantities" was "definitely misleading." The large discounts A&P got were not for taking large quantities at one time but were based on a large volume purchased over a period of time and delivered in many small shipments. The defendants' attorneys pointed out to them that, "A large volume ordered out in many small shipments rarely involves any savings in and of itself * * *." Whatever the system used or by whatever name designated, A&P always wound up with a buying price advantage. This price advantage given A&P by the suppliers was, it is fairly inferable, not "twice blessed" like the quality of mercy that "droppeth as the gentle rain from heaven." It did not bless "him that gives and him that takes." Only A&P was blessed, and the supplier had to make his profit out of his other customers at higher prices, which were passed on to the competition A&P met in the retail field.

One cannot escape the conclusion on the very substantial evidence here, as one follows the devious manipulations of A&P to get price advantages, that it succeeded in obtaining preferential discounts not by force of its large purchasing power and the buying advantage which goes therewith, but through its abuse of that power by the threats to boycott suppliers and place them on its individual blacklist, and by threats to go into the manufacturing and processing business itself, since it already possessed a considerable establishment and experience that would enable it to get quickly and successfully into such business if a recalcitrant supplier, processor, or manufacturer did not yield. The A&P organization was urged to keep secret whatever preferences it received. These predatory discounts and other preferences amounted to 22.15% of A&P's total profits in 1939; 22.47% in 1940; and 24.59% in 1941.

The influence of this ruthless force in the food buying field was also used to compel suppliers to discontinue practices in their business which might be detrimental to A&P. For instance, some A&P suppliers were making store door deliveries to A&P competitors. Since A&P had to deliver to its own store doors from the warehouses it maintained, it was unable to get the full benefit of its warehousing policy if the suppliers continued the store door deliveries. A&P forced some manufacturers to "widen the spread" between store door deliveries and warehouse deliveries and thus perpetuated its purchasing advantage. Also, it forced other suppliers to discontinue merchandising by aid of premiums given the customers. A&P did not want to be bothered with the premium details, and it did not want its competitors to have the advantage thereof, so it forced many suppliers to give up the premium aid to merchandising.

To do their buying of fruits, vegetables, and produce, A&P set up a wholly-owned subsidiary, the Atlantic Commission Company, herein referred to as ACCO. It acted as buyer for A&P and selling and buying broker for the rest of the trade, and for this latter service, ACCO received the usual broker's fees, which went into the pocket of A&P, since the latter was the sole owner of ACCO. ACCO was the largest single operator in its field. For a time it took brokerage from the seller for the merchandise it sold to A&P. These funds went, of course, to A&P. That system was abandoned. But the technique used by A&P in the purchase of merchandise other than fresh fruits, vegetables, and produce, in order to receive preferential treatment as to price, was used by ACCO in its field and with like success. And due to the fact that ACCO was dealing in perishable products, it used other techniques as well.

One of them was termed cash buying. Cash was paid at point of shipment. Such buying was always on a lower basis than term buying because cash buyers put up the money at once and took the merchandise with full assumption of the risks thereafter, while term buyers paid on delivery and the risks up to that point were borne by the shipper. This term buying was at a higher rate. What A&P did through ACCO was to get the cash buying rate without assuming the risks between point of shipment and destination. Outside of paying cash for

the merchandise, none of the other reasons for a lower price on cash sales was present, as the shipper had to guarantee the arrival at destination of the merchandise as U. S. #1 Grade. Purchases on this basis were not made by ACCO for buyers other than A&P.

Another advantage was obtained by A&P through ACCO's purchases of A&P's requirements on the "sales arrival" basis. Under this arrangement, ACCO did not obligate itself to purchase or to pay a stated price until the goods arrived at their destination. On arrival ACCO would wire the price offer to the shipper, on a take it or leave it basis. "Sales arrival" purchases were made when falling markets were anticipated and compelled the shipper to assume the risk of price change from date of shipment to date of arrival. If the market slumped in the meantime, A&P was protected and the shipper took the loss or had to look for another buyer. When the perishability of the product and costs of diversion to another market, when such diversion was necessary, are considered, the superiority of ACCO's and A&P's bargaining position against the shipper becomes apparent. ACCO's aggressiveness and insistence upon its prerogative to fix prices unilaterally are evidenced by a statement of the defendant Baum, an executive officer and director of ACCO:

> "* * * it will be necessary for your shippers to accept the price we place on this merchandise at the time of arrival and discontinue this bartering over 5¢ differential and if the shippers find that this procedure is not in accordance with their ideas or they are not given a fair deal on the average over a period of time then of course it is their privilege to discontinue these arrival sales or price arrivals."

ACCO occupied the dual position of buyer for A&P and seller for the purchaser. This dual relationship was known to both parties. This may have been legal between ACCO and its client, but it was all to the advantage of A&P. Where ACCO acted as buyer for A&P, it might at the same time be acting as seller to the trade. In this kind of a transaction, ACCO had the opportunity to choose for A&P the choicest produce, and as buyer obtain the produce for A&P at the lowest price in the market. The balance, which might be and often was an inferior grade, it sold to the trade; and in selling this produce, it always got the highest price it could get in the market. Because of the preferential discounts which A&P enjoyed in this field, it got a lower price than others and a higher quality of merchandise. When ACCO purchased in the open market for A&P, even though it paid the market price, it always came out with an advantage, not only in the quality of merchandise but in price. Suppose an item was selling in the market at 100. ACCO could buy it for A&P and have its choice of the quality at 95. The balance of the trade could buy at 100 and pay ACCO a 5% brokerage. Thus, the price to A&P was 95 and to A&P's competitors 105.

ACCO was able to sell carloads of produce to jobbers at the carload price, acting then as the jobber's buying broker, with an agreement that it might buy back less than carload lot shipments for A&P at the same price the jobber had paid for the carload. Thus, A&P got l.c.l. shipments at carload price, and the jobber passed on the loss to A&P's competitors in higher prices. ACCO had another arrangement whereby it disposed of carloads to jobbers, earning a brokerage thereby, and simultaneously repurchased l.c.l. lots as buying agent for A&P. The sellers of the l.c.l. shipments were jobbers, including those who had originally procured the produce from ACCO. It was ACCO's established practice to give its l.c.l. business to jobbers who gave their carload business to A&P, price and quality being equal. This repurchase inducement was a very effective weapon in the hands of ACCO. It could be used to expand its carload business with jobbers almost at will, since the jobbers had to purchase from ACCO in order to hold its l.c.l. patronage. As indicative of the coercive power of ACCO in the trade, it was able in some instances to compel a jobber who had already bought a shipment through a broker and incurred or paid brokerage thereon, to buy it also through ACCO and pay it brokerage too. This brokerage, of course, went to A&P. This was the price sometimes exacted by ACCO for its goodwill, and the price was added to A&P's competitors' costs, and the brokerage went to A&P.

ACCO also sought to control some cooperatives by controlling their managers, and there is evidence that ACCO obtained

and benefited from such control to some extent.

ACCO also took merchandise on consignment. It always had the advantage of choice as to whether it would take the shipment for A&P. If it took it for A&P, the preferential price was obtained because it was A&P, and in its dual capacity of representing both buyer and seller, its conflicting obligations at least put ACCO in a position to favor A&P. If the consignment went to the trade, ACCO got a brokerage and then representing only the seller, it is a safe inference that it got all it possibly could for the merchandise. The result was a top price for the merchandise, and brokerage which went to A&P.

From this evidence, we see that ACCO collected brokerage from the trade, which increased the price to A&P's competitors, and the brokerage went into A&P's coffers to increase its competitive advantage. Secondly, ACCO got the best quality for A&P and passed on the inferior to A&P's competitors and, of course, ACCO got preferential treatment as to prices under one scheme or another. ACCO's profits constituted 5.08% of A&P's total profit in 1939; 5.62% in 1940; and 7.16% in 1941.

Closely related to the policy and the purpose to establish a two-price level by the abuse of its power and position, A&P by the same methods forced its suppliers to give it advertising and space allowances that bore no relation to the cost of the service rendered in the matter of advertising or display of merchandise in A&P's stores. Indeed, the evidence showed that in many instances, if not uniformly, token performance was all that was rendered the suppliers who ostensibly were seeking point of sale advertising. For instance, newspaper space advertising allowances were contracted for, not alone at the cost of the advertising but at the cost plus one hundred per cent to A&P. In its contracts with suppliers, A&P would contract for a percentage allowance and agree in the vaguest terms that it would display the suppliers' products on the shelves in just such fashion as it would ordinarily be expected to display the goods in the usual course of merchandising. For this pretended and overpaid service, certain percentage allowances on the commodity price were allowed A&P. It was its policy, and a usually successful one, to get a larger allowance of this kind than its competitors. If it did not get the allowance it sought, the threats to take away the business of A&P were used and brought the supplier into line with one notable exception—the soap manufacturers. Procter & Gamble, Lever Bros., and Colgate Palmolive Peet Co. gave no more advantage to A&P than to other customers by way of advertising and display allowances. A&P expressed its displeasure at the policy of the soap manufacturers, but their position in the trade was invulnerable to A&P's policy. A&P's general policy of obtaining an advantage is highlighted by this failure in the soap industry. The profits from these allowances were substantial and amounted in 1939 to 5.93% of A&P's total profit; in 1940 to 6.23%; and in 1941 to 5.46%.

Another but smaller item was the bag and label allowances. A&P furnished bags and labels to processors and manufacturers, for which it received an allowance. For instance, in the canning industry, the standard allowance for labels was $1.50 per thousand, but A&P insisted upon and received $2 per thousand. It was claimed that A&P's labels were more attractive and expensive. However that may be, the fact remains that A&P was not in the label business any more than it was in the advertising business, but it managed in both to realize a substantial difference between the cost to it and what it realized out of the transaction from other suppliers. Everything was grist to the mill that was grinding down prices to A&P to enable it to maintain the two-price level to its advantage. The bag and label allowances amounted in 1939 to .83% of the total profit of A&P; in 1940 to .75%; and in 1941 to .38%.

As we have indicated, A&P owned and controlled, through the vertical integration of its system, certain corporations that were engaged in the manufacturing and processing of merchandise for sale by A&P in its stores. For instance, the defendant The Quaker Maid Company, Inc., made many items sold in A&P retail stores. The defendant White House Milk Company, Inc., manufactured canned milk. The defendant Nakat Packing Corporation canned fish. These companies were satellites of the A&P system. Their products were sold only to A&P stores and were invoiced at a markup above the cost of production.

These corporations were tools in the hands of A&P, used and useful in maintaining the two-price level to enable it to maintain its position of dominance in the retail food business. Whatever the spread between cost to these defendants in processsing and manufacturing and what they invoiced the goods to A&P for, was credited on the books to A&P. This, of course, was a bookkeeping transaction between A&P and its satellites and was a paper profit which eventually went to reduce the cost of the products to the retail stores when allocated to their credit on a fair method of allocation based upon use employed by the retail stores. In fact, all the paper profits of these manufacturing and processing satellites, together with the real profits of ACCO, the preferential discounts and buying allowances, the advertising allowances, the bag and label allowances, and certain other profits and gains throughout the system, were all kept track of by a system of what the defendants designate statistical accounting, for their own guidance to enable them to determine what the satellites, departments within the system as well as the retail stores, were doing. These accumulated profits and allowances at headquarters amounted in 1939 to 93.69% of A&P's total profits; in 1940 to 90.63%; and in 1941 to 89.02%. The difference between these accumulated profits and allowances and the total profits left the profits shown by the retail stores to be 6.31% in 1939; 9.37% in 1940; and 10.98% in 1941.

No question is raised about the fairness of the method of allocation of the accumulated profits and allowances. When made, they have the effect of reducing to the retail stores the cost of merchandise sold. It is the predatory method through which this accumulation of profits and allowances is obtained and not the method of allocation or statistical handling of them that is challenged by the Government. With this large fund accumulated at the buying and supplying level and allocated to the advantage of low cost of merchandise to the retail or selling level, A&P's enormous power or advantage over competitors emerges more clearly when we consider the evidence on the retail level. Here the price advantage A&P has enjoyed through the coercive use of its power enables it to undersell its competitors and to pick and choose the locations in which the price advantage shall be used. For instance, if a division, unit, or store is selected for attention, whether on the basis of its experience historically in that community or some other basis sufficient to the policy makers of A&P, these policy makers have only to give their attention to gross profit percentages. If Area X is having a tough experience competitionwise, or the area looks prospective in which to increase the volume of business, the gross profit percentage in this area is lowered. This lowers the price at which goods may be sold and the volume increases at the expense of somebody. Sometimes the gross profit rate is fixed so low that the store runs below the cost of operation, even with all the advantage derived by the store in reduction of the cost of its merchandise occasioned by the headquarters' allocation of its predatory profits and accumulations. When the gross profit rate is reduced in Area X, it is an almost irresistible conclusion that A&P had the power to compensate for any possible decline in net profits by raising the gross profit rate and retail prices in Area Y, where it was in a competitive position to do so. The record is replete with instances of deliberate reductions of gross profit rates in selected areas. Thus Area Y, at the desire of the policy makers of A&P, can be brought to aid in the struggle in the Area X, which in numerous instances, as the record shows, sustained heavy net losses for periods extending over a substantial number of consecutive years. There must inevitably be a compensation somewhere in the system for a loss somewhere else, as the overall policy of the company is to earn $7 per share per annum on its stock.

On this record it seems apparent that the goal of the conspiracy to establish a two-price level at the buying level, which enables A&P to meet its competitors with an enormous advantage at the retail level, has been realized.

When Congress enacted the Sherman Act it did not undertake to regulate business in commerce, which so often leads to price or rate fixing. Just a few years before the Sherman Act was enacted, Congress passed the Interstate Commerce Act whereby it did fix rates through an instrumentality of its own creation and within limits which Congress prescribed. The Sherman Act sought to avoid, not only for reasons of policy but for considerations of power, any regulation of business not in

the category with railroads, which were supposed to be affected with the public interest, and to establish a punitive or corrective system for other business in commerce. Congress evidently believed that if competition were preserved in this field, free enterprise would regulate itself. The purpose of Congress was to see to it that competition was not destroyed. To this end, in the most comprehensive and sensitive terms, Congress provided among other things that a conspiracy to restrain trade in commerce and to monopolize it in part should be a criminal offense. That is the offense of which these defendants stand convicted.

No court has yet said that the accumulation and use of great power is unlawful *per se*. Bigness is no crime, although "size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse." *United States v. Paramount Pictures*, 334 U. S. 131, 174, 68 S. Ct. 915, 92 L. Ed. 882. That there was an accumulation of great power by A&P cannot be denied. How it used that power is the question. When A&P did not get the preferential discount or allowance it demanded, it did not simply exercise its right to refuse to contract with the supplier. It went further and served notice on the supplier that if that supplier did not meet the price dictated by A&P, not only would the supplier lose the business at the moment under negotiation, but it would be put upon the unsatisfactory list or private blacklist of A&P and could expect no more business from the latter. This was a boycott and in and of itself is a violation of the Sherman Act. *Schine Theatres v. United States*, 334 U. S. 110, 116, 68 S. Ct. 947, 92 L. Ed. 871; *United States v. Griffith*, 334 U. S. 100, 108-109, 68 S. Ct. 941, 92 L. Ed. 864; *Fashion Guild v. Trade Comm'n*, 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed. 949; *Binderup v. Pathe Exchange*, 263 U. S. 291, 311, 44 S. Ct. 96, 68 L. Ed. 308.

While it is not necessary to constitute a violation of Sections 1 and 2 of the Sherman Act that a showing be made that competitors were excluded by the use of monopoly power, *American Tobacco Co. v. U. S., supra*, at p. 809, there is evidence in this record of how some local grocers were quickly eliminated under the lethal competition put upon them by A&P when armed with its monopoly power. As the evidence showed in this case, A&P received quantity discounts that bore no relation to any cost savings to the supplier. While A&P tried to rig up various contracts with its suppliers that would give the suppliers a semblance of compliance with the Robinson-Patman Act, by colorably relating the discriminatory preferences allowed to cost savings, the primary consideration with A&P seemed to be to get the discounts, lawfully, if possible, but to get them at all events. The conclusion is inescapable on this record that A&P was encouraging its suppliers to violate the Robinson-Patman Act. The unlawful discounts were to be received by A&P as its due, regardless. Whether or not A&P in inducing and knowingly receiving these price discriminations was in violation of the Robinson-Patman Act, as its suppliers certainly were, the advantage which A&P thereby obtained from its competitors is an unlawful restraint in itself. *United States v. Paramount Pictures, supra*, pp. 159-160. The purpose of these unlawful preferences and advantages was to carry out the avowed policy of A&P to maintain this two-price level which could not help but restrain trade and tend toward monopoly. Furthermore, to obtain these preferences, pressure was put on suppliers not by the use but by the abuse of A&P's tremendous buying power. The means as well as the end were unlawful. *United States v. Griffith, supra*, pp. 104-107; *Schine Theatres v. United States, supra*, pp. 117-118. With the concessions on the buying level acquired by the predatory application of its massed purchasing power, A&P was enabled to pressure its competitors on the selling level even to the extent of selling below cost and making up the loss in areas where competitive conditions were more favorable. The inevitable consequence of this whole business pattern is to create a chain reaction of ever-increasing selling volume and ever-increasing requirements and hence purchasing power for A&P, and for its competitors hardships not produced by competitive forces, and, conceivably, ultimate extinction. Under all the cases, this is a result which Sections 1 and 2 of the Sherman Act were designed to circumvent.

[*Role of Individual Employee in Conspiracy*]

The individual defendants are so high in the heirarchy of the A&P system that the policy of A&P, that is, the conspiracy here charged, was fully and well known to all

of them, and they cooperated with each other and with the satellite corporations in carrying out the policy. The satellite corporations were officered and controlled by interlocking directorates composed largely of these individual defendants. What these individuals knew and did, their corporations knew and did. Satellites like The Quaker Maid Company, Inc., Nakat Packing Corporation, and White House Milk Company, Inc., were mere puppets of the individual defendants. The individual defendants were the corporations, and the corporations were in a very real sense the individuals. One cannot disassociate the corporations from the individual defendants, who largely made up the interlocking directorates. These corporate satellites were a part and parcel of the economic power wielded by the other defendants to further the cause of the conspiracy. Their activities considered in vacuo, if possible, may not be unlawful in themselves, but when used to further the conspiracy become illegal. *American Tobacco Co. v. U. S., supra,* p. 809; *Bigelow v. R. K. O. Radio Pictures,* 162 F. 2d 520, 523. See *White Bear Theatre Corp. v. State Theatre Corp.,* 129 F. 2d 600.

We turn now to the defendants' contention concerning certain evidence offered by the defendants and excluded by the District Court. The defendants offered evidence that it was the custom in the trade for retailers to seek and suppliers to offer the same type of concessions obtained by the defendants, without attempting to show that the circumstances and methods by which these concessions were obtained were the same. The court did not err in excluding this proffered evidence. That others engaged in the same practices as the defendants certainly would not exonerate the defendants or tend to disprove their guilt. Certainly trade customs and practices not shown to have been practiced in the same manner as the defendants were shown to have practiced them would not be competent to show that the defendants' practices were not illegal. *United States v. General Motors Corporation,* 121 F. 2d 376, 406; *Hills Bros. v. Federal Trade Commission,* 9 F. 2d 481, 484-485.

The District Court also excluded evidence of the defendants' attempts to comply with the Robinson-Patman Act and with the cease and desist order of the Federal Trade Commission.[3] There are several reasons why this evidence was properly rejected. In the first place, the defendants were not charged here with the violation of either the Robinson-Patman Act or the cease and desist order. The charges against the defendants were not met by showing good faith attempts to comply with other laws. Secondly, the evidence was only cumulative, as the record is replete with admitted evidence of like kind which the defendants were permitted to introduce on the issue of whether the defendants had forced preferential concessions, and whether in the dealings of ACCO the defendants were treated like others. Furthermore, the evidence offered and rejected attempted to show compliance with the Robinson-Patman Act and the cease and desist order by statements of some of the defendants as to how they had intended and endeavored to obey the same. As such, they were merely self-serving declarations, and for this reason no error was committed in excluding them. *American Tobacco Co. v. United States,* 147 F. 2d 93, 120, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575.

At best, these were offers to prove collateral matters, and the trial court, as to these, had a broad discretion. *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 230-231, 60 S. Ct. 811, 84 L. Ed. 1129. There is no showing here of an abuse of discretion by the District Court. We could hardly imagine such a showing being made when we consider the wide range the evidence was permitted to take in this trial, which consumed several months. The objection to the exclusion of collateral issues "is a purely practical one, a concession to the shortness of life."[4]

We turn, finally, to the contention of the defendants Byoir and Business Organization, Inc., that there is no substantial evidence that they were parties to and furthered the illegal objectives of A&P's overall conspiracy to restrain and monopolize trade in commerce. These two defendants are dealt with together, for there is no question that Business Organizations, Inc., which was organized to promote the public relations of A&P, was Byoir's alter ego, Byoir in the habiliments of the corporate action, and chargeable with Byoir's words and deeds.

[3] *Great Atlantic & Pacific Tea Co. v. Federal Trade Com'n, supra,* note 2.

[4] Justice Holmes in *Reeve v. Dennett,* 145 Mass. 23, 28, 11 N. E. 938, 944.

The evidence shows that Byoir was thoroughly familiar with the policies of A&P. Byoir is no babe in the woods, likely not to understand what goes on around him. Not only did he understand, but under the contract of his corporate puppet with A&P it was his duty to counsel, guide, and direct the policy making officers of his client. This obligation he faithfully performed even to the extent of initiating policy and personally participating in its adoption and implementation. The most glaring instance of this disclosed in the record is Byoir's role in the organization and direction during its brief life of Super-Coop, a cooperative of growers and shippers of fresh fruits and vegetables.

It will serve no good purpose to describe the origin and operation of Super-Coop. Suffice it to say that it was formed to secure a larger and more effective control of the shippers by ACCO, A&P's operator in the fruit and vegetable field. From this control ACCO was to benefit in the form of a lower expense rate resulting from the larger volume handled, a greater availability in quantity and selection of supplies for A&P, and an organization readily useful as a propaganda agency to fight A&P's enemies; while the shippers were to receive as their quid pro quo a share of ACCO's profits. The founding fathers of the plan were ACCO's Baum, Byoir, and John Hartford, although when Hartford expressed doubt as to its legality, it was camouflaged to make it appear as though the shippers were the moving force in the organization. There can be no doubt that ACCO actively promoted and launched Super-Coop, and that Byoir's skillful hand was always present and directing. It was Byoir who expressed willingness to assist financially in setting it up; who attempted to secure the Department of Agriculture's approval thereof; who sought to disguise ACCO's sponsorship; and who authored a statement of its policy. Stripped of all non-essentials, Super-Coop is revealed as an attempt by ACCO to induce the movement of all fruits and vegetables through it. It was abandoned by ACCO precisely because of the fear that it was too apparent an attempt to monopolize the fresh fruit and vegetable industry. There can be no doubt on this record that the defendant Byoir had full knowledge of the monopolistic purpose of Super-Coop and of A&P's overall conspiracy which it was intended to further, and such knowledge notwithstanding, took a large personal part in its formation and development.

The defendant Byoir argues that even if the conspiracy did exist, which he does not admit, that he did not become a member of it by rendering services to the conspirators, citing *Di Bonaventura v. United States,* 15 F. 2d 494; *United States v. Dellaro,* 99 F. 2d 781; *United States v. Dubrin,* 93 F. 2d 499; and *United States v. Falcone,* 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128. These authorities indicate the rule to be as the defendant Byoir contends, but the rule is against the defendant Byoir if he knew of the conspiracy. Of course, there is no direct evidence that Byoir knew of the conspiracy. There was no formal agreement. The conspiracy is spelled out by what the defendants said and did. But it is a fairly conclusive inference from the evidence in this record that Byoir, who testified he was familiar with A&P's policies, could not have been ignorant of the thread of this conspiracy, which runs through the whole fabric of A&P's dealings, especially when consideration is given to Byoir's damaging participation in the direction of and his cooperation with ACCO in setting up Super-Coop. We think the evidence and the reasonable inferences to be drawn therefrom are sufficient to show that Byoir and Business Organization, Inc., with knowledge of the conspiracy, cooperated to further it.

On the whole record, we think that there is substantial evidence to support the finding as to the guilt of all the defendants. The other errors complained of have all been considered and found unsubstantial, and the judgment is affirmed.

[¶ 62,376] Opinion of the Attorney General of New York.

Addressed to Robert E. Dineen, Superintendent of Insurance, by Nathaniel L. Goldstein, Attorney General. February 24, 1949.

New York Antitrust Act

Insurance Business—Acquisition Cost Conferences—Fixing Price of Commission to Broker.—Private combinations of insurance companies effected by Acquisition Cost Conferences, which are convened to fix the price of brokerage commissions, contravene the Donnelly Act since price restrictions thereby agreed upon operate largely and directly upon the ultimate price of insurance protection and limit the price of services of agents by denying them bargaining power. Private combinations so intimately concerned with the price structure are illegal *per se* and basically contrary to the statutory prohibitions against combinations in restraint of trade. The rules of the Conferences placing a quota upon general, regional and district agents, while not so plainly subject to the rule of illegality *per se,* are subject to the prohibitions of the Donnelly Act to the extent that they impose unreasonable restraint upon the free exercise of essential activities in the business.

See the New York Antitrust Act annotations, Vol. 2, ¶ 8615.12.

[*Syllabi*]

General Business Law, Article 22 (The Donnelly Act), Section 340; Insurance Law, Article VIII, Sections 180, 182, proposed Section 182-a (S. 1977, A. 2215); 15 U. S. C. A. 1011-1014 (Public Law 15, The McCarran Act)—Acquisition Cost Conferences in casualty and fidelity and surety fields of insurance—Purpose of Donnelly Act amendment to complete state regulation of concerted activities in insurance so as to render Federal law inapplicable—Private commission-fixing agreements among insurers illegal restraint of trade if not regulated under Insurance Law, Article VIII—Article VIII presently contains no authorization for combinations to fix commissions of agents and brokers — Present private regulation by agreement illegal—If desirable or necessary to standardize commissions through agreements, express legislative authorization necessary with accompanying statutory safeguards.

The extension of the Donnelly Act to insurance in 1948 was designed to furnish complete State regulation of restrictive combinations in that business for the purpose of excluding application of the Sherman and other Federal enactments under the terms of the McCarran Act passed by Congress after the decision in the *South-Eastern Underwriters* case (322 U. S. 533). For that purpose complete and effective regulation is necessary.

The Acquisition Cost Conferences now existing are private agreements among insurance companies fixing rate of agents' and brokers' commissions and restricting the number of certain classes of producers. Such agreements are now violations of the Donnelly Act unless regulated under Article VIII of the Insurance Law. Article VIII neither authorizes nor regulates such agreements. The Superintendent has no control over amounts of commissions to be paid although he may control premium charges to the public as filed by insurers or through rating organizations. The service and advisory organizations sanctioned by Article VIII do not contemplate commission-fixing combinations. Any combination to fix the price of producers' services is, therefore, illegal under the Donnelly Act.

If stabilization of commissions through company agreement is desirable or necessary, express legislative authorization is essential. To constitute proper regulation, excluding federal intervention, such authorization must provide restrictions and supervision safeguarding interests of public and all concerned. Right of agents and brokers to deal collectively and be heard seems to be necessary requirement as provided in pending legislation. Unless some such measure is enacted, company agreements limiting commissions are unlawful.

[*Background*]

You have asked my opinion upon the present-day status of the Acquisition Cost Conferences which have functioned for many years in the fidelity and surety and casualty fields of the insurance business. Your request presents a more particular phase of the general subject dealt with in my opinion to you of February 10, 1947 (1947 Atty.

Gen. 200), and, in the light of subsequent changes made and proposed in the State statutes governing insurance, requires an answer to a problem there touched upon, viz., concerted action by insurers to fix agents' commissions (see p. 209).

The revelation in 1944 of congressional power in the field of insurance when conducted interstate (*U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533) left the States no longer the exclusive arbiters of whether and to what extent there should be regulation. In the absence of State action the business was no longer free from any statutory prohibition aimed at restrictive and monopolistic combinations. Application of the Sherman Anti-trust Act was specifically upheld in the *South-Eastern* decision. There followed shortly the McCarran Act (15 U. S. C. A. 1011-1014) by which Congress acted to preserve continued State power to regulate and tax the insurance business free from any barrier which might otherwise be imposed by the silence of Congress or by acts not specifically relating to insurance. This did not mean, however, that in the absence of State action the business was again unhampered in its ability to enter into combinations and engage upon concerted activities. The Sherman, Clayton, and Federal Trade Commission Acts, after a moratorium period ending June 30, 1948, were expressly made applicable to the extent the business "is not regulated by state law".

It was against this background, more fully considered in my prior opinion, that you asked whether the State restraint of trade statute (the Donnelly Act, General Business Law, Art. 22) applied to the business of insurance, and the conclusion reached was that as it had developed and was then framed, that statute did not apply. That opinion stressed the necessity of complete and effective regulation if the State was to avoid application of Federal laws and the intervention of the Federal government to enforce them. It strongly urged enactment of measures expressly aimed at private combinations in the insurance business of a restrictive and monopolistic character. Subsequently, pursuant to the recommendation of the Joint Legislative Commmittee on Insurance Rates and Regulation (Leg. Doc. [1948] No. 46, p. 34), the Donnelly Act was amended so as to apply specifically to all those engaged in the business of insurance "to the extent not regulated by the provisions of article eight of the insurance law" (L. 1948, c. 502). Just as the McCarran Act excepted matters "regulated" by state law from the prohibitory provisions of Federal acts otherwise applicable, so the general prohibition of the state law designed to round out the State's system of supervision contained an exception of matters regulated by Article VIII of the Insurance Law. The Joint Legislative Committee explained the exclusion on the ground that the matters so excepted "are adequately regulated by the Superintendent of Insurance" (Report, p. 35). At the same time, acting upon the "invitation" of the McCarran Act for the immediate purpose of continuing the policy of the State with respect to rate-making and regulation (Report, p. 53), amendments of Article VIII were proposed and adopted (L. 1948, c. 618).

The Joint Legislative Committee was clearly conscious of the invitation to the States contained in the McCarran Act "to deal affirmatively and effectively with those actions which might otherwise be the subject of Federal regulation" (Report, p. 15). Indeed the continued regulation of the insurance business by the States, allowed by Congress as being in the public interest, was clearly conditioned upon State action, as the Committee observed, and the promise of Federal intervention in default thereof was plainly made.

The congressional debates preceding passage of the McCarran Act in its final form, to which there will be occasion to refer more fully hereinafter, emphasized the urgency of complete regulation by the States. As stated by the then Senator Barkley, the McCarran Act was not adopted so as to enable the States by the empty form of regulation merely to immunize the insurance companies on "an island of safety from congressional action" (91 Congressional Record, Part 2, p. 1488). The action of the Joint Legislative Committee in recommending amendment of the Donnelly Act followed failure of the industry to agree upon a bill under which affirmative supervision by the Superintendent of such concerted activities as it wished to engage upon would have been provided (Report, p. 34). The purpose of the Committee, and of the Legislature pursuant to its recommendation, seems clearly to have been to take full advantage of the congressional invitation to provide

State regulation of those activities into which the Federal government would otherwise step. It follows that the term "regulated" as used in the exception in the Donnelly Act (General Business Law, § 340) could have been intended in no other sense than the same word was used by Congress in offering the States opportunity to retain their supervisory powers. It likewise follows that unless combinations of the industry are regulated under Insurance Law, Article VIII, in a manner sufficient to exclude application of the Federal acts, they will be subject to the parallel provisions of the Donnelly Act. Since the latter clearly "regulates" adequately to the extent that Article VIII does not cover the subject, the purpose to exclude any occasion for intervention of Federal regulation seems to have been fully carried out. In consequence, the essential inquiry presents first, the question whether the Acquisition Cost Conferences would constitute unlawful combinations under the Donnelly Act to the extent not otherwise regulated, and second, if so, whether they are "regulated" by Article VIII of the Insurance Law in such a way as to exclude application of the Donnelly Act, and by the same token to render the Sherman Act inoperative.

[*Nature and Effect of Acquisition Cost Conferences*]

The Acquisition Cost Conferences are private combinations of insurers which fix maximum amounts of commissions to be paid by their member companies. They are not rating bureaus but claim, at most, to be service or advisory organizations. It is universally conceded, for reasons to be subsequently stated, that the Superintendent of Insurance has no power either to fix or to supervise commission rates. It must be concluded, therefore, that without clear sanction of law such combinations would be held to be unlawful. The restrictions they impose operate largely and directly upon the ultimate price of insurance protection to the public. Acquisition expenses are one of the largest single elements in ultimate premium costs. To the claim that such agreements tend to repress increases in expense, arising from unbridled competition with consequent saving to the public, it must be answered that private combinations so intimately concerned with the price structure are held to be illegal *per se* (*U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 221-223). "Price fixing, reasonable or unreasonable" is banned (*U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 720). The rule is applied to agreements fixing elements of the ultimate price, such as agents' and brokers' commissions (*Sugar Institute, Inc. v. U. S.*, 297 U. S. 553). Even if otherwise unobjectionable because not directly governing ultimate costs and having a reasonable tendency in reduction thereof, it cannot be ignored that such agreements directly and completely limit the end price that can be obtained for the services of a large segment of the industry. The illegality of such combinations can be predicated on their effect with respect to agents and brokers alone (see *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 323). Moreover, to deny the insurance companies the right to combine privately to limit commissions does not open the way to increases in premium rates to the public. The Superintendent of Insurance has control over filed premium rates which must be adhered to but he cannot fix or supervise commissions paid. If there is no prohibition or regulation of commission arrangements among insurers, it would mean that it lay within the power of the companies by private agreement to deny effectively any real bargaining power to the agents and brokers without public sanction or supervision as a substitute for competition.

Apart from the possible application of Article VIII of the Insurance Law, the provisions of the Donnelly Act as made specifically referable to all phases of the insurance business must, in my opinion, be held broad enough to prohibit concerted arrangements by which insurers fix the maximum commissions to be paid for agents' services and thus directly restrain competition in the price of those services which are likewise a large element in the ultimate cost of insurance. The rules of the Conferences placing a quota upon general, regional and district agents, while not so plainly subject to the rule of illegality *per se*, are subject to the prohibitions of the Donnelly Act to the extent that they impose unreasonable restraint upon the free exercise of essential activities in the business.

There are presently licensed in the State 17,434 fire and casualty agents and 21,715 brokers qualified to sell fire and casualty insurance according to the records of the Insurance Department. Their compensa-

tion and, consequently, their livelihood comes from the commissions paid for the production and servicing of business for the insuring companies. In these lines it is the agent or broker with whom the public directly deals and upon whom it primarily relies. The business has always taken the position that commissions were a matter for private contract between the companies and their agents and brokers (Report of Joint Legislative Committee, p. 27). Apart from the question whether the State should assume supervision over contracts between the individual companies and their agents, it must be perfectly apparent that there can be no freedom of contract or no opportunity for development of a fair market price if the companies combine privately to fix the price they will pay. Such private arrangements are basically contrary to statutory prohibitions against combinations in restraint of trade.

While the industry has generally opposed the actual fixing of commission rates by the State, there has been a substantial degree of "self-regulation" of commissions in the business under concerted arrangements. This grew up, and was sought to be justified, through a feeling that unlimited competition could have destructive consequences. In the case of Acquisition Cost Conferences, which have operated openly, such private regulation had encouragement from former Superintendents wholly apart from statutory sanction or regulatory power. Other lines of insurance engaged in more virulent control and employed sanctions involving refusals to deal with non-conformists, denials of reinsurance facilities and other business facilities, and the like. Such rules were considered more fully in my 1947 opinion in connection with the New York Fire Insurance Exchange and were taken up in the Joint Legislative Committee's Report. Their invalidity under restraint of trade statutes is generally agreed upon. The *South-Eastern Underwriters Assn.* case upheld an indictment under the Sherman Act against a group of stock fire companies operating under such rules. That they involve boycotting methods and elements of coercion, if not, indeed, intimidation, seems clear. More furtive arrangements involving secret agreements and sanctions would even more clearly violate the purpose and policy of the restraint of trade statutes. The fruits of illegal combinations cannot be lawfully gained by concealing the agreement. If the State has not prohibited or does not regulate concerted action concerning commissions, it would mean that so far as state law was concerned insurance companies would have the private power to control the compensation of thousands of agents, who play an important part in bringing insurance protection to the public, without giving them any opportunity for bargaining, collectively or otherwise.

[*State Regulation v. Federal Regulation*]

The McCarran Act specifically makes the Sherman Act applicable to acts of boycott, coercion and intimidation, whether or not the State regulates. If State prohibitions are not effective to prevent such activities, the Federal government is likely to step in under this power. If the State has not regulated restrictive combinations generally, the further application of Federal laws is not withheld. The amendment of the Donnelly Act following my prior opinion and the Joint Legislative Committee's recommendation clearly furnished a State prohibition broad enough to include private combinations of insurers respecting commissions. These developments would make it impossible for the Insurance Department any longer to condone such arrangements as a matter of policy outside of any statutory power. Justification for private company agreements limiting commissions was once sought in the destructive effect of excess commissions and their tendency to increase rates. The Superintendent today has effective power to control maximum premium charges to the public. Not only does this protect the public but it lessens the dangers of uncontrolled commissions. The application of restraint of trade statute prohibitions to insurance means that commission limitations may not be privately agreed upon without authority of law. If means to stabilize commission rates are to be found, it is necesasry that they exist under public sanction and supervision. Fixed rates must be fairly and reasonably arrived at under measures for the protection of the public and the agents and brokers directly concerned as well as the companies. It must, therefore, be determined whether private concerted arrangements like the Acquisition Cost Conferences are presently so regulated as to bring them within both the ex-

ception of the Donnelly Act, and the McCarran Act provision withholding application of the Sherman Act.

[*Insurance Department Not Authorized To Fix Commissions*]

It has been ably and earnestly argued that Article VIII of the Insurance Law, in its present form, at least sanctions private voluntary commission agreements or subjects them to sufficient State supervision. In order that these contentions may be fairly appraised and a substantial basis laid for treatment of the problem, it is necessary to consider both the development of the Acquisition Cost Conferences themselves and of Article VIII of the Insurance Law. Combined efforts of insurers to control commissions seem to have begun early in the present century but were not entirely effective or successful at first. In his monograph entitled "History of Acquisition Costs in New York", former Superintendent of Insurance Francis R. Stoddard has reviewed the course of events leading up to the formation of the Conferences. As early at 1913 the Superintendent of Insurance felt it necessary to call to the attention of authorized companies the necessity of reducing administrative and acquisition expenses (Stoddard, p. 8). Prior to this, however, and as a result of the Merritt Committee report (Leg. Doc. [1911] No. 30), the first rating provisions were adopted in this State. The report of the present Joint Legislative Committee (Leg. Doc. [1948] No. 46) has reviewed the history of the provisions presently embodied in Article VIII of the Insurance Law (pp. 37-48). As pointed out, New York had never adopted an anti-compact law and the existence of rating organizations had not been theretofore forbidden. The Merritt Committee report did not recommend State regulation of rates beyond some supervision of the rate-making bodies and securing proper publicity. This was the aim of Insurance Law Section 141, as added by Laws of 1911, chapter 460. It applied only to fire insurance rates, but casualty and other forms were brought in in 1912 and 1913. The chief prohibition of the early provisions was against discrimination in rates between similar risks.

It is important for present purposes to note that by Laws of 1913, chapters 21 and 23, two new sections, numbered 139 and 140, were added to the Insurance Law. These were the forerunners of the present service and advisory provisions of Article VIII pertinent to the claim that concerted action to fix commissions is "regulated" thereunder. Section 139 in particular applied to every organization "for the purpose of inspecting risks, adjusting losses, testing appliances, formulating rules or establishing standards for the information or benefit of underwriters in the transaction within this state of the business of insurance". This is substantially the same language used to define a service or advisory organization in Section 180 of Article VIII today. Such organizations were required to file their articles of agreement, by-laws, and other information required by the Superintendent, and be subject to examination by him.

In 1922 Superintendent Stoddard found the acquisition cost problem a serious one and felt compelled to call a meeting to impel company action to avert difficulty. As a result, representatives of casualty companies ultimately agreed upon the Casualty Acquisition Cost Conference. Thereafter, the Superintendent endeavored to bring all companies into the Conference (Stoddard, pp. 17 and 18). It is significant that Mr. Stoddard did not undertake to compel such action under the statute or suggest that it was either required or authorized thereunder. He frankly admits that he was without power to compel membership under the law.

Following the report of the Lockwood Committee appointed in 1919 (Leg. Doc. [1922] No. 60), amendments of Section 141 of the Insurance Law were adopted, and Sections 141-a and 141-b were added (L. 1922, c. 660). These were revised and renumbered in the Insurance Law of 1939 under Article VIII thereof. They accomplished substantially the rating system in effect today. Primarily they require rating organizations to admit to membership or provide their services to any company without discrimination, and for the first time gave the Superintendent power to review rates and order revision if they were found excessive or inadequate. As the present Joint Legislative Committee notes, no attempt was made for the regulation or control of commissions (Report, p. 45). Superintendent Stoddard's preliminary report of March 29, 1923 (p. 21), observed, however, that one effect of these changes was to cause the casualty companies to

agree on rules on acquisition and field supervision costs.

It was at this juncture that the Court of Appeals was first called upon to consider the legal status and powers of statutory rating organizations. In *Matter of Importers and Exporters Insurance Co. v. Rhoades,* 239 N. Y. 420, there was presented the question whether the New York fire insurance rating organization could refuse its rating services to a subscriber which refused to comply with its rules relating to commissions, brokerages, and number of agencies. The court below held these matters to be so intimately allied with the making of rates as to be a part thereof. The Court of Appeals reversed. It recognized that commissions were an essential element in rate fixing and that such matters might have been controlled in the past by voluntary associations, but the distinction between a statutory rating organization and one existing solely by private agreement was said to be obvious. In the latter capacity its membership and obligations could be determined upon at will, but as an agency to fix rates under State authority and supervision, the rating association could not exact compliance with its private rules. It could not extend the scope of its rules beyond the granted power to fix premium rates and assume to regulate commissions with the authority of a State agency. The court refused "to smuggle such a grant into the law under the guise of liberal interpretation", holding that power to regulate commissions should be made explicit in terms.

It follows necessarily from this case that the Superintendent's power to disapprove and compel revision of filed premium rates does not permit him to assume any authority to fix or limit commission rates which may be paid to agents. This was even more pointedly emphasized in the next case to come before the Court (*Matter of Northwestern National Life Ins. Co. v. Pink,* 288 N. Y. 359). Here the Superintendent of Insurance had refused, under Insurance Law Section 42, to renew a foreign insurer's license to do business in this State. The basis of the refusal inhered in the Department's long-continued concern with the danger of commission wars and efforts to secure voluntary agreements among the companies on commission rates. It was found by the Superintendent that the Company had paid "excess commissions" to brokers. The Court analyzed his action as denying the right to do business to a foreign insurer unless it would agree to brokerage commissions formulated by voluntary agreement of the New York Fire Insurance Exchange. "A prohibition of that size" was held to be beyond his authority under Section 42. The Superintendent disavowed any claim that he had been delegated power by the Legislature to regulate commissions although predicting the ultimate necessity for giving his Department direct control. The Court clearly comprehended that the result of his action was, nevertheless, to fix commissions of foreign insurers with the compulsion of law at rates privately agreed upon. It refused to find in Insurance Law Section 42 the equivalent of power over commissions which the Legislature refused to grant expressly.

Since the law has not been altered in any respect material to the grounds of the decisions in these two cases, they are the basis of the unquestioned understanding that the Insurance Department is without power to fix or control commissions. As the Joint Legislative Committee observes (Report, p. 27), there is no statutory control of acquisition costs except as to life insurance where it has been expressly dealt with by statute (Insurance Law, §§ 213 and 213-a) In the face of this lack of authority, not only conceded but insisted upon by company representatives, it is still contended that regulation exists in Article VIII. One approach is through the provisions including in the term "rate" all the elements and factors forming the basis for determination thereof (§ 180, subd. 2), and requiring that in rate-making consideration be given to all factors reasonably attributable to the risk and to past and prospective expenses (§ 183, subd. 1-d; see also subd. 3). Since the Superintendent may take the reasonableness of these factors into account in passing on the ultimate rate and disapprove the latter on the basis thereof, it is said to follow that he does exercise a measure of indirect control. It is not, however, under any view the power to fix or control commissions which the court has denied both to the Superintendent himself and to a rating organization in its capacity as such. Paranthetically, it may be observed that the insurance companies involved in *American Eagle Fire Ins. Co., et al. v. Jordan,* (67 Fed. Sup. 76, reversed 169 Fed. (2d) 281), asserted that the District of Columbia Insur-

ance Commission must consider *actual* payments to agents in determining the reasonableness of expenditures for rate purposes.

While the New York Superintendent's right to consider the reasonableness of commission allowances in the rate structures seems fairly established, his power of revision may be exercised only with respect to ultimate rates. He may not intervene to regulate the commissions actually paid. Companies are free to pay more or less than the rating formula basis, subject only to the incidental economic compulsion of the fixed gross premium. This clearly does not constitute direct commission regulation and in no event can these statutory provisions be said to control or to countenance combinations among companies as to commission payments. That the agreement may be to observe the expense schedule of the filed rates does not relieve it of its purely voluntary and unsupervised character. No provision of the rating section would prevent or control an agreement for less or more. Nothing here expresses public approval of concerted action lessening competition within the limits of the premium rates supervised by the State. The express provision for making ultimate rates in concert under the sanction and control of the State denies that implication of more extensive authority to combine may be read into it. It has been decided that such agreements cannot be made as part of a rating organization's authorized function, and conversely as to such agreements an organization would not be functioning under the rating provisions.

The more seriously urged contention stems from the service and advisory organization provisions of Article VIII. Reference is first made to the declaration of purpose added to Section 180 "to authorize and regulate cooperative action among insurers in rate-making and in other matters within the scope of this article". With the accompanying direction for liberal interpretation, this is made the basis upon which to find sanction for the broadest possible range of concerted activities and regulation thereof under the definition of service and advisory organization in subdivision 6 of Section 180, and the requirements and restrictions thereon in Section 182. While it is still a basic premise that there is no public control over actual commission rates agreed upon and put into effect by private combinations of insurers, it is insisted that such agreements are authorized by Article VIII and thus lifted out of the Donnelly Act.

[*Purpose of the McCarran Act*]

A word is here called for with further reference to the purpose and extent of the McCarran Act which brings about the urgency of the present problem. A reading of the congressional debates preceding passage of that Act reveals strongly articulated objection to any action by Congress which would enable the States to permit concerted action otherwise subject to the Sherman Act. There was effort to limit the congressional authorization to the enactment of laws against restrictive and monopolistic combinations at the State level. However, the existing State systems of rate regulation through rating bureaus under State supervision were referred to, and ultimately the Act as presently in force was agreed to without placing specific restriction on the form of regulation which the States must adopt to prevent Federal intervention. Approval was secured, however, only upon the understanding best expressed by Senator Barkley, and previously referred to herein. The intention was not to permit the States to ward off the application of Federal laws to the insurance companies without themselves assuming the responsibility of effective regulation, and Congress was not to be estopped from further asserting its power where it felt the States had failed. It seems clear that no State can discharge the burden of regulation by merely condoning expressly any combinations that insurers might wish to make. On the other hand they were not to be required to regulate by prohibiting all combinations, and it is probable that as part of a complete system of affirmative regulation a State might authorize specific activities in concert, free of active State supervision, without thereby rendering them subject to the Sherman or other Federal Acts. Under the McCarran Act the question will always be present as to whether such action constitutes an authoritative approval in the public behalf or a mere abdication of regulatory power preserved to the State which, in effect, permits violations of Federal law. Whether the authorization by the State was carefully limited and plainly expressed would seem important upon such an inquiry.

[*Insurance Law Article VIII Interpreted*]

The affirmative authorization for commission fixing combinations under Insurance Law, Article VIII, is said to be found in what is actually only the definition of a "service or advisory organization" in Section 180, subdivision 6, reading as follows:

> "6. Every person, partnership, association or corporation whether located within or without this state, who or which inspects risks, adjusts losses, tests appliances, formulates rules, establishes standards, or assists in the making of rates for the information or benefit of insurers or rating organizations in the transacting of insurance business on property or risks located in this state, or furnishes information or advice to insureds or prospective insureds, shall be known as a service or an advisory organization."

This is derived practically verbatim from the earlier definitions in former Sections 139 and 140 of the Insurance Law of organizations for assisting underwriters or assisting in establishing insurance rates. The right to agree upon commissions is predicated by its proponents upon the activities contemplated in formulating "rules" or in establishing "standards".

In fairness, it must be pointed out that filings of the Acquisition Cost Conference rules with the Superintendent have in the past been "accepted" under former Section 140 of the Insurance Law (Stoddard, p. 32). Former Section 140 was the section dealing with organizations which assisted in making rates, and it was apparently upon the theory that the commission agreements affected a rate factor that the filings were accepted in order to give the Conferences whatever semblance of legality he could in connection with the Superintendent's efforts to bring about some control of acquisition costs. Whether such filings could have been compelled, it was not thought necessary to determine (p. 37).

The original service organization provisions now contained in Article VIII were not affirmative grants of authority to combine. Until the Donnelly Act, the State had no anti-compact provision and concerted action was not generally forbidden. Indeed, the provisions for service organization in terms do not necessarily relate to associations of insurers at all, but to any agencies or concerns rendering service to insurers or to rating bureaus. The provisions now relied on were initially only definitions for the purpose of identifying agencies or associations, nowhere forbidden by statute, in order to subject them to certain requirements as to filing their articles or certificates and bylaws and as to examination by the Superintendent.

But now combinations unlawfully restraining trade in the insurance business have been generally prohibited in the Donnelly Act, and it is sought to find in the provisions governing service organizations generally affirmative authorization for insurers to combine for the specific purpose of fixing the rate of commission to be paid to their agents. I do not believe such activities can be found to be "within the scope" of Article VIII.

Clearly, the service organization regulation of Article VIII does not convey an unlimited authority to combine for every purpose which might be desired. The original purpose was not to authorize combinations but generally to require filings by organizations otherwise not restricted as to their activities. When the Donnelly Act amendment prohibiting restrictive combinations became effective, the exception therefrom of those in the insurance industry to the extent of regulation by Article VIII did not become a shield for every combined activity of insurers which might previously have been carried on under the name of a service organization because not otherwise prohibited. Were it so, the amendment of the Donnelly Act thought essential by the Joint Legislative Committee would scarcely have been necessary.

The direction of the inquiry under Article VIII has been reversed by the general prohibition on restrictive combinations, and the question now is, what activities does Article VIII expressly or by plain inference sanction in concert. The activities specified with identifiable particularity for service or advisory organizations are the inspection of risks, adjustment of losses, testing of appliances or assistance in the making of rates for the information or benefit of insurers or rating organizations. In company with these are the general functions of formulating rules and establishing standards. As a source of authority construction principles plainly would limit such undefined rules and standards to those relating to the particular functions set forth in conjunction with them. An otherwise limitless right to make rules would not be inferred.

Just as the scope of the rules of a rating organization may not be extended beyond its authorized function of fixing rates to be charged for insurance, so must the rules of a service and organization be kept within the authorized service and functions thereof. Nothing brings agreements to limit commissions within the scope of such rules expressly or by inference. Information as to commission experience and factors might be collected and furnished for its obvious assistance in making rates, but authority for restrictive agreements with respect to commissions to be paid is not to be found.

It is only when the Superintendent finds that the furnishing of such "information and assistance" involves any unfair or unreasonable practice that he has power to order discontinuance after a hearing (§ 182, subd. 2). Since I must conclude that such information and assistance cannot extend to agreements limiting commissions, this provision does not furnish any more affirmative regulation thereof.

It would indeed be strange if the 1948 legislation recommended by the Joint Legislative Committee had intended to permit private combinations to fix commissions free from the Donnelly Act and had left it to such wholly intangible inferences as would have to be drawn to sustain them. The threat of Federal action and the purpose to prevent it by complete State regulation were clearly understood. The subject of acquisition costs and their regulation have been among the most seriously debated questions in the industry for many years. The courts have indicated the necessity for specific expression of regulations pertaining thereto. The Joint Legislative Committee gave express consideration to the subject (Report, p. 20) and rejected a bill "legalizing" the Acquisition Cost Conferences because not convinced that it was necessary to do so at the 1948 session and because of lack of agreement in the industry as to how it might best be done. Agents and brokers objected particularly because they were not given any right to be heard with respect to commission standards to be established (p. 27). The Committee clearly contemplated the necessity for "permissive state regulation" to authorize agreements fixing commissions and posed the prospect of ultimate policing of such agreements or, as a last resort, State fixation of commissions if authorized agreements were not both fair and reasonable and adhered to. The comments accompanying the Committee's proposed amendments of Article VIII, which were enacted into law, gave no hint of any present purpose to bring into that statute in any form authorization for commission agreements. The conclusion I have drawn from the history of the problem and the face of the existing statutes seems wholly confirmed by the Committee's indication of its purpose in the report.

[*Status of Acquisition Cost Conferences*]

You are advised that the Acquisition Cost Conferences, about which you inquire, are not presently regulated by Article VIII of the Insurance Law and are, consequently, unlawful combinations pursuant to the Donnelly Act. It follows that the existing State regulation rendering the Federal Acts inapplicable consists of complete prohibition of commission fixing combinations. The Superintendent exercises public control of premium rates charged to the public and the companies are deprived of private power to regulate commissions. If, as a matter of policy or necessity, some manner of stabilizing rates at fixed maximum levels is desirable, it would have to rest upon clear warrant of law under public supervision, preferably, of course, through the Superintendent of Insurance who is charged with ultimate responsibility in the matter of insurance rates and general supervision over the business.

There is presently pending in the Legislature a proposed enactment to permit the conference type of commission agreements among insurers (S. 1977, A. 2215). It would authorize such agreements expressly and remove all doubt of public sanction. At the same time it imposes statutory restrictions on them and provides for public supervision. Agreements producing unfair discrimination or excessive or inadequate rates are not authorized and agreements or acts of boycott, intimidation or coercion are prohibited.

The requirement of consultation with agents and brokers before entering into agreements and making rules and regulations thereunder is expressly prescribed. It is probable that such a provision is essential lest any permissive State legislation be found to be merely an attempted immunization of private agreements rather than a real regulation protecting the interests of all affected parties, as well as of the public, of the kind which will exclude Federal in-

tervention. If company agreements are to be permitted by law, it follows that opportunity for the producers, whose compensation is directly concerned, to bargain collectively must likewise be provided by law. The right to be heard is even more important here than if rates were to be directly fixed by a disinterested public administrator in which case it would be certain to be provided.

The pending bill withholds authorization for any agreement involving commission rates in excess of the total production cost applicable to the premium rates in effect for the insurers involved. Agreements and rules must be filed and the Superintendent may hold hearings with respect to failure to observe the requirements of the statute or violation of its prohibitions. He may issue cease and desist orders with respect thereto.

It is not within my province to pass upon the economic wisdom or administrative policy of public authorization for and regulation of commission fixing agreements. It is not for me to undertake to recommend either that unrestrained competition within existing rate structures be the rule or that commissions be allowed to be standardized by reasonable agreements publicly supervised and restricted. If, however, some form of commission stabilization is desirable or essential, it clearly cannot be accomplished by existing unsanctioned private agreements. Express statutory authorization is a prerequisite to the lawful existence of such agreements. If such regulation is to be substituted for free competition, it must be publicly sanctioned and safeguarded with respect to the fairness and reasonableness of what may be done thereunder as to all concerned. Unless some such measure as the pending bill is enacted company agreements limiting commissions are prohibited by law.

[¶ 62,377] United States v. Paramount Pictures Inc. et al.

In the United States District Court for the Southern District of New York. Equity No. 87-273. March 3, 1949.

Sherman Antitrust Act

Film Industry—Consent Judgment—Separation of Production and Distribution from Theatre Operation.—A consent judgment entered against a motion picture production and distribution company, in an antitrust suit charging eight prominent companies in the film industry with violations of the Sherman Act, requires the defendant to divest itself of all interest in a given number of theatres and enjoins the company from granting licenses with controlling stipulations attached thereto, from agreeing to maintain a system of clearances, from performing any existing franchise, formula deal, or pooling arrangement, as well as requiring it to divorce its domestic exhibition business from its production and distribution business. Such separation is achieved by the formation of two independent companies and the transfer of the defendant's theatre assets to one and the transfer of production and distribution assets to the others. The two new companies are required to issue to the defendant in exchange for the assets so received, a number of shares of their common capital stock equal to one-half the aggregate amount of common capital stock of Paramount Pictures Inc. then outstanding. The latter company is ordered to be dissolved and to distribute the stock of the first company *pro rata* among its stockholders and transfer the shares of the second company into the name of a Trustee appointed by the court to be held subject to the supervision of the Court. The judgment directs that the newly formed companies have no common directors, and that they be free of any previous managerial connection with the other, or the defendant. The decree requires each company to refrain from attempting to influence the operating policy of the other.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273, 1530, 1590.

Judgment rendered and entered in lieu of and in substitution for the decree dated December 31, 1946, reported at *1946-1947 Trade Cases* ¶ 57,526.

For plaintiff: Tom C. Clark, Attorney General; Herbert A. Bergson, Assistant Attorney General; Robert L. Wright, Sigmund Timberg, Special Assistants to the Attorney General.

For the defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation: Simpson Thacker and Bartlett; Albert C. Bickford, a member of the firm.

Consent Judgment as to the Paramount Defendants

The plaintiff, United States of America, having filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, Paramount Pictures Inc. and Paramount Film Distributing Corporation (hereinafter sometimes referred to as the "Paramount defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the Paramount defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this Court; and

The Paramount defendants, having represented to the plaintiff and to this Court that they propose, for the purpose of avoiding discrimination against other exhibitors and distributors, promoting substantial independent theatre competition for the Paramount theatres and promoting competition in the distribution and exhibition of films generally, (1) to divorce their domestic exhibition business from their production and distribution business, (2) to divest Paramount Pictures Inc. and the divorced exhibition business of all interest in a minimum of 774 theatres, and (3) to subject themselves and said divorced distribution and exhibition businesses to injunctive provisions, all as hereinafter set forth; and that accordingly they propose to adopt prior to April 19, 1949, a plan of reorganization which will have as its purpose and effect the complete divorcement of the ownership and control of all of the theatre assets of Paramount Pictures Inc. located in the United States from all other assets of the Paramount defendants; that pursuant to such plan two new corporations will be formed, one of which (hereinafter called the New Theatre Company) will own directly or indirectly all of the said theatre assets; and the other of which (hereinafter called the New Picture Company) will own directly or indirectly all of the said other assets; and that thereafter Paramount Pictures Inc. will be dissolved; and that for the purpose of establishing separate ownership and control of the said two new corporations the stock of the New Theatre Company will be delivered to a Trustee who will hold such stock subject to the terms and conditions of this judgment, and certificates of interest representing such trusteed stock will be issued by the Trustee, and such certificates of interest together with the stock in the New Picture Company will be distributed *pro rata* by Paramount Pictures Inc. among its stockholders; and Paramount Pictures Inc. having set forth certain understandings with and made certain representations to the Attorney General in a letter filed herewith; and

The Paramount defendants having consented to the entry of this judgment after the taking of evidence upon the remand of this cause by the Supreme Court to this Court but without rendition of any decision by this Court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues and matters made after said remand, and without admission by the Paramount defendants in respect to any such issue or matter, and the Court having considered the matter,

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

The Complaint is dismissed as to all claims made against the Paramount defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II.

[*Acts Enjoined*]

A. The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must

elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

B. If a final judgment be entered in this cause against Loew's Incorporated, Twentieth Century-Fox Film Corporation, and Warner Bros. Pictures, Inc., or any of them, which shall prescribe for any of such defendants provisions for licensing the exhibition of feature motion pictures different from those required by this judgment, the Paramount defendants or the New Picture Company or either or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with such provisions of this judgment and to comply with such provisions of such judgment against said defendants or any of them, and thereupon an order or supplemental judgment shall be entered on the application of such party or parties so electing, which shall subject such party or parties to such provisions of such other judgment and entitle it or them to the benefits of any terms thereof and relieve it or them from further compliance with such provisions of this judgment.

III.

A. The defendant Paramount Pictures Inc. (hereinafter in this Section III referred to as "Paramount"), its officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant.

(a) The said existing relationships in connection with the theatres in Michigan (excluding Detroit) named in paragraph 9 hereof shall be terminated by November 8, 1949 in accordance with the provisions relating to such theatres set forth in such paragraph 9.

(b) The said existing relationship in connection with the Great Lakes, Hippodrome, Niagara, Seneca, Kenmore, Buffalo, Teck, Bellevue, Kensington, North Park, Lackawanna, and Elmwood Theatres in Greater Buffalo, N. Y., shall be terminated by March 31, 1949, and the said existing relationship in connection with the Roosevelt Theatre, Buffalo, N. Y., shall be terminated by December 31, 1949. Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners in the five theatres first mentioned in this subparagraph (b).

(c) The said existing relationships in connection with the Parkhill Theatre, Yonkers, N. Y., shall be terminated by November 8, 1949 in accordance with the provisions relating to such theatre set forth in paragraph 9 hereof.

6. From acquiring a beneficial interest in any theatre other than those named in paragraph 9 hereof, provided that:

(a) Until the joint ownerships set forth in paragraph 9 have been completely terminated, as provided for in said paragraph, beneficial interests in theatres may be acquired

(i) As a substantially equivalent replacement for wholly owned theatres * held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;

(ii) In renewing leases covering any wholly owned theatre held or acquired in conformity with this judgment or in acquiring an additional interest in any such theatre under lease;

(iii) As a substantially equivalent replacement for any wholly owned theatre held or acquired in conformity with this judgment which has been lost through inability to obtain a renewal of the lease thereof upon reasonable terms, if Paramount or the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition;

(iv) In one theatre in Miami, Florida, Chattanooga, Tennessee, Salt Lake City, Utah, and Tampa, Florida, respectively (which theatres Paramount represents it plans to construct upon sites now controlled by it and are to be substantially equivalent replacements for theatres heretofore lost by fire or failure to obtain renewal of leases), if Paramount or the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition.

(b) After termination of the joint ownerships set forth in paragraph 9 hereof, Paramount or the New Theatre Company may acquire a beneficial interest in any theatre only in the situations covered by paragraphs (i) and (ii) of the preceding sub-section (a) unless the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition.

7. From operating, booking or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making or enforcing any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The theatres in which such ownership now exists are the following:

* As used herein the phrase "wholly owned theatre" means a theatre in which Paramount or the New Theatre Company, or Paramount or the New Theatre Company together with persons who are solely investors, own a beneficial interest of 95% or more.

State	City	Name of Theatre
ALABAMA	Anniston	Calhoun
		Cameo
		Noble
		Ritz
	Auburn	Tiger
	Bessemer	Grand
		State
	Birmingham	Alabama
		Lyric
		Ritz
		Grand
		Temple
		Drive-In
	Chickasaw	Chickasaw
	Ensley (suburb of Birmingham)	Ensley
		Franklin
	Jasper	Jasper
		New
	Mobile	Crown
		Drive-In
		Empire
		Lyric
		Loop
		Saenger
	Montgomery	Charles
		Clover
		Empire
		Grand
		Paramount
		Strand
	Selma	Walton
		Wilby
	Troy	Enzor
	Tuscaloosa	Bama
		Diamond
		Druid
		Ritz
ARIZONA	Phoenix	Studio
		Drive-In
		Indian Head Drive-In
ARKANSAS	Camden	Rialto
		Ritz
		Strand
	Clarksville	Joy
		Strand
	Conway	Conway
		Grand
	Dardanelle	Joy
	Fayetteville	Ozark
		Palace
		Royal
		U-Ark
	Fort Smith	Hoyts
		Joie
		New
		Plaza
		Temple
		Uptown
	Helena	Paramount
		Pastime
	Hope	New
		Rialto
		Saenger
	Hot Springs	Central
		Malco
		Paramount
		Victory

State	City	Name of Theatre
ARKANSAS—Continued	Jonesboro	Liberty
		Palace
		Strand
	Little Rock	Arkansas
		Capitol
		Drive-In
		Heights
		Lee
		New
		Prospect
		Pulaski
		Roxy
		Royal
	McGehee	Ritz
	Morrilton	Rialto
	Newport	Capitol
		Strand
	Pine Bluff	Malco
		Saenger
		Strand
	Russellville	Ritz
	Smackover	Joy
	Stuttgart	Majestic
		Strand
	Van Buren	Bob Burns
		Rio
CALIFORNIA	Hollywood	Paramount
FLORIDA	Pensacola	Drive-In
		Isis
		Rex
		Saenger
GEORGIA	Athens	Georgia
		Morton
		Palace
		Ritz
		Strand
	Augusta	Imperial
		Miller
		Modjeska
		Rialto
	Barnesville	Ritz
	Brunswick	Bijou
		Ritz
		Roxy
	Buford	Allen
		Colonial
	Columbus	Bradley
		Georgia
		Rialto
		Royal
		Springer
		Village
		Rexview Drive-In
	Elberton	Elbert
	Gainesville	Ritz
		Roxy
		Royal
		State
	Lexington	Lex
	Macon	Capitol
		East Macon
		Rialto
		Grand
		Ritz
	Moultrie	Colquitt
		Moultrie
	St. Simons Island	Casino

State	City	Name of Theatre
GEORGIA—Continued	Savannah	Avon
		Beach
		Bijou
		Lucas
		State
		Victory
	Waycross	Carver
		Lyric
		Ritz
IDAHO	Boise	Ada
		Boise
		Granada
		Pinney
ILLINOIS	Chicago	Iris
		McVickers
		North Center
		United Artists
	Galesburg	Colonial
	LaSalle	LaSalle
		Majestic
	Moline	Illini
		Le Claire
	Oak Park	Lake
		Lamar
	Peru	Peru
		Star
	Quincy	Orpheum
		Washington
	Rockford	Auburn
		Coronado
		Midway
		Palace
		Times
	Rock Island	Fort Armstrong
		Rocket
		Spencer
INDIANA	Gary	Grand
		State
IOWA	Algona	Call
		Iowa
	Boone	Boone
		Princess
		Rialto
	Burlington	Capitol
		Palace
		Zephyr
	Cedar Falls	Regent
	Cedar Rapids	Paramount
		State
	Centerville	Majestic
		Ritz
	Chariton	Ritz
		State
	Charles City	Charles
		Gem
	Clarion	Clarion
	Clear Lake	Lake
		Park
	Clinton	Capitol
		Rialto
		Strand
	Cresco	Cresco
	Davenport	Capitol
		Esquire
		Garden
	Des Moines	Des Moines
		Garden
		Hiland
		Ingersoll
IOWA—Continued	Des Moines—Continued	Paramount
		Roosevelt
		Uptown
		Strand
		Eastown
		Iowa
		Drive-In
	Eagle Grove	Princess
	Estherville	Grand
	Forest City	Forest
	Fort Dodge	Iowa
		Rialto
		Strand
	Grinnell	Iowa
		Strand
	Iowa City	Englert
		Strand
		Varsity
	Mason City	Cecil
		Palace
		Strand
	New Hampton	Firemens
	Newton	Capitol
		Rialto
	Oelwein	Grand
		Ritz
	Oskaloosa	Mahaska
		Princess
		Rivoli
	Ottumwa	Capitol
		Ottumwa
		Rialto
		Strand
		Zephyr
	Sioux City	Capitol
		Drive-In
		Hipp
		Hollywood
		Iowa
		State
		Victory
	Waterloo	Paramount
		Strand
KENTUCKY	Fulton	Fulton
		Orpheum
		Strand
	Henderson	Kentucky
		Kraver
	Owensboro	Bleich
		Malco
		Seville
		Strand
LOUISIANA	Alexandria	Paramount
		Rex
		Saenger
	Baton Rouge	Drive-In
		Fort
		Louisiana
		Paramount
		Varsity
	Monroe	Capitol
		Delta
		Paramount
	New Orleans	Globe
		Saenger
		Tudor
	Shreveport	Centenary
		Drive-In
		Majestic
		Rex

State	City	Name of Theatre
LOUISIANA—Continued	Shreveport—Continued	Saenger
		Strand
		Venus
		West End
MAINE	Auburn	Auburn
	Augusta	Colonial
		Capitol
	Bangor	Bijou
		Opera House
		Park
	Brunswick	Cumberland
		Pastime
	Gardiner	Opera House
	Hollowell	Rialto
	Lewiston	Empire
		Priscilla
		Strand
	Livermore Falls	Dreamland
	Norway	Rex
	Orono	Strand
	Ramford	Strand
	South Paris	Strand
	Wilton	Wilton
MASSACHUSETTS	Chicopee	Rivoli
	Fitchburg	Fitchburg
	Greenfield	Garden
	Haverhill	Colonial
		Paramount
	Holyoke	Bijou
		Strand
		Victory
	North Adams	Paramount
		Richmond
	Northampton	Calvin
		Plaza
	Palmer	Strand
	Pittsfield	Capitol
		Colonial
		Palace
		Strand
	Springfield	Paramount
		Broadway
	Ware	Casino
	Westfield	Strand
MICHIGAN	Adrian	Croswell
		Family
	Allegan	Regent
	Alpena	Lyric
		Malz
	Ann Arbor	Orpheum
		Michigan
		State
		Whitney
		Wuerth
	Battle Creek	Bijou
		Michigan
		Post
		Regent
		Strand
	Bay City	Bay
		Center
		Regent
		Westown
	Benton Harbor	Lake
		Liberty
	Big Rapids	Big Rapids

State	City	Name of Theatre
MICHIGAN—Continued	Cadillac	Center
		Lyric
	Detroit	Alger
		Royal
		United Artist
	East Lansing	State
	Flint	Capitol
		Della
		Garden
		Palace
		Regent
		Roxy
		State
		Strand
	Grand Haven	Grand
		Robinhood
	Grand Rapids	Center
		Eastown
		Royal
		Four Star
		Kent
		Majestic
		Our
		Wealthy
	Greenville	Gibson
		Silver
	Hillsdale	Dawn
		Hill
	Holland	Center
		Colonial
		Holland
	Ionia	Center
		Ionia
	Jackson	Capitol
		Majestic
		Michigan
		Regent
		Rex
	Kalamazoo	Capitol
		Fuller
		State
		Michigan
		Orpheum
		Uptown
	Lansing	Capitol
		Gladmer
		Lansing
		Michigan
		Nortown
		Southown
	Ludington	Center
		Lyric
	Manistee	Lyric
		Ramsdell
		Vogue
	Monroe	Family
		Monroe
	Muskegon	Michigan
		Regent
		State
	Niles	Ready
		Riviera
	Owosso	Capitol
		Center
		Strand
	Pontiac	Eagle
		Oakland
		Orpheum
		Rialto

State	City	Name of Theatre
MICHIGAN—Continued	Pontiac—Continued	State
		Strand
	Port Huron	Desmond
		Family
		Majestic
	Saginaw	Center
		Franklin
		Mecca
		Michigan
		Strand
		Temple
		Wolverine
	St. Joseph	Caldwell
	South Haven	Michigan
		Model
	Sturgis	Roxy
		Strand
	Three Rivers	Rialto
		Riviera
	Traverse City	Michigan
		Trabay
	Willow Run	Center
	Ypsilanti	Martha Washington
		Wuerth
MINNESOTA	Fairmont	Nicholas
		Strand
MISSISSIPPI	Biloxi	Buck
		Saenger
	Clarksdale	Delta
		Paramount
	Columbus	Dixie
		Princess
		Varsity
	Greenville	Delta
		Paramount
	Greenwood	Le Flore
		Paramount
	Gulfport	Gulf
		Paramount
	Hattiesburg	Buck
		Lomo
		Rose
		Saenger
	Jackson	Century
		Drive-In
		Majestic
		Paramount
		Pix
	Meridian	Alberta
		Strand
		Temple
	Natchez	Baker Grand
		Ritz
	Tupelo	Lyric
		Tupelo
	Vicksburg	Alamo
		Saenger
		Strand
	West Point	Ritz
		Star
	Winona	Winona
NEBRASKA	Fairbury	Bonham
		Majestic
	Falls City	Oil City
		Rivoli
	Grand Island	Capitol
		Empress
		Grand
NEBRASKA—Continued	Hastings	Rivoli
		Strand
	Omaha	Omaha
		Orpheum
		Paramount
		Drive-In
NEW HAMPSHIRE	Berlin	Albert
		Princess
		Strand
	Concord	Capitol
		Star
	Portsmouth	Colonial
		Olympia
NEW JERSEY	Newark	Adams
		Paramount
	Paterson	U. S.
NEW MEXICO	Albuquerque	Chief
		Kimo
		Lobo
		Mission
		Rio
		Sunshine
		Yucca
		Drive-In
		Mesa
NEW YORK	Fulton	Avon
		State
	New York City	Rivoli
	Owego	Tioga
	Rochester	Capitol
		Paramount
		Regent
	Waverly	Amuzu
		Capitol
	Yonkers	Parkhill
NORTH CAROLINA	Asheboro	Carolina
	Asheville	Imperial
		Isis
		Palace
		Paramount
		Plaza
		State
		Commitment to build new theatre
	Burlington	Alamance
		Carolina
		Paramount
	Canton	Colonial
		Strand
	Chapel Hill	Carolina
		Village
	Concord	Cabarrus
		Paramount
	Durham	Carolina
		Center
		Rialto
	Fayetteville	Broadway
		Carolina
		Colony
	Gastonia	Lyric
		Temple
	Goldsboro	Carolina
		Paramount
		Wayne
	Greensboro	Carolina
		Imperial
		National

State	City	Name of Theatre
NORTH CAROLINA —Continued	Greenville	Colony
		Pitt
		State
	Hendersonville	Carolina
		State
	Hickory	Center
		Park
	High Point	Broadhurst
		Center
		Paramount
		Rialto
	Lenoir	Center
		State
	Lexington	Carolina
		Granada
	Lumberton	Carolina
		Pastime
	Monroe	Center
		State
	Mt. Airy	Center
	Raleigh	Ambassador
		Capitol
		Palace
		State
		Varsity
	Rockingham	Little
		Richmond
	Rocky Mount	Carolina
		Center
	Salisbury	Capitol
		State
		Victory
	Wilmington	Bailey
		Bijou
		Carolina
		Royal
		Ritz
	Wilson	Carolina
		Ritz
		Wilson
	Winston-Salem	Carolina
		State
		Colonial
		Forsyth
NORTH DAKOTA	Jamestown	Star
PENNSYLVANIA	Aliquippa	Rialto
		State
		Strand
		Temple
	Ambridge	State
	Bloomsburg	Capitol
		Columbia
	Butler	Capitol
		Penn
	Carlisle	Comerford
		Strand
	Danville	Capitol
	Dickson City	Rex
	Dunmore	Orient
	Duryea	Pastime
	Forest City	Freedman
	Forty Fort	Forty Fort
		Institute
	Hawley	Ritz
	Hazleton	Capitol
		Feeley
		Grand
	Honesdale	Lyric
	Jersey Shore	Victoria
PENNSYLVANIA —Continued	Kingston	Kingston
	Lebanon	Capitol
		Colonial
		Jackson
	Luzerne	Luzerne
	Mauch Chunk	Capitol
	Miners Mills	Crystal
	Northumberland	Savoy
	Old Forge	Holland
	Olyphant	Olyphant
		Granada
	Parsons	Parsons
	Pittston	American
		Roman
	Plymouth	Shawnee
	Pottsville	Capitol
		Hippodrome
		Hollywood
	Sayre	Sayre
	Scranton	Bell
		Capitol
		Comerford
		Family
		Globe
		Rialto
		Riviera
		Roosevelt
		State
		Strand
		Temple
		Westside
		Pinebrook
	Shenandoah	Strand
	Sunbury	Rialto
		Strand
	Towanda	Keystone
	Wilkes-Barre	Capitol
		Comerford
		Hart
		Orpheum
		Penn
		Sterling
		Strand
		Temple
		Irving
	Williamsport	Capitol
		Keystone
SOUTH CAROLINA	Anderson	Drive-In
	Columbia	Drive-In
	Darlington	Liberty
		Darlington
	Florence	Carolina
		Colonial
	Greenville	Drive-In
	Greenwood	Carolina
		Ritz
		State
SOUTH DAKOTA	Madison	Lyric
		State
TENNESSEE	Elizabethton	Bonnie Kate
		Ritz
	Jackson	Paramount
		State
		Met
		Drive-In
	Kingsport	State
	Memphis	Malco
		Strand

State	City	Name of Theatre
TEXAS	Abilene	Majestic
		Palace
		Paramount
		Queen
	Amarillo	Capitol
		Paramount
		Rialto
		State
		Esquire
	Anahuac	Rig
	Arlington	Aggie
		Texan
	Arp	Rex
	Austin	Paramount
		Queen
		State
		Austin
		Capitol
		Texas
		Varsity
	Baytown	Arcadia
		Bay
	Beaumont	Gem
		Jefferson
		Lamar
		Liberty
		Star
		Tivoli
		Peoples
		Circle Drive-In
	Breckenridge	National
		Palace
	Brownsville	Capitol
		Queen
	Brownwood	Bowie
		Lyric
		Gem
	Channelview	Sanja
	Conroe	Crighton
		Liberty
	Corsicana	Grand
		Ideal
		Palace
		Rio
	Dallas	Capitol
		Dalsec
		Fair
		Forest
		Majestic
		Melba
		Palace
		Rialto
		Tower
		White
		Circle
		Inwood
		Knox
		Lakewood
		Lawn
		Esquire
		Varsity
		Village
		Wilshire
		Telenews
		Drive-In-Buckner Bvd.
		Drive-In-Northwest H'way.
TEXAS—Continued	Denison	Rialto
		Rio
		State
	Denton	Dreamland
		Palace
		Texas
	Donna	Plaza
	Eagle Lake	Cole
	Eastland	Majestic
		Lyric
	El Paso	Ellanay
		Palace
		Pershing
		Plaza
		Texas Grand
		Wigwam
	Fort Worth	Bowie
		Gateway
		Hollywood
		Majestic
		Palace
		Parkway
		River Oaks
		Worth
		Tower
		Varsity
		Bowie Drive-In
		Belknap Drive-In
		7th St. Theatre
	Galveston	Key
		Martini
		Queen
		State
		Tremont
		Broadway
	Gladewater	Cozy
		Gregg
		Palace
	Goose Creek	Palace
		Texan
	Greenville	Colonial
		Rialto
		Texan
	Groves	Lyric
	Hallettsville	Cole
	Harlingen	Arcadia
		Grande
		Rialto
		Strand
	Henderson	Palace
		Strand
	Houston	Alabama
		Almeda
		Bluebonnet
		Eastwood
		Kirby
		Majestic
		Metropolitan
		North Main
		River Oak
		Tower
		Village
		Wayside
		Yale
		Santa Rosa
		Broadway
		Garden Oaks
		Fulton

State	City	Name of Theatre
TEXAS—Continued	Houston—Continued	Shepard Drive-In
		So. Main Drive-In
		Winkler Drive-In
	Jacksonville	Jackson
		Palace
		Rialto
	Kilgore	Crim
		Strand
		Texan
	La Porte	Port
	Longview	Arlyne
		Rembert
		Rita
	Lufkin	Lynn
		Pines
		Texan
	McAllen	Azteca
		Palace
		Queen
		El Rey
	Marshall	Lynn
		Paramount
	Mercedes	Rex
		Rio
		State
	Nacogdoches	Rita
		Stonefort
		Texan
	Nederland	Rio
	Needville	Cole
	Orange	Bengal
		Gem
		Royal
		Strand
	Overton	Gem
		Strand
	Paris	Grand
		Main
		North Star
		Plaza
		Rex
	Pelly	Alamo
	Pharr	Drive-In
	Port Arthur	Majestic
		Pearce
		Peoples
		Port
		Sabine
		Strand
		Surf Drive-In
	Port Neches	Lynn
		Neches
	Richmond	Lamar
	Rosenberg	Cole
		State
	Rusk	Cherokee
	San Antonio	Aztec
		Empire
		Majestic
		Texas
		Broadway
		Laurel

State	City	Name of Theatre
TEXAS—Continued	San Antonio—Continued	State
		Sunset
		Woodlawn
	San Marcos	Hayes
		Palace
		Texas
	Silsbee	Palace
		Pines
	Temple	Arcadia
		Bell
		Gem
		Rio
		Texas
	Texarkana	Drive-In
		Paramount
		Strand
		Texan
	Tyler	Arcadia
		Liberty
		Majestic
		Tyler
	Vernon	Pictorium
		Vernon
	Waco	Orpheum
		25th Street
		Texas
		Waco
		Circle Drive-In
	Wallis	Cole
	Weslaco	Gem
		Ritz
	Wichita Falls	Majestic
		State
		Strand
		Wichita
	Yoakum	Grand
		Ritz
UTAH	Ogden	Colonial
		Orpheum
		Paramount
VERMONT	Brattleboro	Paramount
	Burlington	Flynn
		Majestic
	Montpelier	Capitol
VIRGINIA	Cape Charles	Radium
	Charlottesville	Jefferson
		Lafayette
		Paramount
		University
	Danville	Capitol
		Dan
		Rialto
	Exmore	Cameo
	Hampton	Langley
		Rex
	Hilton Village	Village
	Lynchburg	Isis
		Paramount
		Trenton
	Newport News	James
		Paramount
	Phoebus	Lee
WEST VIRGINIA	Bluefield	Granada
		State
	Wheeling	Rex
WISCONSIN	LaCrosse	Fifth Avenue
		Hollywood

The existing joint ownership in the above enumerated theatres shall be terminated as to all such theatres within three years from the date of entry of this judgment, and as to at least one-third of such theatres within one year from such date, and as to at least two-thirds of such theatres within two years from such date, in accordance with the following provisions:

(a) Paramount or the New Theatre Company shall terminate the existing joint ownership in each of said theatres by a sale or other outright transfer of the entire interest of Paramount or the New Theatre Company therein either (i) to a co-owner or co-owners, or (ii) to a person who is not a defendant herein and not owned or controlled by or affiliated with a defendant herein, except as otherwise provided in sub-paragraph (b) below.

(b) In the event that Paramount's interest in any joint ownership shall not be terminated as provided in sub-paragraph (a), Paramount or the New Theatre Company may acquire the interest of such co-owner or co-owners, after first negotiating for such acquisition with such co-owner or co-owners, in not to exceed the following theatres from the above list in each of the following communities:

State	*City*	*Theatres*
ALABAMA	Anniston	Any two of the theatres above listed, only one of which may be a first run theatre.*
	Auburn	Tiger Theatre.
	Bessemer	Any one of the theatres above listed in each of these cities.
	Ensley	
	Jasper	
	Selma	
	Birmingham	Any four of the theatres above listed, only two of which may be first run theatres.
	Chickasaw	Chickasaw Theatre.
	Mobile	Any four of the theatres above listed, only one of which may be a first run theatre.
	Montgomery	Any three of the theatres above listed, only one of which may be a first run theatre.
	Troy	Enzor Theatre.
	Tuscaloosa	Any three of the theatres above listed, only one of which may be a first run theatre.
ARIZONA	Phoenix	Either one of the two drive-in theatres above listed.
ARKANSAS	Camden	Any one of the theatres above listed in each of these cities.
	Jonesboro	
	Fayetteville	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	Fort Smith	
	Hot Springs	
	Little Rock	Any two of the theatres above listed.
FLORIDA	Pensacola	Any three of the theatres above listed, only one of which may be a first run theatre.
GEORGIA	Athens	Any one of the theatres above listed in each of these cities.
	Augusta	
	Brunswick	
	Columbus	
	Gainesville	
	Macon	
	Waycross	
	Savannah	Any two of the theatres above listed, only one of which may be a first run theatre.
IDAHO	Boise	Any two of the theatres above listed, only one of which may be a first run theatre.

* The term "first run theatre," as used in this judgment (except where otherwise specifically stated), shall be understood to mean not necessarily the best theatre of the joint ownership or of Paramount in the particular city, but a theatre which in size, location and physical appointments is suitable for operation upon a regular policy of first run exhibition of the better pictures released by the eight distributor defendants.

State	City	Theatres
ILLINOIS	LaSalle Moline Oak Park Peru Quincy	Any one of the theatres above listed in each of these cities.
	Rock Island Rockford	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
INDIANA	Gary	Any one of the theatres above listed.
IOWA	Cedar Rapids	Any one of those theatres above listed.
	Davenport	Any two of the theatres above listed, only one of which may be a first run theatre.
	Des Moines	Any six of the theatres above listed, only two of which may be first run theatres.
	Sioux City Waterloo	Any one of the theatres above listed in each of these cities.
KENTUCKY	Fulton	Any one of the theatres above listed.
	Owensboro	Any two of the theatres above listed, only one of which may be a first run theatre.
LOUISIANA	Alexandria Monroe	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	Baton Rouge New Orleans	Any one of the theatres above listed in each of these cities.
	Shreveport	Any four of the theatres above listed, only one of which may be a first run theatre.
MAINE	Bangor Lewiston	Any one of the theatres above listed in each of these cities.
MASSACHUSETTS	Haverhill Holyoke North Adams Northampton Pittsfield Springfield	Any one of the theatres above listed in each of these cities.
MICHIGAN	Ann Arbor Battle Creek Flint Grand Rapids Kalamazoo Lansing Pontiac Saginaw	Any one of the theatres above listed in each of these cities.
	Detroit	The Royal Theatre, provided however, that promptly after the acquisition by Paramount or the New Theatre Company of the interest of the co-owner therein, Paramount or the New Theatre Company shall lease the said theatre to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein and which lease shall contain no rental provisions based upon a share of the profits of such theatre or any other theatre, and provided further that Paramount or the New Theatre Company shall sell such theatre property as soon as practicable and in any event before the expiration of such lease.
MINNESOTA	Fairmont	Any one of the theatres above listed.

State	City	Theatres
MISSISSIPPI	Biloxi	Any one of the theatres above listed in each of these cities.
	Clarksdale	
	Greenville	
	Greenwood	
	Gulfport	
	Natchez	
	Hattiesburg	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	Meridian	
	Vicksburg	
	Jackson	Any three of the theatres above listed, only one of which may be a first run theatre.
	Winona	Winona Theatre.
NEBRASKA	Fairbury	Any one of the theatres above listed in each of these cities.
	Falls City	
	Hastings	
	Grand Island	Any two of the theatres above listed, only one of which may be a first run theatre.
	Omaha	Any two of the theatres above listed.
NEW HAMPSHIRE	Concord	Any one of the theatres above listed in each of these cities.
	Portsmouth	
NEW JERSEY	Newark	Any one of the theatres above listed.
NEW MEXICO	Albuquerque	Any one of the theatres above listed.
NEW YORK	Fulton	Any one of the theatres above listed.
	New York City	Rivoli Theatre.
	Rochester	Any two of the theatres above listed, only only one of which may be a first run theatre.
NO. CAROLINA	Asheboro	Carolina Theatre.
	Asheville	Any four of the theatres above listed (and which list shall be deemed to include the theatre in this city, when built, as to which there is a commitment to build), provided that such four theatres shall not include, and Paramount or the New Theatre Company shall concurrently dispose of the interest of Paramount in, one first run theatre in this city.
	Burlington	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	Durham	
	Fayetteville	
	Goldsboro	
	Greensboro	
	Greenville	
	High Point	
	Salisbury	
	Wilmington	
	Wilson	
	Winston-Salem	
	Canton	Any one of the theatres above listed in each of these cities.
	Chapel Hill	
	Concord	
	Gastonia	
	Hendersonville	
	Hickory	
	Lumberton	
	Monroe	
	Rockingham	
	Rocky Mount	
	Raleigh	Any three of the theatres above listed, only one of which may be a first run theatre.

State	*City*	*Theatres*
PENNSYLVANIA	Aliquippa	Any one of the theatres above listed in each of these cities.
	Bloomsburg	
	Butler	
	Carlisle	
	Hazelton	
	Lebanon	
	Pittston	
	Pottsville	
	Shenandoah	
	Sunbury	
	Wilkes-Barre	
	Williamsport	
	Scranton	Any two of the theatres above listed.
SO. CAROLINA	Anderson	The drive in theatre in each of these cities.
	Columbia	
	Greenville	
	Greenwood	Any two of the theatres above listed, only one of which may be a first run theatre.
SO. DAKOTA	Madison	Any one of the theatres above listed.
TENNESSEE	Elizabethton	Any one of the theatres above listed in each of these cities.
	Jackson	
	Memphis	
	Kingsport	State Theatre.
TEXAS	Abilene	Any one of the theatres above listed in each of these cities.
	Beaumont	
	Breckenridge	
	Brownwood	
	Brownsville	
	Corsicana	
	Denison	
	Denton	
	Galveston	
	Harlingen	
	McAllen	
	Orange	
	Paris	
	Port Arthur	
	Temple	
	Tyler	
	Vernon	
	Wichita Falls	
	Austin	Any three of the theatres above listed, only one of which may be a first run theatre.
	Amarillo	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	El Paso	
	Texarkana	
	Waco	
	Dallas	Any seven of the theatres above listed, only two of which may be first run theatres.
	Fort Worth	Any four of the theatres above listed, only one of which may be a first run theatre.
	Houston	Any seven of the theatres above listed, only one of which may be a first run theatre.
	San Antonio	Any four of the theatres above listed, only one of which may be a first run theatre.
UTAH	Ogden	Any two of the theatres above listed, only one of which may be a first run theatre.
VIRGINIA	Charlottesville	Any one of the theatres above listed in each of these cities.
	Lynchburg	
	Newport News	
WISCONSIN	La Crosse	Any one of the theatres above listed.

(c) With respect to any jointly owned theatre as to which Paramount's interest shall not be sold or otherwise transferred in accordance with the provisions of sub-paragraph (a) or as to which the interest of the co-owner or co-owners shall not be acquired by Paramount or the New Theatre Company under the provisions of sub-paragraph (b) of this paragraph 9, Paramount or the New Theatre Company may negotiate with a third person who is not a defendant herein and not owned or controlled by or affiliated with a defendant herein, for a sale of the entire joint interest in such theatre to such third person and may negotiate for the acquisition thereof and thereafter acquire the interest or its co-owner or co-owners for the sole purpose of effectuating such a sale, provided that such sale shall be consummated not later than six months following such acquisition[1] and shall create substantial motion picture theatre operating competition in any community in which Paramount or the New Theatre Company shall retain any theatre.

10. From voting its stock in any of the corporations through which said joint ownerships are held for the purpose of preventing corporate action which will effectuate dissolution of such joint ownerships upon reasonable terms in accordance with paragraph 9 hereof.

B. Paramount owns a beneficial interest in the following theatres, and the only other beneficial interests in such theatres are those of persons who are solely investors: Houlton and Temple Theatres, Houlton, Me.; Empire, Park and Strand Theatres, Rockland, Me.; Chateau, Empress, Lawler and Time Theatres, Rochester, Minn.; Avon, Broadway, State and Winona Theatres, Winona, Minn.; and Grand, Paramount and Strand Theatres, Rutland, Vt.

1. As to not to exceed the following theatres from the above list, Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners therein, or to sell or otherwise transfer the interest of Paramount therein in accordance with the provisions of sub-paragraph (a) or (c) of paragraph 9 of sub-section A of this Section III, or to continue the same in the existing joint ownership applicable thereto:

Any one of the theatres above listed in Houlton, Me.

Any two of the theatres above listed in Rockland, Me., only one of which may be a first run theatre.

Any two of the theatres above listed in Rochester, Minn., only one of which may be a first run theatre.

Any two of the theatres above listed in Winona, Minn., only one of which may be a first run theatre.

Any two of the theatres above listed in Rutland, Vt., only one of which may be a first run theatre.

2. The remainder of the theatres above listed in the first paragraph of this sub-section B shall be disposed of by Paramount or the New Theatre Company, or by the existing joint ownership if continued as above provided for in this sub-section B, to a person not a defendant herein and not owned or controlled or affiliated with a defendant herein, in accordance with the provisions of sub-paragraph (a) or (c) of said paragraph 9.

3. The provisions set forth in paragraphs 1 and 2 of this sub-section B shall be effectuated within two years from the date hereof and in such a manner as to create substantial motion picture theatre operating competition in any community in which Paramount or the New Theatre Company, or the joint ownership if continued as above provided, shall retain any theatres.

C. 1. For the purpose of creating substantial motion picture theatre operating competition in the communities hereinafter listed, Paramount or the New Theatre Company shall dispose of all of the interests of Paramount in at least one half of the following motion picture theatres within one year from the date hereof, and in all of the following motion picture theatres within two years from the date hereof, and each such disposition shall be to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein:

One theatre in each of the following cities in Florida: Bartow and Bradenton.

Two theatres in Clearwater, Fla.*

One first run theatre in Daytona Beach, Fla.

One theatre in Deland, Fla.

Two theatres in Fort Lauderdale, Fla., one of which shall be a first run theatre.

[[1] By order of September 5, 1950, the words "six months following such acquisition" were changed to read "October 5, 1950" CCH.]

The Ritz Theatre in Fort Myers, Fla.

One first run theatre in Gainesville, Fla.

One theatre in Hollywood, Fla., which theatre shall not be the theatre located in the Hollywood Hotel.

Three theatres in Jacksonville, Fla., one of which shall be a first run theatre.

Two theatres in Lakeland, Fla., one of which shall be a first run theatre.

One theatre in Lake Worth, Fla.

One first run theatre in Ocala, Fla.

Two theatres in Orlando, Fla., one of which shall be a first run theatre.

One theatre in Plant City, Fla.

One theatre in St. Augustine, Fla.

Four theatres in St. Petersburg, Fla., of which one shall be a first run theatre.

One theatre in Sanford, Fla.

One theatre in Sarasota, Fla.

One first run theatre in West Palm Beach, Fla.

One theatre in Winter Park, Fla.

One first run theatre in Atlanta, Ga.

One theatre in Preston, Idaho.

One first run theatre in Bloomington, Ill.

One first run theatre in Elgin, Ill.

One first run theatre in Kankakee, Ill.

One theatre in Pekin, Ill.

One first run theatre in Peoria, Ill.

One first run theatre in South Bend, Ind.

One theatre in Danville, Ky.

One theatre in Bath, Maine.

The Regent Theatre and the Annex Theatre, Detroit, Mich.

One theatre in Austin, Minn.

One first run theatre in Mankato, Minn.

One first run theatre in Minneapolis, Minn.

One first run theatre in St. Cloud, Minn.

One first run theatre in St. Paul, Minn.

One theatre in Peekskill, N. Y.

One first run theatre in Poughkeepsie, N. Y.

One first run theatre in Charlotte, N. C.

One first run theatre in Fargo, N. D.

One first run theatre in Minot, N. D.

One theatre in Bellevue, Ohio.

One first run theatre in each of the following cities: Fremont, Ohio, Hamilton, Ohio, and Middletown, Ohio.

One first run theatre in each of the following cities: Columbia, S. C. and Spartanburg, S. C.

One theatre in Sumter, S. C.

One first run theatre in Aberdeen, S. D.

One first run theatre in Huron, S. D.

One first run theatre in Watertown, S. D.

One first run theatre in Chattanooga, Tenn.

Two first run theatres in Knoxville, Tenn.

One theatre in Logan, Utah.

One theatre in Provo, Utah.

One theatre in Barre, Vt.

One theatre in Eau Claire, Wis.

As to not to exceed twelve of the foregoing theatres, in the event that Paramount or the New Theatre Company is unable to sell on reasonable terms, Paramount or the New Theatre Company, upon application to the Court in any such case and with the approval of the Court first obtained, may lease or sublease the same to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein; on condition, however, that no such lease or sublease shall contain any rental provisions based upon a share of the profits of the theatre covered by the lease or any other theatre; and further on condition that Paramount or the New Theatre Company shall thereafter sell its interest in any such theatre so leased or subleased as soon thereafter as it can do so upon reasonable terms and in any event prior to the expiration of such lease or sublease.

2. If the existing decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Florence B. Bigelow, et al. against RKO Radio Pictures Inc., et al.*, shall be modified or vacated, and if, after such modification or vacating, the competitive situation in outlying Chicago (outlying Chicago for the purposes hereof including the entire city of Chicago except the downtown portion of Chicago and also including Berwyn, Blue Island, Chicago Heights, Evanston, La Grange and Oak Park) shall be less favorable for the independent exhibitors in outlying Chicago (an independent exhibitor for the purposes hereof meaning an exhibitor who is not a defendant herein or owned or controlled by or affiliated with a defendant herein), and if such less favorable competitive situation shall be shown by the Attorney General to the satisfaction of the Court in which this consent judgment is entered, then such Court may order such relief against, or with respect to, the theatres of Paramount or the New Theatre Company located in outlying Chicago as it may deem just or proper in order to create proper competitive

conditions in outlying Chicago or in any particular section thereof.

3. As to the cities hereinafter mentioned in this paragraph 3, Paramount or the New Theatre Company (in lieu of disposing of the interest of Paramount in any motion picture theatres in such cities) shall commence within six months from the date hereof, and shall thereafter, until in any case the Attorney General otherwise consents in writing or, if such consent cannot be obtained, the Court otherwise orders, operate (a) only one first run theatre *, as distinguished from a theatre or theatres operating other than first run, in each of the following cities: Tucson, Ariz.; Aurora, Ill.; Alton, Ill.; Danville, Ill.; Decatur, Ill.; Galesburg, Ill.; Kewanee, Ill.; Joliet, Ill.; Waukegan, Ill.; Grand Forks, N. D.; Anderson, S. C.; Greenville, S. C., and Mitchell, S. D., and (b) only two first run theatres in San Francisco, Cal., in Duluth, Minn., and in Sioux Falls, S. D.

D. If Paramount so elects, the "theatre assets of Paramount located in the United States" and to be transferred to the New Theatre Company as provided in this judgment may be construed as not to include the Paramount Theatre property in New York, N. Y. Such property, if not so included, shall be regarded as being included in the other assets of the Paramount defendants to be transferred to the New Picture Company as provided in this judgment, provided, however, that (a) the theatre portion of such property may not be operated by the New Picture Company and may not be leased by Paramount or the New Picture Company to a defendant herein or a person owned or controlled by or affiliated with a defendant herein but may be leased by Paramount or the New Picture Company to the New Theatre Company (or a subsidiary of the New Theatre Company) under a lease which contains no rental provisions based upon a share of the profits of the theatre so leased or any other theatre, and (b) such property shall be sold by the New Picture Company within five years from the date hereof to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

IV

[*Formation of Independent Companies*]

A. Within a period not to exceed one year after the entry of this judgment the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever. The foregoing provisions shall not be construed to prohibit the directors, officers, agents or employees of Paramount Pictures Inc. who become affiliated with either one of said new companies and who receive stock in such companies, either in exchange for stock presently held by them in Paramount Pictures Inc. or as the result of the exercise of option privileges now owned by them or who receive certificates of interest in the New Theatre Company issued by the Trustee as herein provided, from so acquiring stock or certificates of interest in the company with which they do not become affiliated and holding such stock or certificates of interest for a sufficient period of time to permit them to sell such stock or certificates of interest to persons not affiliated with the seller's company without undue hardship to the seller, provided that in any event such sales shall be made within a period not to exceed one year from the effective date of the reorganization of Paramount Pictures Inc.

B. The by-laws of the New Theatre Company shall provide that a majority of its Board of Directors shall consist of individuals who have not had any prior connection with the defendant, Paramount Pictures Inc., or the New Picture Company, as directors, officers, agents or employees. The names of the candidates for election or designation to the original Board of Directors of the New Theatre Company shall be submitted to and approved by the Attorney General and the Court.

C. The by-laws of the New Picture Company shall provide that all replacements of members of the Board of Directors on and after the date of reorganization of Paramount Pictures Inc. shall be filled by indi-

* The term "first run theatre," as used in this paragraph 3, shall be understood to mean a theatre with a policy of playing features in the particular city on a first run basis, other than second choice or western features or features released by distributors other than the defendants herein.

viduals who have not had any prior connection with the defendant Paramount Pictures Inc. or the New Theatre Company as directors, officers, agents or employees, until such time as a majority of the Board of Directors of the New Picture Company shall consist of such individuals and such Board shall thereafter continue to have such a majority.

V

[*Transfer of Assets*]

A. The defendant, Paramount Pictures, Inc., shall present to its stockholders, prior to April 19, 1949, a plan of reorganization to effect a divorcement of its theatre assets located in the United States from its other assets. Such plan shall provide that one of the new companies, viz., the New Theatre Company, shall receive the said theatre assets, and the other, viz. the New Picture Company, shall receive the said other assets, and the two new companies shall each issue to Paramount Pictures Inc. in exchange for the assets so received a number of shares of their common capital stock equal to one-half the aggregate amount of common capital stock of Paramount Pictures Inc. then outstanding. Paramount Pictures Inc. shall be dissolved and (a) shall distribute the stock of the New Picture Company *pro rata* among its own stockholders, and (b) shall on behalf of its stockholders transfer the shares of the New Theatre Company to, and register the same in the name of Bank of New York and Fifth Avenue Bank, a corporation organized and existing under the laws of New York, as Trustee, hereinafter called the Trustee, to hold in accordance with the terms and conditions hereinafter set forth.

B. Upon the organization of the New Picture Company, Paramount Pictures Inc. shall cause the New Picture Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of sections II, IV, VI (in so far as section VI is applicable to the New Picture Company), VIII and IX of this judgment, and thereafter the New Picture Company shall be in all respects bound by, and receive the benefits of, the terms of such sections of this judgment.

C. Upon the organization of the New Theatre Company, Paramount Pictures Inc. shall cause the New Theatre Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of sections III, IV, VI, VIII and IX of this judgment, and thereafter the New Theatre Company shall be in all respects bound by, and receive the benefits of, the terms of such sections of this judgment.

VI

[*Supervision of Trustee*]

A. The Trustee shall declare its submission to the jurisdiction of this Court for all purposes of this cause, and shall enter its appearance herein by counsel, and is made a party hereto; and said Trustee is hereby appointed to receive and hold, as the custodian of this Court, subject to the provisions of this judgment and to the further orders and judgment of the Court herein, the shares of capital stock of the New Theatre Company which shall be transferred to it as above provided for the purpose of assuring effective separation of the ownership and control of the New Picture Company from the ownership and control of the New Theatre Company.

B. The Trustee shall execute and issue certificates of interest representing the shares transferred to it hereunder and shall deliver them to the defendant, Paramount Pictures Inc., which shall distribute such certificates of interest, together with the shares of stock of the New Picture Company, *pro rata* among its own stockholders. All such certificates shall be registered by the Trustee in the names of the recipients.

C. The certificates of interest issued hereunder may be in such denominations as the Trustee shall elect. The certificates of interest shall be executed on behalf of the Trustee by such officer or officers of the Trustee as it may authorize, and such certificates of interest may be countersigned by a trust company in the City of New York as registrar.

D. The Trustee shall, so long as any of the shares of the capital stock of the New Theatre Company shall be held by the Trustee, collect and receive any and all cash dividends declared by the New Theatre Company appertaining to the shares so held, which shall be payable to the Trustee as the registered stockholder entitled to such dividends by the terms of the declaration thereof. Such dividends shall be held by the Trustee as trustee for the respective registered holders of certificates of interest to be paid to or upon their order as hereinafter provided.

The Trustee shall as soon as practicable after receipt of each cash dividend pay to each registered holder of a certificate of interest an amount which is equal to 50% of the amount of such dividend applicable to the shares of stock represented by such certificate of interest, in order to permit the holder thereof to apply such amount toward payment of income taxes on the income deemed to have been constructively received by him by virtue of the payment of such dividend to the Trustee; provided, however, that unless at least 51% of the shares of stock of the New Theatre Company have been released by the Trustee and registered in names other than that of the Trustee within two years from the date of creation of the Trust, the Trustee shall retain 100% of the dividends thereafter paid to it by the New Theatre Company and shall thereafter pay over no part of such dividends to certificate holders as provided above.

E. At any time upon the surrender to the Trustee at its office in the City of New York of any outstanding certificates of interest by the registered holder thereof, or his transferee, and the filing with the Trustee of a duly executed affidavit, substantially in the forms annexed as "FORMS A THROUGH B", the Trustee shall as soon as practicable unless it has reason to believe that the facts are not as represented in the affidavit, deliver to such applicant stock certificates for the number of shares of capital stock of the New Theatre Company represented by the surrendered certificates of interest. The term "applicant" as hereinafter used shall refer to a registered holder of a certificate of interest, or his transferee, who may surrender such certificate of interest to the Trustee in accordance with this or any of the succeeding paragraphs.

If at any time the number of shares of capital stock of the New Theatre Company held by the Trustee have been reduced by the conversion of certificates of interest in accordance with the preceding paragraph to 33⅓% or less of the total number of shares of capital stock of the New Theatre Company outstanding, the Court may, upon application of the New Theatre Company, declare the trust terminated and all shares released therefrom if the Court shall first find that upon such termination there will be no working control of or controlling influence over the New Theatre Company by a person or persons affiliated with the New Picture Company, and no working control of or controlling influence over the New Picture Company by a person or persons affiliated with the New Theatre Company.

In the event of an order of the Court terminating the Trust in accordance with the preceding paragraph, it shall be the duty of the New Theatre Company promptly to notify the holders of certificates of interest; and thereafter, upon the surrender to the Trustee at its office in the City of New York of any outstanding certificate of interest by an applicant whose shares have been released by such direction or order, the Trustee shall as soon as practicable deliver to the applicant stock certificates for the number of shares of capital stock of the New Theatre Company represented by the surrendered certificate of interest.

When certificates of interest are surrendered to the Trustee for transfer and the circumstances are not such as to entitle the applicant to the issuance of a certificate for shares of capital stock of the New Theatre Company, the Trustee shall issue a new certificate of interest in the name specified by the applicant.

F. Upon the delivery by the Trustee of a certificate for shares of capital stock of the New Theatre Company against the surrender of an outstanding certificate of interest or upon the transfer of a certificate of interest into the name of a new registered holder, the Trustee shall pay in cash, to or upon the order of the person in whose name the surrendered certificate (or the certificate delivered for transfer) is registered, the amount of all cash dividends received by the Trustee appertaining to the number of shares represented by such certificate during the period in which such person was the registered holder of such certificate, less the amount theretofore released and paid by it in respect of the shares represented by such certificate, but without interest thereon, as well as the amount of any dividends in respect of such shares which have been declared by the New Theatre Company payable on a date subsequent to the surrender (or delivery for transfer) of the certificate of interest to holders of record on a date prior to such surrender (or delivery for transfer).

G. The Trustee shall at any time after the end of four years from the date of the creation of the Trust, if the Attorney General so requests, and in any event not later than five years from such date, mail to each of the registered holders of remaining cer-

tificates of interest, addressed to him at the last known post office address appearing on the books of the Trustee, a notice stating that the shares of capital stock of the New Theatre Company remaining in the name of the Trustee as of a date not less than ninety days after the mailing of such notice, will be sold and the net proceeds distributed among such holders in proportion to the number of shares represented by their certificates; and as promptly as practicable after the date specified in such notice, the Trustee shall sell, in such manner as the Court shall direct, the remaining shares in the Trust to persons who are not owners of stock in the New Picture Company and upon distribution of the net proceeds (together with any dividends in the hands of the Trustee to which the holders of the remaining certificates of interest may be entitled) the Trust shall terminate.

H. If it shall appear to the Court or the Attorney General at the time that the Trust is proposed to be terminated, as provided in subsections E or G of this section VI, that a working control of or controlling influence over the affairs of either of the two new companies is being exerted by or on behalf of a person or persons affiliated with the other such company, and the Court finds that such a working control or controlling influence exists, the Court may take such action as may be necessary and appropriate in respect of such persons to ensure the termination of such working control or controlling influence, including, but not limited to, if such persons are stockholders of either company, the suspension of their right to vote or to receive dividends upon their stock, and, if such persons are officers, agents, directors or employees of either company, their removal from such positions.

I. Any shares which may be issued by the New Theatre Company during the existence of the Trust provided for herein, shall likewise be transferred to the Trustee and be subject to the terms of this judgment unless the person to whom such shares are proposed to be issued files an affidavit in substantially the forms annexed marked "FORM A THROUGH B" with the New Theatre Company.

J. To aid the Court in the enforcement of this judgment, appropriate provisions shall be made in the charters or the by-laws of the New Picture Company and the New Theatre Company requiring that so long as the Trust provided for herein is in existence any person to whom a dividend is paid (other than the Trustee) shall have first disclosed the identity of the beneficial owner of the shares in respect of which the dividend is payable, and that, in the event that one of such companies shall not have paid a dividend within thirty days of a dividend payment by the other, any person (other than the Trustee) to whom the dividend is paid shall also have first disclosed the extent of any beneficial ownership such person and the beneficial owner may then have in the other company. Before the Trust is terminated both of said companies will procure from all of the stockholders then of record and the transfer agents whatever additional data as to beneficial ownership may be necessary to determine accurately as of the date of proposed termination the names of all beneficial owners of stock and the amounts respectively held by them.

K. The two new companies shall make arrangements with their transfer agents for the submission to each of them, at any desired intervals, of all such information as will enable such companies to determine the name of every person who is a holder of shares (or certificates of interest) in both companies, and the number of shares (including shares represented by certificates of interest) in each company standing in his name, and such information will be made available to the Attorney General.

L. All certificates of interest surrendered pursuant to conversions or exchanges effected under this section VI shall forthwith be cancelled by the Trustee and shall not be reissued.

Within 60 days after the conversion of certificates of interest as herein provided shall have commenced, and at monthly intervals thereafter, the Trustee shall file with the New Theatre Company a report showing the aggregate amounts of certificates of interest transferred and converted since the last previous report of the Trustee and the names of all persons to whom share of stock of the New Theatre Company shall have been issued pursuant to every such conversion and to whom certificates of interest shall have been transferred; and from time to time upon the request of the Attorney General the Trustee shall furnish him with any information which he may require relating to the carrying out of this judgment.

M. The Trustee shall exercise full voting rights on the shares of capital stock of the New Theatre Company registered in its

name, having due regard for the interests of the holders of the certificates of interest, in accordance with the terms, conditions and purposes of this judgment.

N. The Trustee shall keep at an office maintained by it in the City of New York books for the transfer of the certificates of interest issued hereunder. The Trustee shall furnish to the New Theatre Company as and when requested lists containing the names and addresses of the holders of certificates of interest and the respective amounts held by them.

The Trustee may to enable it to effect the purposes of this judgment (so far as consistent with the provisions hereof), decide all matters of detail in respect of the form of certificates of interest and the arrangements necessary for their issuance and transfer.

The Trustee shall be accountable for its action hereunder only in proceedings in this cause, and any order of the Court entered upon notice to the Trustee and to the New Theatre Company shall be full protection to the Trustee for any action which it may take pursuant thereto, and any action so taken by the Trustee shall be binding upon all holders of certificates of interest. The Trustee shall not be liable to anyone for deferring to take any action until instructed by the Court.

O. In case any certificate of interest issued hereunder shall become mutilated or be destroyed, the Trustee, in its discretion, may issue a new certificate of interest of the same denomination in lieu of such mutilated or destroyed certificate. In case of loss or destruction, the applicant for a substituted certificate of interest shall furnish to the Trustee evidence of such loss or destruction to the satisfaction of the Trustee in its discretion and such reasonable indemnity as the Trustee shall require.

P. The Trustee shall be entitled to reasonable compensation, the amount thereof to be approved by the Court, for all services by it hereunder, which compensation, together with counsel fees and other expenses incurred hereunder and approved by the Court, and all stamp and other taxes imposed by law upon the transfer of the shares of the New Theatre Company from the Trustee to the holders of certificates of interest, shall be paid by the New Theatre Company.

Q. The Trustee shall be subject to removal by the Court in its discretion and, in the event of such removal, or in the event of the resignation of such Trustee, the Court may appoint a successor Trustee. The term "Trustee" as herein used shall be deemed to refer to any such successor Trustee.

VII

[*Transitory Period*]

A. Nothing contained in this judgment shall be construed to limit, in any way whatsoever, the right of the Paramount defendants, during the period required for the completion of the reorganization of the Paramount defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Paramount Pictures Inc. has or may acquire pursuant to the terms of this judgment a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

B. From and after the effective date of the reorganization of the Paramount defendants, the provision of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or Paramount Pictures Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this judgment.

VIII

[*Enforcement*]

A. For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this judgment, and that during the times that the plaintiff shall desire such access, coun-

sel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment.

B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX

[*1946 Decree Superseded*]

A. This judgment is rendered and entered in lieu of and in substitution for the decree of this Court dated December 31, 1946. This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the Paramount defendants shall not have been approved by the stockholders of Paramount Pictures Inc. prior to April 19, 1949.

B. For the purpose of any application under this judgment, the plaintiff and the defendant, Paramount Pictures Inc., hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application may be determined by any judge sitting in the United States District Court for the Southern District of New York.

Any application by either party under this judgment shall be upon reasonable notice to the other.

C. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent judgment to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out the same (including applications for alternative relief to accomplish termination of any joint ownership in a manner consistent with the purposes of this judgment in situations where none of the methods of terminating any such joint ownership provided in paragraph 9 of section III of this judgment has effected such termination, due to the unreasonableness of Paramount or a co-owner), for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Forms

"FORM A-1"

(Individual Form)

STATE OF .... }
COUNTY OF .... } ss:

.... being duly sworn deposes and says:

That deponent is surrendering a certificate or certificates of interest registered in the name of .... numbered ...., issued by ...., as Trustee, under a judgment entered on the ..... day of ...., 1949 by a statutory three judge District Court in the suit of United States of America v. Paramount Pictures Inc. and others; that he is the beneficial owner of .... shares of capital stock of .... (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that he makes this affidavit for the purpose of procuring the issuance in the name of deponent of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That deponent does not own any beneficial interest in any shares of the capital stock of .... (herein referred to as the New Picture Company) a corporation of the State of ...., whether registered in deponent's name on the books of the New Picture Company or registered in the name or names of others. That deponent in making this application is not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with

the New Picture Company, but in his own behalf in good faith.

Sworn to before me this .... day of ...., 19....

"FORM A-2"

(Form for Joint Tenants and Tenants in Common)

STATE OF ....} ss:
COUNTY OF ....}

......................being duly sworn deposes and says:

That deponent is one of .... joint tenants (or tenants in common), all of such tenants being herein referred to as the "Applicants"; that he is, pursuant to authority duly conferred on him, surrendering on behalf of Applicants a certificate or certificates of interest registered in the name of ...., numbered ...., issued by ...., as Trustee, under a judgment entered on the ....day of ...., 1949 by a statutory three judge District Court in the suit of United States of America v. Paramount Pictures Inc. and others; that the Applicants are the beneficial owners of .... shares of capital stock of .... (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the Applicants of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That none of the Applicants owns any beneficial interest in any shares of the capital stock of ....(herein referred to as the New Picture Company) a corporation of the State of ...., whether registered in his own name on the books of said New Picture Company or registered in the name or names of others. That Applicants in making this application are not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in their own behalf in good faith.

Sworn to before me this ....day of ...., 19....

"FORM A-3"

(Partnership Form)

STATE OF ....} ss:
COUNTY OF ....}

......................being duly sworn deposes and says:

That deponent is a member of the partnership of ...., the members of which are .... (hereinafter called the "Applicants"); that he is, pursuant to authority duly conferred on him, surrendering on behalf of Applicants a certificate or certificates of interest registered in the name of ...., numbered ...., issued by ...., as Trustee, under a judgment entered on the .... day of ...., 1949 by a statutory three judge District Court in the suit of United States of America v. Paramount Pictures Inc. and others; that Applicants are the beneficial owners of .... shares of capital stock of .... (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the Applicants of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That none of the Applicants owns any beneficial interest in any shares of the capital stock of .... (herein referred to as the New Picture Company) a corporation of the State of ...., whether registered in his own name on the books of said New Picture Company or registered in the name or names of others. That Applicants in making this application are not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in their own behalf in good faith.

Sworn to before me this ....day of ...., 19....

"FORM A-4"
(Corporate Form)

STATE OF .... } ss:
COUNTY OF .... }

........................being duly sworn deposes and says:

That deponent is .... of the ...., a corporation (or a joint stock company), hereinafter called the "Applicant"; that he is, pursuant to authority duly conferred on him, surrendering on behalf of Applicant a certificate or certificates of interest registered in the name of ...., numbered ...., issued by .... as Trustee, under a judgment entered on the ...... day of ...., 1949 by a statutory three judge District Court in the suit of United States of America v. Paramount Pictures Inc. and others; that Applicant is the beneficial owner of .... shares of capital stock of .... (hereinfater referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the Applicant of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That Applicant does not own any beneficial interest in any shares of the capital stock of .... (herein referred to as the New Picture Company) a corporation of the State of ...., whether registered in the Applicant's own name on the books of the New Picture Company or registered in the name or names of others. That the Applicant in making this application is not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in its own behalf in good faith.

Sworn to before me this .... day of ...., 19...

"FORM A-5"
(Trustee Form)

STATE OF .... } ss:
COUNTY OF .... }

........................being duly sworn deposes and says:

That deponent is trustee under the .. trust, that on behalf of such trust estate he is surrendering a certificate or certificates of interest registered in the name of ...., numbered ...., issued by ...., as Trustee, under a judgment entered on the .... day of ...., 1949 by a statutory three judge District Court in the suit of United States of America v. Paramount Pictures Inc. and others; that such trust estate is the beneficial owner of .... shares of capital stock of .... (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the trust estate of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That such trust estate does not own any beneficial interest in any shares of the capital stock of .... (herein referred to as the New Picture Company) a corporation of the State of ...., whether registered in the name of such trust estate on the books of said New Picture Company or registered in the name or names of others. That deponent in making this application is not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in behalf of such trust estate in good faith.

Sworn to before me this .... day of ...., 19...

[¶ 62,378] Philip Klein, trading as Phil's Distributors, v. National Pressure Cooker Company.

In the Supreme Court of the State of Delaware. No. 9. February Session, 1948 Term, February 21, 1949.

Delaware Fair Trade Act

Constitutionality of Fair Trade Act Upheld.—In an action brought by a manufacturer of pressure cookers against a retailer for violations of fair trade agreements executed pursuant to the Delaware Fair Trade Act the respondent raised the defense of the Act's unconstitutionality. It was argued that the inclusion in the title of the expression "through the use of voluntary contracts . . ." restricts the subject matter of the Act and that the provision in Section 6 binding persons having no privity of contract is invalid as not being within the scope of the title. In rejecting the argument, the Court held that the words relied upon by the appellant were simply descriptive of the method in which the intent of the Act was to be carried out and upon reading the title of the Act the whole purpose thereof became apparent.

See the Delaware Fair Trade Act, Vol. 2, ¶ 8124; and Resale Price Maintenance Commentary, Vol. 2, ¶ 7134.

For the appellant: F. William Carr (of Killoran and Van Brunt of Wilmington).

For the appellee: David F. Anderson (of Sutherland, Berl and Potter, of Wilmington).

RICHARDS, C. J., TERRY, CAREY, PEARSON and LAYTON, J. J., sitting.

[*Pleadings*]

This is an appeal from a decree entered in the Court of Chancery in and for New Castle County.

The complainant below, National Pressure Cooker Co., a Wisconsin corporation, filed its bill against the respondent, Philip Klein, trading as Phil's Distributors, seeking an injunction to restrain and enjoin the respondent from engaging in unfair competition with the complainant in violation of the provisions of Chapter 201, Volume 43, Laws of Delaware, designated as the "Fair Trade Act."

The pertinent allegations of the bill are that the complainant for some years past has been a producer and distributor of certain commodities known as pressure cookers, together with certain appliances used in connection therewith which are distributed, marketed and sold at retail to the consumer under the following brand or trade names: "Presto Cooker," "National Pressure Cooker," "Presto Divider," "Aluna Cleaning Pads," and "Presto Timer"; that the complainant has spent large sums of money to advertise and promote the sales of its products under the brands or trade names as indicated, and has a valuable property interest in the good will attached to such names and its products; that in order to protect its corporate name, brands or trade names and good will, and pursuant to the provisions of the "Fair Trade Act," complainant entered into fair trade contracts, commencing on February 14, 1945, with a large number of retail dealers who sell its products in this State; that such fair trade agreements between the complainant and its local dealers are still in force and effect; that pursuant to the aforementioned fair trade agreements, the complainant promulgated a schedule of the applicable minimum resale prices for the products manufactured, produced and distributed by it for retail sale in this State, designated as a "Fair Trade Price List," which schedule was attached to each contract and which price list also is now in effect in this State; that the respondent is an individual engaged in the retail sale of commodities, articles and home appliances in the City of Wilmington and has never entered into a contract with the complainant under the provisions of the "Fair Trade Act"; that the respondent has been informed and notified of the fair trade agreements, including the fair trade price list which is now in force and effect in this State, between the complainant and a number of retail dealers who sell the complainant's products; that the respondent has sold and offered for sale, and will continue to sell and offer for sale, the complainant's products as indicated under the brand or trade names aforesaid at prices below the applicable minimum resale price contained in the fair trade price list, as established by the complainant in violation of the provisions of the "Fair Trade Act"; that the respondent has repeatedly ignored the complainant's request that he refrain from selling or offer-

ing for sale the complainant's products under the brand or trade names above designated at prices below the applicable minimum resale prices in force and effect in this State; that the good will of the complainant and the good will attached to complainant's products, which are marketed or sold under the brand or trade names above set forth, will be irreparably damaged and injured in this State and elsewhere unless the respondent is restrained and enjoined from engaging in unfair competition in the respects as set forth, and that, even though the respondent is not a party to a fair trade contract with complainant under the provisions of the statute, the respondent nevertheless is guilty of unfair competition.

The bill concludes with a prayer that the respondent, his agents, servants, employees, associates or other persons in any manner connected with the respondent, be perpetually enjoined and restrained from engaging in unfair competition with the complainant in violation of the "Fair Trade Act of this State," and from willfully and knowingly advertising, selling, or offering for sale any commodity manufactured, produced or distributed by complainant under the brand or trade names of "Presto Cooker," "National Pressure Cooker," "Presto Divider," "Aluna Cleaning Pads," "Presto Timer," or any of them at less than the price stipulated in any contract entered into pursuant to the Delaware "Fair Trade Act" between complainant and any other person in this State.

The respondent demurred, averring "that the provisions of the Delaware Fair Trade Act (Act of April 22, 1944, Chapter 201, Volume 43, Laws of Delaware), upon which the complainant's cause of action is based, are unconstitutional and hence void by reason of the failure of the title to said Fair Trade Act to comply with the requirements of Article 2, Section 16 of the Constitution of the State of Delaware."

The Chancellor entered a decree wherein he overruled the respondent's demurrer. From this decree the respondent has appealed.

[*Appeal Court Opinion*]

TERRY, J., delivering the opinion of the Court: The sole question to be determined is whether or not the title of "The Fair Trade Act (Chapter 201, Volume 43, Laws of Delaware)" is sufficient to give a fair and reasonable notice to the legislators and to the general public or the subject matter of the legislation proposed.

The title and pertinent provisions of the Act are as follows:

> "AN ACT to protect trademark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trademark, brand or name, through the use of voluntary contracts establishing minimum retail prices and providing for refusal to sell unless such minimum retail prices are observed."

Under Section 1 certain terms are defined, such as commodity, producer, wholesaler, retailer and person.

Section 2 provides that no contract relating to the sale or resale of a commodity which bears a trademark, brand or name of the producer or distributor shall be deemed in violation of any law of Delaware by reason of the provisions under which the seller requires the buyer not to sell at less than the minimum prices established by the seller.

Section 3 provides that "for the purpose of preventing evasion of the resale price restrictions imposed in respect to any commodity by any contract entered into pursuant to the provisions of this Act," certain specified practices, such as combination sales, shall be deemed a violation of such resale price restrictions.

Section 4 provides that the minimum resale price may be fixed by only the owner or distributor specifically authorized by the owner of the trademark, brand or name.

Section 5 exempts certain resales which otherwise would be covered by a contract entered into under the Act.

Section 6 provides: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for resale or selling is or is not a party to such a contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Section 7 provides that the Act shall not apply to the contracts between purchasers.

Section 8 contains the usual severability clause.

Section 9 repeals inconsistent Acts.

Section 10 designates the Act to be known as "Fair Trade Act."

[*Argument of appellant*]

The appellant contends that the Act is unconstitutional, as applied to him, by reason of the failure of the title of the Act to comply with the requirements of Article 2, Section 16 of our Constitution.

> "Article 2. Section 16: No bill or joint resolution, except bills appropriating money for public purposes, shall embrace more than one subject, which shall be expressed in the title."

Two distinct subjects are included in the constitutional provisions; first, that no bill shall embrace more than one subject; the second, with which we are concerned, that the subject shall be expressed in the title. The question to be decided is whether or not the subject of the Act is expressed in the title, or, as applicable to the present case, does the title of the "Fair Trade Act" adequately express the subject of the Act notwithstanding that by Section 6 it purports to affect persons who are not parties to "voluntary contracts establishing minimum resale prices" as well as parties to such contracts?

The appellant argues that the first part of the title states that the purpose of the Act is to protect trademark owners, producers, distributors and the public; that under the next portion these persons are to be protected against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trademark, brand or name; that it then concludes by stating how this protection is to be enforced; that is, "through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed."

It is argued that the inclusion in the title of the expression "through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed" restricts the subject of the Act and implies that its provisions will be applicable only to retailers who voluntarily entered into such contracts, and not to retailers who refrained from so doing. Thus, it is urged, therefore, that that portion of Section 6 which reads "whether the persons so advertising, offering for sale or selling is or is not a party to such contract" is invalid, because there is nothing in the title of the Act, nor the subject thereof as expressed in the title, which would put the members of the Legislature or the public on notice that such a novel provision was contemplated or intended to be embraced within the body of the Act. It is also said that the portion as indicated cannot be regarded as germane to the subject of the Act as expressed in the title when consideration is given to the restriction placed on the subject of the Act by embracing within the title the clause reading "through use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed."

With the foregoing observations in mind, the appellant says that the title is misleading, and that Section 6 of the Act, by reason thereof, is invalid as not being within the scope of the title under Article 2, Section 16 of the Constitution.

[*Presumption of Constitutionality*]

The question is one of substantial interest. Legislative Acts should not be disturbed except in clear cases, and then only upon weighty considerations. Each case dealing with the subject must of necessity be determined upon its own merits. Nevertheless, it should be said to those seeking to annul legislative Acts on such grounds as here presented that it has consistently been the policy of this Court to construe the provisions of Article 2, Section 16 of the Constitution most liberally, and whenever possible, to sustain rather than to destroy the legislation. Especially is this so in the light of the general rule that each legislative enactment is cloaked with the presumption of constitutionality and should not be invalidated unless the circumstances be shown beyond doubt to do violence to the provisions of the Article and Section aforesaid.

[*Object of the Constitutional Provision*]

In many instances our Courts have quoted with approval the observations of Judge Cooley, Const. Lim. (8th Ed.), Vol. 1, p. 296, that the purpose of the provision is, "First, to prevent hodgepodge or log-rolling legislation; second, to prevent surprise or fraud upon the legislature by measns of provisions in bills of which the titles give no intimation * * *; third, to fairly apprise the people through publication of legislative proceedings as is usually made of the subjects of legislation that are being considered, in order that they may have opportunity of

being heard thereon by petition or otherwise, if they shall so desire." We have repeatedly said, in substance, that the principal object of the constitutional provision is that the title of the Act when published shall be sufficiently comprehensive to give to the people, as well as to the members of the Legislature, fair and reasonable notice of the subject matter of the legislation proposed, thus preventing deception by the inclusion of provisions of which the title gives no intimation whatsoever. This statement, ever, does not include within it the thought however, does not include within it the thought that a title of an Act is intended to furnish a synopsis or index to the sections thereof. All that is required is that the language be of sufficient import to give reasonable intimation of the subject matter dealt with. In determining whether or not the subject of the Act is expressed in the title, the whole language of the Act should be considered as well as its manifest purpose and scope. *Monaghan v. Lewis,* 5 Penn. 218, 59 A. 948; *Foraker v. White,* 7 Boyce 25, 102 A. 186; *Wilmington Trust v. Highfield,* 4 W. W. Harr. (34 Del.) 394, 153 A. 864; *State v. Emerson,* 1 Terry 328, 10 A. (2d) 515; *Clendaniel v. Conrad,* 3 Boyce 549, 83 A. 1036; *State v. Grier,* 4 Boyce 322, 88 A. 579; *State v. Ferschke,* 2 Boyce 477, 81 A. 401; *In re Cypress Farms Ditch,* 7 W. W. Harr. (37 Del.) 71, 180 A. 536.

[*Purpose of Act Apparent*]

Upon a reading of the title of the present Act the whole purpose thereof becomes apparent; that is, the protection of owners of trademarks and brand names, together with the public, from cut-throat and unfair competition respecting the retail sale of such commodities. The objection of the appellant that the words "through the use of voluntary contracts" are deceptive and misleading because no intimation whatsoever could be gathered therefrom that the Act would apply to anyone offering for sale or selling any commodities who is not a party to such contract (Sec. 6) cannot be sustained. It seems to us that such an objection is answered by the explanation that the words "through the use of voluntary contracts" merely describe the method by which the desired protection against price-cutting is to be obtained, for without a voluntary contract no price restriction is binding upon anyone.

[*Wording of Title Adequate*]

We think the provisions of the Act are sufficiently expressed in the title, and that that portion of the title relied on by the appellant, "through the use of voluntary contracts", as being more restricted than the language employed under Section 6, is reasonably capable of the construction that it is merely descriptive of the method by which retail prices are to be established and the general intent of the Act carried out. *Goldsmith v. Mead Johnson & Co.,* 176 Md. 682.

In the light of our past decisions we cannot agree with the conclusion reached in the case of *Bristol-Meyers v. Webb's Cut Rate Drug Co.,* 137 Fla. 508, 188 So. 91, wherein that Court in dealing with a similar statute reached a different conclusion, nor do we think, as the appellant contends, that our conclusion as here expressed can be said to be inconsistent with that reached by this Court in the case of *State v. Emerson,* 1 Terry (40 Del.) 233.

For the reasons indicated, the decree as entered below is sustained and an order will be entered accordingly.

[¶ 62,379] Turner Glass Corporation v. Hartford-Empire Company et al.

In the United States Court of Appeals for the Seventh Circuit. No. 9633. October Term, 1948, January Sessions, 1949. March 7, 1949.

Appeal from the judgment of the United States District Court for the Southern District of Indiana.

Sherman Act

Action for Treble Damages—License-Lease of Plant Machinery—Inherent and Collateral Illegality.—A glass manufacturing company, relying on a previous decision against the defendants finding that they had conspired to set up a monopoly by obtaining and licensing patents in glass making machinery, claimed treble damages of his licensor alleging that his business had been damaged as a result of the same restrictive licensing policy.

This action was dismissed when it was found that this license-lease for plant machinery was enforceable without reference to other, illegal agreements entered into by the defendants and that there was nothing inherently illegal in the agreement sued upon.

See the Sherman Act annotations, Vol. 1, ¶ 1270.235.

For plaintiff-appellant: John G. Rauch, John M. Kitchen, Perry E. O'Neal, Patrick J. Smith, Robert D. Morgan.

For defendant-appellees: Hubert Hickam, Alan W. Boyd, Harvey A. Grabill, Charles C. Baker, Stephen H. Philbin, Joseph H. Daniels, William G. Davis, Irving M. Fauvre, Leslie Henry, Paul Y. Davis, Henry A. Middleton, James W. Ross, Albert R. Connelly.

Before MAJOR, C. J., KERNER, J., and WHAM, District Judge.

KERNER, J. By this appeal plaintiff challenges the propriety of a judgment dismissing its complaint after a trial upon the merits.

Plaintiff, basing its claim upon a decree entered by the District Court of the Northern District of Ohio (46 F. Supp. 541, affirmed, 323 U. S. 386, and 324 U. S. 570), hereinafter referred to as the *Toledo* case, sued defendants to recover five million dollars together with treble damages alleged to have been sustained by defendants' violation of §§ 1 and 2 of the Sherman Act (15 U. S. C. A. §§ 1 and 2) and § 3 of the Clayton Act (15 U. S. C. A. § 14). In the *Toledo* case, the court adjudged the defendants, except The Stevenson Corporation, guilty of a conspiracy, combination and monopoly in obtaining and licensing patents in glass making machinery, and in limiting and restricting the use of the machinery.

Plaintiff's complaint alleged a conspiracy substantially in the language of the *Toledo* complaint, and averred that the restrictive licensing policy of the defendants under their patents, and the royalties and license fees paid by plaintiff to Hartford during the period of the conspiracy, placed plaintiff at a competitive disadvantage which directly caused injury and damage to plaintiff's business and property.

After defendants had filed answers, the cause was referred to a master to take testimony and report the same with his findings of fact, and state his conclusions of law thereon. The master took the testimony of the witnesses, reported more than 13,000 pages of testimony and stipulations, admitted in evidence 1,221 exhibits, and filed his report in which he made 42 findings of fact, among which was one that license fees and royalties had been paid by plaintiff from 1923 to August 4, 1930 under certain license and lease agreements, but concluded that the law was with defendants and recommended that the cause be dismissed. Exceptions to the report were filed and overruled and the report of the master was approved by the court.

The court found *inter alia* that plaintiff, an Indiana corporation, has, since 1893, been engaged in the manufacture of glass containers, and that prior to 1920 its entire business has been the manufacture of whiskey and beer bottles; that this business was destroyed by the advent of national prohibition, and that plaintiff was obliged to seek other fields of ware or go out of business. It began the production of various kinds of blown glassware, and during 1920, for the purpose of obtaining better operating results, it equipped its plant with automatic feeders manufactured by the Howard Automatic Machine Company. The use of these feeders did not bring satisfactory results.

In 1923 Hartford became the owner of the Howard patents. During the same year, plaintiff, finding its operating results for prior years so unsatisfactory that its officers and stockholders considered closing the plant, sought and obtained the advice of one Hartley. Thereafter, Hartford and plaintiff entered into license and lease agreements for the use by plaintiff of Hartford's patented machinery and for the servicing thereof. Thereafter it received the benefits which resulted from Hartford servicing the machines used by plaintiff, and plaintiff was in a position to obtain Hartford's most improved equipment. One of the first services rendered by Hartley, who later became president of plaintiff, was to obtain an agreement from Hartford to extend credit to plaintiff for new equipment needed to increase its plant efficiency and production. Acting under Hartley's advice, plaintiff adopted a policy of expansion, sought a wider range of products and an increased

production through the acquisition or control of other glassware manufacturers. Favorable results followed. In 1924 it made a net profit of $109,356, and thereafter until the end of the third quarter of 1929 plaintiff had net earnings averaging more than $150,000 per year.

In 1929 the entire glass industry was adversely affected by the severe business depression which began during the summer. Prices declined, and competition became more difficult to meet. Plaintiff decided that it would need improved Hartford equipment in order to speed up and increase its production and reduce overhead costs. It acquired additional feeders and annealing lehrs, in the expectation of obtaining increased volume by concentrating on sales of low-priced ware, and at the end of the first three quarters of 1929 it had earned about $229,000 more than in any prior full year of operation, but for the balance of that year plaintiff suffered steadily mounting losses totalling about $100,000. Losses continued throughout 1930, and by August 1930 it was obvious that plaintiff could not continue unless some method of refinancing could be found. These losses, the court found, could not be attributed to any cause for which defendants had any responsibility or over which they had any control. After a series of negotiations, a meeting of plaintiff's creditors and bondholders was held. Those present agreed that the appointment of a receiver was unavoidable, and a complaint was filed against plaintiff in the United States District Court for the Southern District of Indiana, to which plaintiff filed an answer, and a receiver was appointed. The receiver, having no capital, suspended plant operations and began to arrange a sale. Authority to sell at public auction was procured on December 27, 1930, and on April 3, 1931 the receivership assets were sold subject to confirmation by the court. The court confirmed the sale on April 4, 1931, and thereafter, in May, 1932, the receiver's administration of plaintiff was approved, the receivership proceedings were closed and the receiver discharged.

The court also found that the evidence did not establish that Hartford, Owens, Hazel-Atlas, Corning or Glass Container ever engaged in any conspiracy or violated the United States anti-trust laws except as adjudicated in the *Toledo* case, or that any of the defendants caused plaintiff's failure or caused any injury to plaintiff's business or property, and that in the *Toledo* case, Judge Kloeb had held that "the Hartford royalties have been passed on to the ultimate consumer as a part of the price of glassware."

In this court, pursuant to plaintiff's request and suggestion that only certain questions of law be considered on this appeal, all of the oral testimony and all of defendants' exhibits were omitted from the record, and it now includes only 38 of the 1,221 exhibits. In this state of the record, we must accept the findings as correct. *Carter Oil Co. v. Norman,* 131 F. 2d 451, 456. They cannot be questioned on appeal, *United States v. Title Guarantee & Trust Co.,* 133 F. 2d 990, 995, and *Howard v. Chicago, B. & Q. R. R. Co.,* 146 F. 2d 316, but, of course, if the findings are based on documentary evidence alone, we are permitted to determine any question of fact. *Carter Oil Co. v. McQuigg,* 112 F. 2d 275. Fortunately, there is no question here involving conflicting testimony. The facts are not in dispute.

It must be conceded that plaintiff cannot maintain an action under the provisions of § 7 of the Sherman Act unless it has suffered an injury in its business or property by reason of the violation by the defendants of some of the prohibitions contained in that Act, *Jack v. Armour & Co.,* 291 Fed. 741, 745; *Northwestern Oil Co. v. Socony-Vacuum Oil Co.,* 138 F. 2d 967. It must show that it was injured, *Alden-Rochelle v. American Soc. of Composers, etc.,* 80 F. Supp. 888, 897, and the mere fact that the defendants have been adjudged guilty in the *Toledo* case is of no avail to plaintiff unless it establishes that it sustained pecuniary damage. *Keogh v. Chicago & N.W. Ry. Co.,* 271 Fed. 444, 447, and *Twin Ports Oil Co. v. Pure Oil Co.,* 119 F. 2d 747. The plaintiff must show personal, pecuniary damages, *Maltz v. Sax,* 134 F. 2d 2, 5, which must be proved by facts from which their existence is logically and legally inferable, *Keogh v. Chicago & N.W. Ry. Co.,* 260 U. S. 156, 165. Without actual damages to plaintiff, there can be no recovery. *Maltz v. Sax, supra;* and *Beegle v. Thomson,* 138 F. 2d 875, 881.

Plaintiff says it has suffered an injury. It has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants may have done. We have already observed that Judge Baltzell found that the evidence failed to

establish that any of the defendants caused plaintiff's failure or caused any damage to plaintiff's business or property. He found as a fact that before plaintiff became a Hartford licensee, its operating results had been unsatisfactory, and that it was not until plaintiff received Hartford service on its Howard machines that satisfactory results ensued. However, in its briefs plaintiff contends that the payment of the license fees and the entry of the judgment in the *Toledo* case was evidence of pecuniary damage, and upon oral argument its counsel stated that if the license agreements are legal, plaintiff "is out." We take this to mean that, in the event we hold that the agreements are not inherently illegal, the judgment must be affirmed. Accordingly we address ourselves only to that contention.

To be sure, for the purposes of this case, the conspiracy to violate the anti-trust laws found at Toledo is established, and, of course, an agreement essentially a part of a scheme to fix the price or curtail the quantity of an unpatented ware would be in violation of the anti-trust laws, *Continental Wall Paper Co. v. Louis Voight and Sons,* 212 U. S. 227; *American Equipment Co. v. Tuthill,* 69 F. 2d 406, 409; and *United States v. Line Material Co.,* 333 U. S. 287. But a patentee may grant a license upon any condition if its performance is reasonably within the reward which the patentee is entitled to secure. *United States v. General Electric Co.,* 272 U. S. 476, 489.

Our study of the *Toledo* case has not convinced us that the inherent illegality of the agreements in our case was considered or decided in that case. We find no language in either opinion of the Supreme Court relating to inherent invalidity of the agreements. It is true, however, that Judge Kloeb said:

> " * * * a license and lease system may be perfectly legal and just if properly used. However, in the instant case, there has been a deliberate abuse and misuse of that system."

(46 F. Supp. 621.) In using the quoted language we think the illegality found was that of the licensing system as a whole, in view of the manner in which the court found that it had been used. It in no manner was dependent on illegality of the agreements here involved.

We believe we find the solution of our problem in what was said in *Gasoline Products Co. v. Champlin Refining Co.,* 46 F. 2d 511, and cases cited therein.

The plaintiff in the *Gasoline Products* case sued defendant to recover royalties under a license agreement. Defendant, as in our case, contended that the agreement was illegal because plaintiff was engaged with others in a conspiracy to violate the anti-trust laws by means of a patent pool for the purpose of establishing a monopoly, fixing prices, controlling the market and extorting huge profits from defendant and others engaged in the manufacture of cracked gasoline, and that the license agreement was issued in furtherance of the illegal combination. The court in rejecting the defense, at page 514 said:

> "As the contract is admittedly valid on its face, involving the doing of no wrongful act, by its terms an ordinary and legitimate business transaction, between parties authorized to contract, it is apparent that the defendant, who voluntarily entered into it, must go somewhere back of and outside of the contract to show its illegal nature. This it does or attempts to do by pointing out that the combination was formed for the purpose of stifling competition and fixing prices in its cracking business; and that the contract sued on partakes of the illegal purpose of the plaintiff, is an essential part of its wrongful scheme, and is a method of carrying it out and reaping the profits made possible by the monopoly.
>
> "The defendant was not a party to the cross-license agreements and I can see no force in the argument that the mere purchase of a sublicense from the alleged illegal combination makes the purchaser a party to it.
>
> "The contract in suit is complete in itself, involves the doing of nothing illegal, and is enforceable without reference to any other agreement. I fail to see how there can be any illegality 'inherent' in one contract when it is necessary to go wholly outside of it and into another contract to find illegality."

We find additional support for the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust law violations. *Bruce's Juices v. American Can Co.,* 330 U. S. 743, was an action to recover on notes given for the purchase price of cans. The defendant pleaded that the consideration for the notes was illegal and the notes void because plaintiff had violated the Robinson-Patman Act. In holding that recovery on the notes

could not be defeated by the defense asserted, the court, at page 755, said:

> "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute [Sherman Anti-Trust Act]. * * * But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit * * * ."

In our case, Hartford was the owner of the patents. Their validity was not challenged in the *Toledo* case, nor is their validity attacked here, hence Hartford had the right to lease the machinery covered by the patents. Having that right, and plaintiff desiring to use the machinery, it voluntarily entered into agreements which conferred upon it the right to use the leased machinery in the United States, for the manufacturing of glassware defined as "Permitted Ware." Limiting the use of leased machinery is within the prerogative of a patentee. Compare *General Talking Pictures v. Western Electric Co.*, 305 U. S. 124. The agreements were complete in themselves, and by the agreements plaintiff secured Hartford's property and received all the benefits of the use of the machines for which it paid the agreed license fees and royalties. The agreement did not fix prices so as to come within the rule enunciated in *United States v. Line Material Co., supra,* or limit the quantity of ware that plaintiff could produce, or the markets in which plaintiff's glassware could be sold. See *American Equipment Co. v. Tuthill, supra.* They did not involve the doing of anything illegal, and each of the agreements was enforceable without reference to any cross-license agreement or agreements into which the defendants might have entered among themselves.

Under these circumstances we are impelled to the conclusion that the licensing agreements were not inherently illegal. Accordingly the judgment of the District Court is affirmed.

[¶ 62,380] U. S. v. The Timken Roller Bearing Company.

In the United States District Court for the Northern District, Eastern Division of Ohio. Civil Action No. 24214. March 3, 1949.

Sherman Antitrust Act

Anti-Friction Bearing Industry—Monopolistic Agreements with Foreign Parties—Violations of Antitrust Statute.—A domestic manufacturer of anti-friction bearings is held to violate the Sherman Act by contracting with a foreign company to fix prices, allocate territories and eliminate competition. The purchase of a large interest in a foreign company engaged in the same business was held not a legitimate business venture but a means to perpetuate a carefully organized scheme to set up a non-competitive market on a world scale. Defenses raised, namely that the restraints were not unreasonable and were ancillary to other legitimate business contracts were rejected by the court in the face of the documentary evidence against them.

See the Sherman Act annotations, Vol. 1, ¶ 1021.361.

For the plaintiff: Don C. Miller, Robert A. Nitschke, Cleveland, Ohio.

For the defendant: Luther Day, Cleveland, Ohio, and John G. Ketterer, Canton, Ohio.

[*Pleadings and Review of Evidence*]

FREED, J.: [*Digest*] The instant action was brought by the United States under favor of Section 4 of the Sherman Antitrust Act, to prevent and restrain the continuing violations of Sections 1 and 3 of the Act. Permanent injunction with adequate protection to prohibit the violations is sought.

The complaint charges, that the defendant and the co-conspirators entered into contracts, agreements and understandings to eliminate competition between themselves and with others, in the manufacture and sale of anti-friction bearings in all the markets of the world, including the United States. It recites that they allocated the respective territories in the world in which each party might manufacture and sell anti-friction bearings and that they prevented one party from selling or shipping anti-friction bearings into the territory allocated to any other

party, except in completed articles of manufacture and for replacement bearings in those articles. It further charges that they fixed and agreed upon prices of bearings shipped into the territory allocated to any other party and that they fixed and agreed upon prices of anti-friction bearings sold and shipped to Russia. They allocated the use of the trade mark "Timken" to each of the parties in their respective designated territories and required that the co-conspirators not manufacture and sell bearings, except under the mark "Timken". The agreements required the co-conspirators to surrender to defendant the rights in the name "Timken" upon the termination of the contracts between them. It is claimed, in certain of the designated territories they entered into agreements with other manufacturers to regulate and allocate the sale of anti-friction bearings and they aided and assisted each other in restricting and eliminating in their respective territories competition from others in the manufacture and sale of anti-friction bearings.

It is alleged in the complaint that the combination and conspiracy resulted in unreasonable restraint of imports into and exports from the United States. It is further alleged that the current world shortage of anti-friction bearings and decreased European production caused by the war, has created large potential export markets for anti-friction bearings of American manufacture. Notwithstanding this, the continuation of the conspiracy and combination will restrain and prevent defendant from seeking and acquiring many world markets with the eventual consequence of reducing its production of bearings and employment of labor.

The factual and legal questions to be determined in respect of the charges of the complaint are posed by the Government as follows:

Within the purview of the Sherman Act is it illegal for the "defendant and two foreign corporations, which between them manufacture and sell a substantial portion of the world's production of anti-friction bearings, to regulate interstate and foreign commerce by private arrangements embodying the following restrictive practices"?

"(a) Allocation, by agreement, of trade territories throughout the entire world, each agreeing with limited exceptions, not to manufacture and sell in the other's territory;

"(b) Imposition by agreement, of price restrictions upon products sold by any party in the territory of another;

"(c) Agreement to exclusively exchange present and future know-how and inventions, patented or unpatented;

"(d) Use, by agreement, of a common trade mark 'Timken' in their respective territories, compulsory use of that mark by the foreign conspirators, prohibition against their dealing in products under any other name, and requiring that they cease using the name upon termination of the agreement;

"(e) Mutual co-operation and assistance to protect each others' markets and to eliminate the competition of outsiders;

"(f) Participation in foreign cartels which restrict exports by United States producers."

The defendant, The Timken Roller Bearing Co., is an Ohio corporation with its principal offices located at Canton, Ohio. It employs upwards of 16,500 employees at its various plants located in Ohio and in Colorado, in the United States and St. Thomas, Ontario in Canada. Its foreign sales are handled by two wholly owned corporations: Timken Roller Bearing and Service Limited and The Timken Roller Bearing Co., of South America, Canadian and Ohio corporations respectively. Defendant manufactures tapered roller bearings, alloy steel, seamless tubing and removable rock bits.

British Timken Limited, named a co-conspirator, (hereinafter referred to as British Timken) is a British Joint Stock Company which maintains its plant and principal offices at Birmingham, England.

On January 1, 1928, a "business agreement" consisting of three written instruments of the same date was made between defendant and British Timken, to be in effect for a period of ten years. Simultaneously all existing contracts between them were cancelled.

The agreement of 1928 followed generally the pattern of those which preceded it. The world was divided into respective territories for the manufacture and sale of bearings in this language: "For the purpose of this Agreement the United Kingdom of Great Britain and Northern Ireland and all other countries of Europe and all colonies or dependencies of said United Kingdom and European countries except in or adjacent to North or South America shall be deemed to be the territory of the British Company and

the rest of the world shall be deemed to be the territory of the American Company."

Exclusive license was granted to British Timken under existing or future patents of defendant for the duration of the agreement. In turn British Timken was to assign absolutely and for all time its existing and future patent rights in defendant's territory.

They agreed to inform each other in respect of all inventions and improvements regardless whether they were patented or not patented. Advice as to methods of manufacture was to be furnished by defendant, and British Timken was obliged to follow it.

Each party agreed not to sell bearings directly, or to others for shipment into the other party's territory, except as assembled component parts of completed articles manufactured in its own territory and for bearing replacement purposes in such completed articles. In the event such sales in or into the other party's territory were made, they were obliged to advise each other of the details of the sales and pay an amount of ten per cent of the net sales price.

They agreed to endeavor to maintain the distinctive character of the trade mark "Timken". British Timken agreed not to manufacture or sell bearings except under the trade mark and only in accordance with the provisions of the agreement, and to eliminate the name "Timken" from its corporate name and to refrain from its use as a trade mark upon the termination of the contract.

Early that year [1928] steps were taken by Dewar, with the consent and co-operation of defendant, to organize Societe Francaise Timken (French Timken) which accordingly came into existence in July of 1928. The ownership of its stock was divided between defendant and British Timken. Dewar, however, during the entire time under consideration, controlled its operations and supervised its business activities. French Timken purchased from S. M. G. the trade mark rights in the name "Timken" for 12,000 francs.

A "business agreement" was entered into bewteen British Timken and French Timken, on the model of the one between defendant and British Timken, allocating to French Timken France and her colonies, dependencies and mandates (except those in North and South America) as its exclusive territory for the manufacture and sale of anti-friction bearings.

Before the expiration of the 1928 contract, another agreement between defendant and British Timken became effective (on January 1, 1935) for sixteen years, which was substantially the same as the 1928 contract.

In it were found, however, the following provisions: "The American Company [Timken] in its territory may accept and execute orders for bearings for ultimate destination in the British Company's [British Timken's] territory for use for bearing replacement purposes in such completed articles of manufacture but such right shall not authorize sales to or known to be destined for manufacturers in the British Company's territory or sales at prices in conflict with the wishes of the British Company and the American Company from time to time will notify the British Company of the details of the sales authorized under this paragraph and will pay to the British Company an amount equal to five per cent (5%) of the net sale price thereof."

Conversely the same provision is made as to prices and payments to defendant for sales of replacement bearings by British Timken in defendant's territory.

Russia became the joint territory of defendant and British Timken. Business transacted there was conditioned as follows:

"The prices and terms at or upon which offers are made and orders are accepted shall so far as practicable be mutually agreed from time to time but nevertheless either of the parties hereto shall be at liberty to quote and accept orders at low prices and extended times for payment without the consent of the other party after having first submitted the prices and other terms to the other party for its consideration and remarks provided that any such quotation or acceptance shall not involve under cutting some quotation already made by the other party."

The present operations of defendant, British and French Timken in the world market of anti-friction bearings are carried on under the provisions of and subject to the restrictions of two contracts both dated November 28, 1938. They are, the "Tripartite Contract" between defendant, British and French Timken and the agreement between defendant, British Timken and Dewar, which is supplemental to the Tripartite Agreement. These are the final understandings which superseded all the numerous others and are to govern the conduct of the parties until the end of 1965.

The 1938 contracts are each entitled "Business Agreements" and contain substantially the same provisions present in the 1935 agreements.

To summarize their salient features, the contracts provided for exclusive marketing areas which prevented the parties from selling in each other's territories, fixed prices on all replacement bearings sold in each other's territories, fixed prices on bearings sold in Russia and compelled British Timken and French Timken to manufacture and sell bearings only under the terms of the agreements and under the trade mark "Timken".

The evidence is overwhelming and uncontradicted that defendant, British Timken and French Timken religiously adhered to their contractual obligations to make the territorial divisions inviolate. Indeed, in some instances they refused to disturb the allocated territories even where exceptions were made in the agreements.

Each of the parties refused orders for shipment outside of its territory, referring them to the company in whose territory they were to be used. During the period from July 1, 1945 to February 20, 1947, alone, defendant transmitted 402 inquiries or orders to British Timken and French Timken. In each instance the customer who placed the order was advised that either British or French Timken had the exclusive right to supply the bearings.

The steady and persistent effort to assure the exclusive right of each party to manufacture and sell in its own domain is emphatically illustrated in the various letters and memoranda of the officers of the contracting parties and particularly of the officers of defendant. They bear out the Government's contention that the respective trade provinces were to be preserved regardless of the unsatisfied demand for bearings in the various parts of the world. Over the entire span of years during which the restrictions existed, the parties did not deviate from their course of conduct. Even when the world gradually became engulfed in armed conflict, provisions were made to supply customers by specific arrangements so as to retain the trade division.

. . . the parties not only sought the preservation of their respective sales fields, but that they supported the agreements by the maintenance of price fixing arrangements. The protective discount policy insured the parties against competition from each other in replacement bearings. Defendant sold at a 70% discount for export in its own territory, but quoted prices representing a 50% discount from the American list on standard bearings in response to unsolicited inquiries from British Timken's territory.

The inhibition imposed by the contracts on British and French Timken, not to manufacture or sell tapered roller bearings, except under the name "Timken" was observed and both companies throughout the years before and after 1928, to date, have become identified as producers of "Timken" bearings. The goodwill they built up and the competitive position they acquired in the allocated territories was under the name "Timken." The retention of the goodwill and place of dominance in their business field depended on the continued right to use the name. The severance of contractual relations meant the termination of their ability to profit by the many years of experience in manufacture and successful business dealings with their customers. In turn no competitor of British or French Timken was permitted to use the trade mark "Timken."

In addition to dividing the world into restricted manufacturing and marketing areas, maintaining price fixing arrangements, and interchange of discoveries, know-how and inventions to the exclusion of others, defendant, British Timken and French Timken co-operated to shut out the competition of other dealers in tapered roller bearings.

The rigid territorial divisions were followed at all times except when adherence to such restrictions would result in the possibility of loss of business. They were made for the dual purpose of protection against each other and to eliminate the competition of other tapered bearing producers.

The collaboration of defendant, British Timken and French Timken to eliminate competition with each other and to eliminate the competition of other bearing producers was augmented by agreements of British Timken and French Timken with their competitors abroad, to share customers and sales in certain markets and to stabilize prices. Hess referred to the association resulting from the agreement as a cartel in reporting on its success to H. H. Timken (the founder and at the time president of defendant company).

Although the cartels were formed without defendant's execution of the actual agreements, they were the result of the understandings and co-operation of defendant with British and French Timken to bring them about. Defendant's territory was affected. It was the beneficiary of their operations. Its officials were in consultation with the officers of British and French Timken concerning them, they prompted and approved the agreements.

The cartel agreement between SKF and British Timken was not only an arrangement on prices of bearings and the percentage of the total bearings each was permitted to sell, but the parties agreed not to sell replacements of the other's bearings. The division of business as to specific customers was set up on a quota basis. When one of the parties exceeded its quota on a certain customer that party was required to raise its prices until there was compliance with the agreement.

The lengthy recital of letters, reports and memoranda paints such a clear picture of the conduct of the accused companies over the period of years, that the Court feels it serves the necessary purpose of pointing out the patent reasons for resolving the factual issues which are involved. It leaves no room for dispute or contradiction on the salient facts.

The evidence conclusively establishes to the satisfaction of the Court the assertions of the Government: that defendant, British Timken and French Timken have manufactured and sold during the period from 1928 to date a substantial portion of the world's production of anti-friction bearings and that they have imposed restraints on foreign commerce, by (1) allocating trade territories throughout the entire world each agreeing with limited exceptions not to manufacture or sell in the other's territory; by (2) fixing of prices on products sold by any party in the territory of the other party; by (3) mutual co-operation and assistance to protect each other's markets and to eliminate the competition of outsiders and by (4) participation in foreign cartels which restrict exports by United States producers.

The contentions that defendant stifled or eliminated competition and restrained trade, by exclusively exchanging present and future know-how and inventions, patented or unpatented, and by compulsory use of the trade mark "Timken" by British and French Timken, by prohibition against their dealing in products under any other name, and by requiring that they cease using that name upon the termination of the agreements, will be discussed later in this opinion.

The analysis of the evidence is susceptible of but one conclusion. It discloses an extensive and far reaching combination to smother all competition between defendant, British and French Timken and to stifle or suppress competition of other manufacturers by joint effort against them or by agreement with them.

It is readily seen that the present relationship of the parties is not only the culmination of the successive agreements beginning in 1928. The combination is, as well, the outgrowth of the principal agreements in 1909, when world markets were divided and competition was eliminated. Those contracts were not merely patent licenses for the manufacture of tapered roller bearings in limited areas, but they encompassed fields beyond the ambit of the existing patent rights. *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, *U. S. v. National Lead Co.*, 63 Fed. Sup. 513, 523, aff'd 332 U. S. 319, *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 456. The territorial restrictions applied to markets where defendant had no patent rights. *Interstate Circuit, Inc. v. U. S.*, 306 U. S. 208, 228. They included future development and inventions in the industry. *U. S. v. National Lead Co., supra, Ethyl Gasoline Corp. v. U. S., supra, Pope Manufacturing Co. v. Gormully,* 144 U. S. 224.

After the expiration of the principal patents, the restrictions imposed continued. Without the benefit of the limited monopoly power of the patents the agreements followed the same pattern. They no longer revolved around the patents, but were without pretense contracts for the avowed purpose of suppressing competition. Duncan (Timken's London counsel) pointedly said in November 1927:

> "As we understand the position, the main advantage derived by the English Company under the Agreement will be the advice and information to be received from you, the right to use the name "Timken" and the absence of your competition. Do you not think that it would be better to accentuate these advantages in the Agreement, rather than leave them merely as incidents in a patent license?"

When in 1928 the American, British and French companies agreed to continue their

activities, British and French Timken had grown from infancy in the bearing industry to a position of dominance and was a potential competitor with whom defendant had to reckon.

The relationship effected and maintained was not that which prevails between a manufacturer and its exclusive foreign agents for the distribution of its product. Each company was a manufacturer and distributor, independent of the others, but joined for the sole and only purpose of mutual benefits. It is not even contended that defendant, British Timken and French Timken ever competed.

The inflexible territorial limitations imposed by the parties on each other, which they violated only to prevent others from encroaching on the protected markets, were designed for the purpose of preventing competition and were reinforced by price agreements. The word "Timken" had become synonymous with tapered roller bearings. To lend support to the desire to eliminate the competition of other producers, defendant supplied British and French Timken, and them alone, with know-how in the production of bearings. It insisted that bearings produced and sold by them be identified by the name "Timken."

The cartel agreements in France, England and Italy were made by British Timken and French Timken with the knowledge, approval and co-operation of defendant to effectuate the plan of excluding competition of others in the territories of defendant, British and French Timken.

The extent to which they were successful in impeding competition is of no moment. It is sufficient that that was the end sought to be accomplished. *Associated Press v. U. S.*, 326 U. S. 1, 12, *U. S. v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150. The French Anti-Friction cartel, the English SKF-British Timken cartel and the agreements with Bock and R. I. V. fortified defendant in the overall plan of suppressing competition in the sale of tapered bearings.

[*Operation of the Sherman Act*]

It is an imperative of the Sherman Act that all combinations in restraint of international trade and all agreements to restrict competition be condemned. *U. S. v. National Lead Co., supra, U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 291, *U. S. v. Aluminum Co. of America*, 148 Fed. (2d) 416. The very aim of all the antitrust laws is to ban conduct and practices which destroy free and unhampered competition. That postulate has been repeatedly announced by the courts even before the legislative enactment. Within the last decades the decisions reiterating it have covered thousands of printed pages. They have been regarded as inimical to economic freedom. The Government refers to the instant combination as an international cartel, which appellation is assailed by defendant. That name applied to the combination has no significance, other than to label it as a pool of "separate firms to maintain prices above a competitive figure." (Webster's New International Dictionary). It is merely descriptive of the combined relationship between defendant, British Timken and French Timken. If the term connotes vice or illegality it is clearly applicable.

The strict allocation of markets to the members of a combination of competitors in the various parts of the world and the eradication of competition among them violates the Sherman Act. *U. S. v. American Tobacco Co.*, 221 U. S. 106, *U. S. v. National Lead Co., supra.*

The contracts by which it was agreed that in a particular area anti-friction bearings might be sold by only one of the members of the combination, necessarily were intended to and had the effect of eliminating competition. The Supreme Court repeatedly recognized the inherent danger of such agreements to our system of free enterprise, and held that agreements or arrangements for dividing markets were illegal under the Sherman Act. *U. S. v. American Tobacco Co., supra, U. S. v. Addyston Pipe & Steel Co., supra, U. S. v. National Lead Co., supra.*

The fact that defendant, British and French Timken were manufacturing and selling only tapered bearings does not immunize the combination against the operation of the antitrust laws. It is true that there is competition between tapered and other types of anti-friction bearings to the limited extent pointed out earlier. The prohibitions of the Sherman Act, however, are equally applicable to combinations in restraint of trade when only part of the commerce is stifled. As was said in *Eastman Kodak v. Federal Trade Commission*, 158 Fed. (2d) 592, 594, cert. denied 330 U. S. 828:

> "Hence it will not do to say that all film is in the same class. If a purchaser wants a color film he must be able to buy it from more than one manufacturer if

there is to be 'free and open competition with commodities of the same general class'; that he can buy a black and white film will not serve to destroy the monopoly of the sole producer of color film."

and in *U. S. v. Yellow Cab Co.*, 332 U. S. 218, 225:

> "Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy."

and again in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 225 (footnote 59), "And the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U. S. 38) since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected."

The benefits of a competitive price system under the Sherman Act would be lost to the vast number of manufacturers whose machinery and equipment are geared to use only tapered bearings, if the operation of the Act were to be construed otherwise.

The practice of selling only at prices agreeable to the party into whose territory the sales were made and the provisions of the contracts for agreed prices on replacement parts and the other price fixing arrangements of defendant, British and French Timken must be condemned as violations of the Sherman Act. *U. S. v. Masonite Corp.*, 316 U. S. 265.

In *U. S. v. Socony-Vacuum, supra,* the Supreme Court said:

> "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.
>
> * * * *
>
> "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." (Footnote 59.)

In *U. S. v. Line Material Co.*, 333 U. S. 287, it was said:

> "Price fixing in any form is perhaps the most powerful of all inducements for abandonment of competition. It offers security and stability; it eliminates much of the uncertainty of competitive practices; it promises high profits."

and again in *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, 143:

> "We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se. United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States v. Masonite Corporation, supra.* We recently held in *United States v. Gypsum Co.*, 333 U. S. 364, 400, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements."

Both the territorial sales limitations and price fixing constitute a menace to international trade in tapered bearings.

No less harmful and injurious to the unrestricted flow of commerce in tapered bearings was and continues to be the association of defendant, British and French Timken for the purpose of protecting each other's markets and the exclusion of outsiders from the tapered bearing market. Such conduct is denounced by the antitrust laws. *Associated Press v. U. S., supra, Montague & Co. v. Lowry, supra, Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20, *U. S. v. Trenton Potteries Co.*, 273 U. S. 392.

The participation in the foreign cartels by defendant completed the circle within which the combination operated to forestall competition. The circumstances outlined above under which defendant took part in the operation of the cartels leave no room for escape for defendant from the prohibitions of the Sherman Act. The ban on restraints of imports and exports has been consistently enforced by the courts. *United States v General Dyestuff Corp.*, 57 Fed. Sup. 642, *United States v. Nord Deutscher Lloyd,* 223 U. S. 512. What was so well said in *United States v. National Lead Co., supra,* 524, is equally pertinent when applied to the facts in this case:

> "The several agreements relating to manufacture and trade within the European markets are but some of the links in the chain which was designed to enthrall the entire commerce * * *."

Nor does the fact that the cartel agreements were made on foreign soil relieve defendant from responsibility. *U. S. v. Nord Deutscher Lloyd, supra.* They had a direct and influencing effect on trade in tapered bearings between the United States and foreign countries.

There is no charge made in the complaint that the parties engaged in the practice of

exclusively exchanging present and future know-how and inventions, patented or unpatented. Evidence seeking to establish such claim was offered at the trial. Although it does not convincingly appear that either the exclusive exchange of know-how or the enforcement of the trade mark restrictions alone served as direct instruments to eliminate competition, they have been most helpful in buttressing other illegal conduct to achieve the desired result. They were integral parts of the general scheme to suppress trade.

[*Defendants Contentions*]

Are the contentions urged by the defendant sufficient to overcome such manifest violations of the Sherman Act?

[*Restraints Are Reasonable*]

The first contention of defendant is that even if the agreements between the three Timken companies for division of territory, and any incidental arrangements as to price contained therein were made, any restraint resulting therefrom to constitute a violation of the Act, must be found to be unreasonable. Defendant's position is that it undertook to extend its activities by the purchase of British Timken and the formation of French Timken with Dewar. It protests that it was not done for the purpose of eliminating competition and that it did not have that effect, that there has been no intent to unduly restrain trade but that it was done for good business reasons. Defendant says the division of markets between the companies was reasonably ancillary to the acquisition of British Timken and the formation of French Timken.

In advancing the argument that only such contracts or combinations are within the condemnation of the Act as prejudice the public interest by unduly restricting competition or obstructing trade, defendant concedes that:

"It would appear, superficially, that contractual provisions like those involved in the case at bar that American Timken will not sell bearings in the territories of British and French Timken, respectively, and *vice versa*, tend to prevent competition between the parties."

The contention made invites a discussion of the rule of reason doctrine applied by the courts to the Sherman Act. A vast body of decisions may be found dealing with the doctrine. For the present purpose, it will suffice to say, that it is now firmly established that the statutory provision, "Every contract, combination * * * in restraint of trade * * * is hereby declared to be illegal * * *" means that all unreasonable restraints of trade offend the Act. *Standard Oil Co. v. U. S.*, 221 U. S. 1, *U. S. v. Columbia Steel Co., supra.* It is equally well recognized that the determination of what constitutes unreasonable restraint is the province of the courts. Judicial construction of the law has declared certain restraints unreasonable. With but rare exceptions, since the decisions in the *Standard Oil* case and the *American Tobacco* case in 1911, activities which theretofore were stricken down as illegal restraints have been regarded since as unreasonable *per se*.

In view of the settled law and the facts, defendant's contention that the restraints were reasonable must be rejected as untenable. The restraints on commerce, here proved by abundant evidence, have been denounced as unreasonable *per se*.

Defendant seeks to draw a parallel between the instant facts and those in the *Columbia Steel* case, *supra*. By contradistinction from the facts in that case defendant, British Timken and French Timken are separate corporations who in their respective territories, both before and after their agreements, were potential competitors in the tapered bearing market. They were the largest dealers in tapered bearings in their respective territories. They occupied dominant positions in the entire anti-friction bearing industry. Defendant did not acquire British and French Timken.

[*Combination for Good Business Reasons*]

The defense that the combination was formed without intent to restrain trade, for good business reasons, was denied validity in numerous cases. If good business reasons and expressions of good intent would serve as justifications for restraining trade and stifling competition the Sherman Act would render no aid to the free flow of commerce. The Act aims to bulwark the national economy and insists that individual interests give way to the benefit of all. *Standard Sanitary Mfg. Co. v. U. S., supra*, 49, *Addyston Pipe & Steel Co. v. U. S. supra*; *Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S. 600.

There is nothing in the evidence to indicate a lack of intent to restrain trade. Indeed, all that the evidence discloses is an intent to form a smoothly operating combination to control commerce in the tapered bearing industry throughout the entire world.

In the face of the numerous agreements and the clear expressions of defendant's officers in the volumes of letters and memoranda offered in evidence, it is difficult to understand how anyone can disclaim a clear intent to restrict competition.

[*Partnership or Joint Venture*]

It is next urged by defendant that any restraints imposed by the agreements were ancillary to the creation of a close relation between it and Dewar, analagous to a partnership or joint venture. It is suggested that the purpose was to expand its bearing business in European markets, and necessarily involved the investment of large sums in the acquisition and development of British and French Timken and hence not in violation of law. In this connection defendant assumes that since the parties could lawfully agree to be excluded from each other's territories, they could lawfully agree also that any incursions into each other's territories should be made only at prices agreeable to the party in whose territory the sale was made. It says that such a provision was reasonably ancillary to prevent competition by defendant with the corporations through which the common undertaking was conducted.

Both the assumption made and the conclusion reached are wholly erroneous. The common undertaking was a joint venture only in the sense that they jointly undertook to continue the manufacture and distribution of bearings with all the limitations and restrictions which had theretofore been imposed. The joint venture was not ancillary to the agreement. Regardless of the descriptive term used to denote the affiliation, it did not constitute a legal basis for the avoidance of the consequences of the conduct which eliminated competition.

Throughout the trial great emphasis was placed on this phase of the defense. The record abounds with repetition of "joint venture," "partnership," "partnership in the layman's sense." All of the defendant's officers and employees took great pains to make reference time and again to "our joint venture" and to "our partners."

It will be recalled that the relationship of defendant, British Timken and French Timken in respect of the manufacture and sale of bearings did not originate with the agreement between defendant and Dewar. Ever since 1909 defendant had maintained the territorial market restrictions with the predecessors of British Timken, and in France with the predecessor of French Timken.

The agreements made in 1928 and the activities restricting commerce, were antedated by other agreements and activities of similar nature. Licensing of patents first served as the basis for the restrictions, but they were continued despite the expiration of the patents. Atlhough the question, whether the early agreements founded on patent ownership transgressed the law may not be in issue in this case, the fact that in their essence they set the pattern for the restraints, is of great and fundamental importance. The only substantial change in the relationship of the parties resulting from the Dewar-defendant contract was that defendant acquired a stock ownership in British Timken and French Timken. The execution of the 1928 contracts did not mark the beginning of new business contacts. They merely extended the restrictive arrangements which had existed for almost twenty years between potential competitors.

The only conclusion which may properly be drawn is that the restraints were not ancillary to the "joint venture." To the contrary, the arrangements were made to carry on effectively the combination to eliminate competition between the parties and to frustrate any competition of outsiders.

It is quite obvious . . . that even if the stock investment of defendant and the cooperation between them indicated a preexistent fiction of a "joint venture" or partnership in their own judgment, by 1934 neither believed that such relationship existed.

The facts are that defendant did not build plants in Europe or purchase subsidiaries abroad. It simply acquired substantial interests in a dominant manufacturer of bearings in England, participated in the formation of and invested in the stock of a potential competitor in France. The repeated assertion that it was in a joint venture or was a member of a partnership does not make it so.

Even if we were to assume, arguendo, that there was a "joint venture" between the parties and that an Ohio corporation

could become partner in a business undertaking with a citizen of England or an English corporation (10 Ohio Jurisprudence § 632, § 857, *Ohio v. Standard Oil Co.*, 49 O. S. 137), no immunity is afforded to defendant from the violations of the Sherman Act.

The argument is predicated on the oft quoted opinion of Judge Taft, later Chief Justice Taft, in *Addyston Pipe and Steel Co., supra,* in which restraints of trade resulting from a legal partnership agreement were held not to run afoul of the law. That decision does not uphold the type of conduct which is here attacked.

If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs. But if the association is formed for the purpose of continuing a combination to allocate exclusive sales territories in the world, to fix prices and to eliminate competition both within and without the combination, it cannot hide from the effects of the law under the cloak of a joint venture or partnership. Were it otherwise, an easy way could be found to circumvent the law by entering into agreements purportedly to protect a joint venture or partnership.

[*Agreement to Furnish Know-How*]

Defendant also asserts that any restraints imposed by the contracts were ancillary to its agreements to furnish know-how to British Timken and other Timken companies. It says that the covenants by which it agreed not to compete in the territory in which British and French Timken were to use this know-how and by which each of them in turn, agreed not to compete in defendant's territory were reasonably ancillary to the sale of the know-how under the contracts. It concludes that the law permits the restriction not to compete in each other's territory as a recompense for its contribution to the foreign companies of advice and instruction in the manufacture of bearings and the quality of steel used and information with respect to inventions, discoveries and practices whether patented or not.

In taking this position it principally relies on the *Addyston Pipe case, supra.* It is pointed out that the agreements "by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold" and "by the buyer of property not to use the same in competition with the business retained by the seller" were held in that case to be ancillary restraints not in violation of the Sherman Act.

Defendant goes so far as to argue "that, due to the more restrictive nature of a patentee's monopoly, he is more restricted in the conditions which he may impose, than is the seller of unpatented property such as know-how, which is available to any member of the public who can discover it" and "that the legal principle which supports a patentee's agreement not to sell in the licensed territory is just as applicable to one who licenses or transfers know-how."

The precise legal basis for the argument so advanced is not disclosed. Analogy is drawn between *Fowle v. Park,* 131 U. S. 88 and *Dr. Miles Medical Company v. Park & Sons Company,* 220 U. S. 373 and the instant case.

It must be noted at the outset of the discussion of the problem, that the know-how furnished by defendant to the other companies was not a secret process for the manufacture of tapered roller bearings. Other manufacturers were admitted to the plants of British and French Timken, where they could observe all the know-how put into operation. In the extensive record of the testimony dealing with the assistance given by the officials and technical staff, there is no trace of any secret process which was imparted by them. No contention was made at any time that such was the case. The know-how consisted of designs, data showing how defendant manufactured its product, the advice of defendant's employees and help of like nature.

Reference is made to a patentee's right to impose restrictions in respect of the patented products.

The patent monopoly is so circumscribed as not to be an instrument in restraint of trade to a greater extent then is consistent with the privileges granted. The proposition of law has been firmly established that the patent does not empower its owner to restrain trade in processes or devices which are not embraced within the scope of his patent. *U. S. v. Line Material Co., supra, Standard Sanitary Co. v. U. S., supra, U. S. v. U. S. Gypsum, supra.* The law has too jealously guarded the benefits derived from a free flow of commerce to permit even the reward for the development of the useful

arts and sciences to be greater than essential to encourage inventions.

The limitations imposed by the judicial opinions on the use of patents to restrain trade are too well-known to justify a lengthy discussion of them. Those opinions only serve as guide posts to resolve the question here presented.

In order to sustain the argument of defendant, this Court is asked to find that one who transmits his skill in the manufacture of a product to another is entitled to a greater reward than one who is instrumental in the advancement of science by his inventive genius. Such finding would be obviously wrong.

In *Ethyl Gasoline Corp. v. U. S., supra,* 456, the court said:

"He may not, by virtue of his patent condition his license so as to tie to the use of the patented device or process the use of other devices, processes or materials which lie outside of the monopoly of the patent licensed."

During the existence of the tapered bearing patents defendant could not legally allocate markets on processes which were not within the ambit of its patent monopoly. Therefore, it defies all sense of logic to say that upon the expiration of the patents defendant could lawfully engage in like conduct and practices upon the theory of supplying know-how on unpatented processes.

One who possesses greater knowledge or superior skill in the manufacture of a product is entitled to be fairly and adequately compensated if he furnishes his knowledge or skill to others. He is not entitled, however, to exact as a price for such contribution, complete freedom from competition. The *quid pro quo* for furnishing of know-how cannot be an absolute license to avoid the provisions of the Sherman Act. The harm caused thereby would be too great a tribute to knowledge and skill when viewed in the light of public policy.

It would seem that after the lapse of years since the passage of the Sherman Act, every type of economic venture has been under the scrutiny of judicial eyes to determine whether it clashes with the mandate of the Act. The ingenuity of business enterprise, however, makes it inevitable that new practices be examined as they arise. So in this instance a phase of business conduct must be weighed in the light of the general principles of the antitrust laws without the benefit of specific decisions for guidance.

We are, here, confronted with a situation, wherein a patentee upon the expiration of its patent monopoly, seeks to justify the perpetuation of the favored position it enjoyed by virtue of the patent through the ingenious theory of furnishing know-how. If lawful restraints and monopolies could be predicated on the ownership of know-how they could last ad infinitum. This Court cannot subscribe to such unharnessed privilege.

The contracts to divide the world into exclusive marketing areas cannot be defended as ancillary to the transfer of know-how by defendant.

[*Protection of Trade Mark*]

The next contention advanced by defendant is, that if any restraints were imposed by the Business Agreements, they were ancillary to the licensing of the trade mark "Timken" to British and French Timken and therefore were not contrary to law.

Neither factual nor legal justification may be found to give merit to the contention.

Defendant maintains that the objectives which it desired in 1928 to achieve in respect of the mark were:

"(1) The affirmation of its equitable ownership of the mark in England and in various portions of the British Empire.

"(2) The disposition of the French and German trade-mark problems to the end that it would ultimately become the owner of the trade-mark registrations in those countries.

"(3) The removal of any possibility of challenge to it of its registrations in certain European countries wherein, as has been shown, they could be questioned on the basis of prior use.

"(4) The establishment of a reversionary right in it in the mark on termination of the contract with the British and French Companies."

It is readily discernible from the recital of these objectives that defendant had serious doubt of its ownership of the mark in 1928 in the various territories assigned to British and French Timken. In fact in some markets British Timken's predecessor was the owner of the mark. In France S. M. G. had registered it. In Germany one Prausnitzer was the sole owner of the trade mark "Timken." It is apparent from the testimony that defendant could not use the mark in a great portion of the world.

At that time defendant was primarily concerned, therefore, not in safeguarding

the trade mark rights which it then possessed, but rather in acquiring the rights obtained by other manufacturers, as a consequence of the early patent license agreements, in areas where defendant had agreed not to manufacture and sell. Its own covenants not to make or sell bearings in territories allotted to others brought about the situation that the trade mark "Timken" was registered and owned by others.

Defendant's assertion that it was the sole equitable owner of the mark is unimpressive. The agreements attempted to remedy its dubious trade mark rights.

It is true that from the inception of the business dealings with foreign producers and distributors, defendant scrupulously guarded its right in the trade name. Every agreement contained a provision that on all bearings sold, the name "Timken" be affixed. It is also true that the officials of defendant impressed company counsel with the importance of the preservation of the trade mark. But the trade mark provisions of the challenged contracts were subsidiary and secondary to the central purpose of allocating trade territories, specifically recited in them as follows:

> "The Companies parties hereto for their mutual advantage and convenience in working have agreed to make arrangements for an interchange between them of information and facilities and in connection therewith to define their respective territories and for other purposes in manner hereinafter appearing."

The evidence conclusively proves that defendant entered into the agreements not for the purpose of exercising its right to protect the trade mark "Timken" from its unlawful use by British and French Timken nor to protect the public from British or French Timken passing off their products as those of defendant, but for the purpose of preventing competition in the sale of bearings. Through the years 1909-1924, defendant enjoyed freedom from competition, because of its patent monopoly. It now attempts to defend the extension of this right on the basis of granting British and French Timken the use of its trade mark.

Assuming that the restraints were reasonably ancillary to protect the trade mark and that the law sanctions such ancillary restraints, defendant's contention nevertheless is founded on the tenuous premise that it was the equitable owner of the mark outside of the marketing territory allocated to it.

Defendant did not and could not have a right to license a trade mark in markets where it did not own the mark.

Defendant maintains that the trade mark is its property; that the ownership of any property is in a limited sense monopolistic; that in the exercise of such a limited monopoly power, defendant has the right to exact as a consideration for the use of its property, an agreement with others not to compete.

[*Sherman Act v. Patent Monopoly*]

The conflict between the Sherman Act and the limited patent monopoly has been the subject matter of innumerable litigated cases. The courts have attempted to harmonize the opposing basic policies inherent in their respective economic concepts. They tried to fit the antitrust laws within the framework of the Constitutional grant of a patent monopoly. Whether within the provisions of the Sherman Act commerce may be restrained to the extent that it is reasonably ancillary to protect a trade mark has not been decided or discussed by the courts.

Trade marks in our economic system provide the method by which one seller may be enabled to distinguish his goods from those of another. Fundamentally the basic function of the law pertaining to trade marks is to safeguard the good will of one manufacturer or distributor against the sale of another's merchandise as his. *Canal Co. v. Clark*, 80 U. S. 311, *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403. The right to protect it is bestowed by the law not only to reward business enterprise and prevent piracy on successful and established ventures, but at the same time to prevent deception of the public into believing that they are purchasing one product instead of another.

The trade mark right as all other rights is not without bounds. The owner's rights are canalized within the exercise of the trade mark's accepted and defined functions. The law is replete with decisions which set out their functions and limitations.*

* Whatever extension of trade mark rights is encompassed in the Lanham Act (Title 15 U. S. C. A. Sec. 1051 *et seq.*), its enactment did not open the door to employ a trade mark as an instrument to undermine the antitrust law. This is borne out with transparent clarity by its legislative history.

Some of them are lucidly delineated in *United Drug Co. v. Theodore Rectanus Co.*, 248 U. S. 90, 97, 98, as follows:

"The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co. v. Clark,* 13 Wall. 311, 322; *McLean v. Fleming,* 96 U. S. 245, 254. There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co. v. Metcalf,* 240 U. S. 403, 412-414.

"The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See *United States v. Bell Telephone Co.,* 167 U. S. 224, 250; *Bement v. National Harrow Co.,* 186 U. S. 70, 90; *Paper Bag Patent Case,* 210 U. S. 405, 424.

"In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol — a commercial signature — upon the merchandise or the package in which it is sold."

In order to resolve the instant question all that need be said is that the trade mark right is not comparable to the right the owner has in a chattel or realty; it is not a right in gross or at large; it is not such a right as is awarded to an inventor in the product of his invention. *U. S. v. Masonite Corp.,* 316 U. S. 265.

Even the patent monopoly is not broad enough to encompass the power to engage in conduct and practices to eliminate competition such as were employed by defendant, British and French Timken. *U. S. v. National Lead, supra, U. S. v. Line Material Co., supra, Hartford-Empire v. U. S.,* 323 U. S. 386, 433, *Mercoid v. Mid-Continent Co.,* 320 U. S. 661, 665, *Standard Sanitary Co. v. U. S., supra, U. S. v. Gypsum, supra, Ethyl Gas v. U. S., supra, U. S. v Masonite Corp., supra, Federal Trade Commission v. Beech-Nut Co.,* 257 U. S. 441, *Interstate Circuit v. U. S., supra, U. S. v. Paramount Pictures,* 334 U. S. 131, 143 (see note 12).

A trade mark is not the product of invention. The privileges which are accorded to the owner of a patent are predicated upon invention and are safeguarded to carry out the Constitutional intent to promote the progress of science and the useful arts. If a trade mark were to be given the power of monopoly, it would not be limited in time as in the case of a patent. The public would not benefit from an invention and there would not be the ultimate gain which flows from the disclosure of a patent. That is the foundation for the patent monopoly.

A trade mark brands a product as to its origin. The law empowers the owner or the originator of a mark to protect his wares against the imitator who seeks to palm off merchandise as his by the use of the same mark. He is given the right to enjoin such practices. The public interest is served by that protection which in the exercise of all rights is paramount. Deception is prevented.

The trade mark may become a detrimental weapon if it is used to serve a harmful or injurious purpose. If it becomes a tool to circumvent free enterprise and unbridled competition, public policy dictates that the rights enjoyed by its ownership be kept within their proper bounds. If a trade mark may be the legal basis for allocating world markets, fixing of prices, restricting competition, the unfailing device has been found to destroy every vestige of inhibition set up by the Sherman Act. The rights pertaining to trade marks and trade names were well known long before that legislative enactment was passed by Congress. It is certain that it was never intended that the consequences of violations of the antitrust laws may be escaped by the licensing of trade marks.

[*Potential Competition in the International Market*]

Defendant vigorously asserts its position, that since exports and imports of anti-friction bearings from and into the United States in foreign commerce over the years have been relatively insignificant, an injunction to prevent the alleged restraints would be a vain and needless gesture on the part of the Court. The basic purpose of the

Sherman Act, it says, is to insure trade on a competitive price basis. The argument goes that inasmuch as there is no price competition in bearings imported into or exported from the United States, and since it is impossible for American manufacturers or foreign manufacturers to engage in the exporting or importing of bearings to each other's markets on a successfully commercial basis, the illegality which is essential to the granting of equitable relief does not exist.

Several days were devoted, in the trial of the case, to defendant's effort to sustain this contention. Tables of figures were offered in addition to the statements of defendant's officials, to prove that the volume of exports and imports in tapered roller bearings was negligible. Whether the absence of trade was the result of the competitive restrictions charged by the Government or of natural economic forces was not pointed out.

Several witnesses testified that the economic dislocation of world markets precipitated by the first world war, and the depression which followed, caused a near chaotic condition in foreign commerce. It was augmented, they said, by the policies of the various nations to encourage purchase of domestic goods. The "Buy British" slogan was mentioned as illustrative of this program, in which nearly all countries engaged. The tariff regulations, the formation of the sterling bloc, the fluctuation of currency values, the government restrictions against imports and exports also contributed to the net result, they maintained, that producers were unable to compete with foreign manufacturers on a profitable basis. They concluded that this condition has prevailed not only in the roller bearing industry, but it affected all industries.

In the consideration of this claim the question immediately arises: If all the impediments to foreign trade existed ever since 1914, which became more and more pronounced to the present day, why were the contracting parties, defendant, British Timken and French Timken so concerned about air-tight agreements to keep each one within its own commercial domain? The repeated and persistent provisions of the successive contracts, for territorial restrictions, contradict any claim of lack of ability to compete.

Local and national pride in domestic goods and sales resistance to foreign made products have always been obstacles to import and export trade. The ingenuity of the American businessman, fortified by the advantages of free competition in many instances has been able to penetrate the strongest tariff walls.

The evidence bears out the fact that there was and there is actual and potential competition in the international roller bearing market. The contracts were consummated for the very purpose of regulating and restricting it.

It is not purely conjecture to conclude, that had it not been for the rigid restrictions provided in the contracts and their strict enforcement in actual practice, the volume of business with foreign countries would have been considerable in size. The officers of defendant admitted that the need for bearings from the United States was continuously shown by the inquiries made by foreign purchasers. Small competitors of defendant in the United States were able to make shipments abroad on a relatively large scale. The last war accentuated the demand, but defendant adhered to its obligation as a member of the combination and refused to make sales. Forsythe's report to Klinedinst:

> "We have received definite orders from their sales territories, which upon being referred to British Timken were turned down at their instructions"

is convincing evidence of the potential competition and the destructive effect of the combination.

Political and social changes have repeatedly caused fluctuations in international trade. Our own economy has always been affected by the currents of trade regulations abroad. But violent as the variations have been, commerce with foreign nations has remained one of the great influences on our own economic welfare. The provisions of the Sherman Act, pertaining to free competion with other nations, have not become a dead letter as a consequence of the world events of the past thirty-five years.

The evidence presented is convincing that defendant, British Timken and French Timken have formed a world cartel in tapered roller bearings. They have divided the world into exclusive sales territories. They have fixed prices. They agreed to and have effectively eliminated competition among themselves. They agreed to and did attempt

to eradicate the competition of outsiders. They combined with competitors to fix prices. The defenses offered do not constitute justifications for such patent violations of the antitrust laws.

The Government is entitled to a decree. The exact nature of the needed remedy to prevent future violations will be determined at a hearing set for that purpose.

[¶ 62,381] Chicago Seating Company v. S. Karpen & Bros.

In the United States District Court for the Northern District of the Eastern Division of Illinois. No. 48 C 1892, February 23, 1949.

Robinson-Patman Act

Treble Damages Action—Discriminatory Practices—Complaint Dismissed.—A "customer" of a furniture manufacturer brought action for treble damages on the basis of the latter's alleged discriminatory practices consisting of a refusal to sell specially designed furniture, at prices available only by quotation, to the plaintiff, while at the same time filling orders solicited by two universities. The manufacturer's motion to dismiss the complaint was granted on the ground that when it arranged with the universities for specially designed furniture it did not extend a service to its purchasers, even though such arrangement was made at its own expense. The negotiations were destined primarily to benefit the manufacturer, and any benefit accruing to its purchasers was purely incidental. The complaint was dismissed on the further grounds that the plaintiff does not qualify as a purchaser and that it is still permissible for a seller to select his own customers.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.475, 2216.

For plaintiff: Byron M. Getzoff.

For defendant: Dawson, Ooms, Booth & Spargenberg.

Memorandum and Order

CAMPBELL, District Judge: Plaintiff brought this action under Section 2 (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. A. 13), seeking recovery of treble damages for the alleged discriminatory practices of defendant. That particular sub-section of the Act states:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The complaint alleges that subsequent to the time plaintiff had established itself as a customer of defendant, the latter induced the University of Oklahoma to solicit bids for furniture which was specially designed by defendant and prices for which were available only by quotation by defendant. Defendant then made these prices available to other purchasers, who were competitors of plaintiff, but refused to quote or sell to plaintiff. Subsequently, defendant induced the University of Illinois to solicit the same type of bid, and, on this particular bid, prices were quoted and materials were sold to plaintiff. Later the same university again solicited bids for similar equipment, but defendant refused to quote prices or sell the goods. After these alleged acts of discrimination, defendant accepted orders from plaintiff for defendant's regular line of merchandise.

Thereupon, defendant moved to dismiss the complaint on the following grounds: (a) that it does not show an unlawful discrimination within the meaning of Section 2 (e); (b) that it does not allege facts showing that plaintiff was a purchaser as to whom there was any unlawful discrimination; (c) that defendant did nothing more than select its own customers, as it was expressly permitted to do under Section 2 (a).

The principal issue to be determined in this cause is accurately stated by plaintiff to be, "Did the defendant by negotiating with the University of Illinois and University of Oklahoma for the said institutions to

exclusively require the special designed products of the defendant thereby render a service?" The Court is unable to agree with plaintiff's contention that defendant either did, or intended to, extend a service to its purchasers when it arranged for the requirement of specially designed furniture, even though such arrangement was made at its own expense and without cost to said purchasers. The negotiations were designed primarily to benefit the defendant, and any benefit accruing to its purchasers was purely incidental. The distinction between this practice and those described in *Corn Products Company v. F. T. C.*, 324 U. S. 726, and *Elizabeth Arden v. Blass*, 150 F. 2nd 988, should be readily apparent. In the former case, the manufacturer spent large sums of money for advertising the product of one of its purchasers; in the latter case, the manufacturer either furnished the services of a clerk or paid part of the clerk's wages disproportionately as to all its purchasers. The activities complained of here and the price-quoting appear to belong in a completely different category, and should not be classified as services.

Furthermore, plaintiff does not qualify as a purchaser within the meaning of the term as defined in the case of *Shaw's Inc. v. Wilson-Jones Co.*, 105 F. 2nd 331:

> "The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends."

and further:

> "Past purchases or conversations in respect to possible future purchases are insufficient."

Despite plaintiff's contentions to the contrary, it is still permissible for a seller to select his own customers. Plaintiff asserts that this is true under Section 13 (a) but not under 13 (e), because the proviso is not contained therein expressly. However, the language of the proviso itself should be noted:

> "And provided further, That nothing contained in Sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Quite obviously, therefore, since subsection (e) is a part of Section 13, it is also included within the scope of the proviso.

Defendant's motion to dismiss the complaint is, therefore, granted, and the same is accordingly dismissed.

[¶ 62,382] Standard Oil Co. v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. No. 9215. March 11, 1949.

Petition for Review of Order of Federal Trade Commission.

Robinson-Patman Act

Discriminatory Sales Held to Be in Interstate Commerce.—A company engaged in refining and distributing gasoline transported gasoline from its refinery in one state to its bulk plants in another state, and from there to its customers in the same state. In a suit charging discrimination between its customers, it was held that the company was engaged in interstate commerce, and that such commerce did not end at the bulk plants, even though different vehicles were used to transport the gasoline, but that the stream of commerce flowed continuously from the tanks at the refinery to the tankers on the lake, from the tankers to the tanks at the bulk plants, and from there into tank cars and tank trucks to the customers. The bulk plants were not like a warehouse where the goods awaited further sale and distribution. Although the gasoline was not brought to the bulk plants pursuant to orders already taken, the demands of the territory were fairly constant and could be accurately estimated, so the flow of the stream of commerce kept surging. Sales to the customers were held to be in interstate commerce subject to the price discrimination prohibitions of the Robinson-Patman Act.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.170.

Robinson-Patman Act

Price Discrimination Made in Good Faith to Meet Competition Held No Defense.—When a company engaged in the business of refining and distributing gasoline and other petroleum products discriminates in price by selling gasoline to four wholesalers for resale at wholesale and through their own retail stations, at a price substantially lower than the prices charged retail purchasers in the same area for gasoline of the same grade and quality, the fact that such discrimination is made in good faith to meet competition is not a complete defense under Section 2 of the amended Clayton Act. Prior to amendment by the Robinson-Patman Act, Section 2 of the Clayton Act provided that a discrimination in price made in good faith to meet competition was a defense. The amended Section 2 (a) still declares it unlawful to make a discriminatory price, and it keeps as defenses the cost savings and other defenses of the old Clayton Act, but takes out of the defense category the provision for making a lower price to meet competition. Section 2 (b) of the Robinson-Patman Act provides that if a discrimination in price is shown, the burden of justifying it is upon the party making the discriminatory price, and he can meet this prima facie case by showing that he acted in good faith to meet the low price of competitor. That it is not intended as a defense is apparent from the Conference Report resolving the disagreement of the two Houses. Petitioner showed that it made the lower price for its gasoline in good faith to meet competition. The effect of such showing was to rebut the prima facie case made by the Commission's proof of the petitioner's discriminatory prices in the sale of its gasoline. But where the discrimination is between purchasers who are in competition, and the competition which is alleged and proved to be injured is among the retail customers of the favored purchasers and other retailers, the fact that the seller's discriminatory price was made to meet his own competition is not controlling.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2213.05.

Federal Trade Commission Act and Robinson-Patman Act

FTC Order Modified as to Policing of Wholesalers and Sales at Peril.—A portion of an order of the Federal Trade Commission prohibiting a gasoline refiner from selling to wholesalers at prices lower than those to retailers where the wholesalers resell to their customers at less than the refiner's posted price, is modified. The refiner should not be required to police its wholesalers and to sell to them at its peril. The order is modified to prohibit the refiner from selling to wholesalers at prices lower than those to retailers where the wholesalers "to the knowledge of respondent [refiner] or under such circumstances as are reasonably calculated to impute knowledge to the respondent" resell to their customers at less than the refiner's posted price.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.370, 2212.5034, and the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.508.

Modifying and enforcing a Federal Trade Commission cease and desist order in Dkt. 4389.

For petitioner: Weymouth Kirkland, Howard Ellis, W. H. Van Oosterhout, and Arthur J. Abbott.

For respondent: Walter B. Wooden and James W. Cassedy.

Before KERNER, MINTON, and DUFFY, Circuit Judges.

[*Petition for Review of Order Sought*]

MINTON, Circuit Judge: The petitioner seeks to review a cease and desist order issued by the respondent ordering it to cease and desist from discriminating in the price of gasoline of the same grade and quality among its customers in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. Sec. 13). The Commission asks the enforcement of its order.

[*Petitioner's Contentions*]

The petitioner contends that the order should not be enforced because, first, the Commission failed to find and could not have found under the undisputed evidence in this case, that either or any of the purchases involved in such discrimination was in commerce; secondly, that the Commission treated as immaterial the petitioner's conclusive showing that the discrimination made in price was in good faith to meet an

equally low price of a competitor, which showing the petitioner asserts is a complete defense. Third, the petitioner contends that:

> "Paragraph 6 of the Modified Order directs Standard at its peril to prevent jobbers to whom it sells gasoline and who are in competition with Standard in the resale thereof from reselling to their retail dealers at prices less than Standard's price to its own retail dealers; requires Standard to police, maintain and regulate such competitor's prices on gasoline, title to which passed to the jobbers on delivery by Standard; and subjects Standard retroactively to punishment for contempt should a jobber-competitor fail to maintain such resale prices."

[*Findings of Commission*]

Substantial evidence in this record shows the following facts as found by the Commission. The petitioner's principal office and place of business is located in Chicago, Illinois. It is engaged in the business of refining and distributing gasoline and other petroleum products throughout fourteen states, principally in the Middle West. The petitioner has a refinery at Whiting, Indiana, to which it supplies crude oil from fields located in other states. One of the divisions in which it distributes its products is known as the Detroit Field, which embraces some thirteen counties in southern Michigan, including the city of Detroit. The Detroit Area, as distinguished from the Detroit Field, is confined to the city of Detroit and its suburbs. The petitioner has no refinery in Michigan, and almost all the gasoline it sells and distributes in the Detroit Field is transported by tankers from its refinery at Whiting through the Great Lakes to the petitioner's marine terminal at River Rouge, outside the city of Detroit. This terminal has a storage tank capacity of sixty-three million gallons. During the summer months, deliveries are made from Whiting weekly and sometimes twice weekly. In the fall, sufficient gasoline is delivered and stored to take care of the estimated requirements during the winter months when navigation on the Great Lakes is closed. The amount of gasoline used in Detroit is fairly constant and can be accurately estimated. During the years from 1936 through 1940, the years here in question, the petitioner supplied 16 to 17% of all the gasoline in the Detroit Area. In addition to the River Rouge tanks, the petitioner operated six bulk plants in the Detroit Area. Practically all of the gasoline sold in the Detroit Area passed through the River Rouge terminal, except that in some instances gas was delivered directly from Whiting by truck and also by the same means to commercial users. Deliveries were made from the River Rouge terminal by tank cars and tank trucks up to February 1, 1940, and thereafter by trucks alone. The delivery trucks were owned and operated or leased and operated by the petitioner through its employees.

The petitioner supplied gasoline to approximately 358 retail service stations, approximately two hundred of which the petitioner owned and leased, and eight of which it leased and subleased. The remaining 150 were independent operators who owned or leased their stations from someone else. The latter had agreements to purchase their entire requirements of Standard Oil gasoline only from the petitioner. While the former had no such agreements, they did not buy gasoline from anyone except the petitioner. The delivery to the retail customers was known as "tank wagon delivery" and was made at a price fixed in Chicago by the petitioner from time to time, known in the trade as the "posted tank-wagon price."

In addition, the petitioner supplied gasoline to four dealers in the Detroit Area, Citrin-Kolb Oil Company, Stikeman Oil Company, Inc., Wayne Oil Company, and Ned's Auto Supply Company, hereinafter sometimes referred to as Citrin, Stikeman, Wayne, and Ned's. These customers were also known as wholesale customers. They had their own storage tanks and trucks for delivery and met the credit qualifications of the petitioner.

During the time in question Citrin, Stikeman, and Wayne sold a substantial portion of their gasoline purchased from the petitioner direct to the public through retail service stations owned and operated by them. Ned's was engaged entirely in the retail sale of gasoline to the public through its own stations. To these last four customers, known, as we have pointed out, as the wholesale customers, the petitioner has discriminated in price by selling its gasoline to them for resale at wholesale and through their own retail stations at a price substantially lower than the prices charged retail purchasers in the Detroit Area for gasoline of the same grade and quality. The petitioner's Red Crown gasoline, its largest

selling brand and comprising about ninety per cent of its sales in the Detroit Area, was sold to those four wholesalers at 1½¢ a gallon lower than the prices charged by the petitioner for the same gasoline to other retail dealers in the Detroit Area.

Citrin, in addition to supplying its own stations which sold at retail, from January 1, 1938, to December 31, 1940, sold one million gallons of gasoline annually to Langer and Cohn, who run a chain of service stations, at 1½¢ a gallon less than the tank wagon price, and in addition sold another retail service operator at ½¢ a gallon less than the tank wagon price. For a time Citrin also issued special service cards which entitled the holder to a 2¢ a gallon discount on the purchase of gasoline from one of the retail service stations operated by Citrin.

There is no evidence that Wayne ever sold gasoline to retailers at a price lower than the posted tank-wagon price charged by the petitioner to its dealers or that Wayne ever allowed any discounts. The same is true of Stikeman.

Ned's, however, sold at retail exclusively, and it has been its practice since March 7, 1938, to sell to its customers below the prevailing retail service station price or to give premiums and discounts which result in a price below its posted price.

A lower price at one service station than at another is an important factor in the purchasing public's mind, especially in the price of the petitioner's advertised brands. Any difference in price between two stations selling the same brand of gasoline is very important in influencing the business. The margin of profit between the tank wagon price to a service station and the retail price is small, averaging since November 1, 1939, about 3.3¢ a gallon in the Detroit Area.

In 1937 Ned's was selling the petitioner's Red Crown gasoline to the public at approximately 2¢ a gallon below the prevailing retail service station price, which continued with variations until the latter part of 1939. In 1939 and 1940, when Ned's posted price was the prevailing retail price, it gave premiums and discounts under cover. It has from time to time given commercial discounts of 1 to 2¢ a gallon off the posted tank-wagon price. In 1939, Ned's also issued trading stamps with a value of 2¢ a gallon, which were redeemable in merchandise or gasoline at Ned's stores. Price cutting at Ned's stores has been almost continuous, and this company has been responsible for starting most of the retail price cutting in major brand gasolines in Detroit over a period of several years. This practice of Ned's has caused substantial damage to other retail service station operators selling the petitioner's Red Crown gasoline and also to retail service station operators selling other brands of gasoline.

The price discriminations granted to Ned's, Citrin, Wayne, and Stikeman on gasoline sold by them at retail have given a substantial competitive advantage to these favored dealers in their retail operations over other retailers of gasoline, including retail customers of the petitioner. This competitive advantage is capable of being used and has been used by Ned's and to some extent by Citrin to divert large amounts of business from other gasoline retailers, including customers of the petitioner, with resultant injury to them and to their ability to continue in business and successfully compete with Ned's and Citrin in the retailing of gasoline. The effect of these discriminations in price allowed by the petitioner to Ned's, Citrin, Wayne, and Stikeman has been and may be substantially to lessen competition and to injure, destroy, and prevent competition with each of these four dealers and with their respective customers in the retail sale of gasoline.

[*Low Price in Good Faith; No Cost Savings*]

There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor. The petitioner failed to show that the discriminatory price which it made these four dealers was justified on the basis of any cost savings.

[*Petitioner's Discriminatory Sales Held to Be in Commerce*]

The findings of the Commission based upon the substantial evidence above indicated are sufficient to support the Commission's conclusion of law that the discriminatory sales were in commerce. It is not disputed that the petitioner is engaged in commerce, but it is vigorously insisted that commerce ended at the River Rouge plant and the bulk plants in the Detroit Area and that the petitioner's transactions from there on were

wholly intrastate. With this we are unable to agree. The break that occurred at River Rouge was a break in transportation but not in the constant stream of commerce that flowed from the Whiting refinery to the petitioner's customers in Michigan. The stream of commerce flowed continuously from the tanks at the refinery to the tankers on the lake; from the tankers to the tanks at River Rouge and the bulk plants in Detroit; and from there into tank cars and tank trucks to the petitioner's customers. There may have been several breaks in transportation in getting from one vehicle or receptacle to the other in completing the commercial transaction of getting the petitioner's gasoline from Whiting into the Detroit territory, but the stream of commerce was never broken, no matter how many receptacles were used on the way. The rest at River Rouge was not like a warehouse where the goods awaited further sale and distribution. Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit.

We think this case quite analogous to *Stafford v. Wallace,* 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735. In that case, the livestock came by carrier interstate and intrastate into the receiving pens of the stockyards where the animals were fed, watered, and held until sales were consummated, either to the packers who drove them across the street to the packing house, or to the wholesale dealers or feeders who reshipped them. The transportation was broken at the yards. The animals came to rest, but the stream of commerce moved on to final destination; and the stockyards, with its holding pens, was held to be in commerce, just as here the various changes in the manner of movement may have slowed down the stream of commerce between Whiting and Michigan, but never stopped it. The tanks at River Rouge were similar to a "packaging house" on the way to market. The tank cars and trucks were the most convenient "packages" that could be used to complete the distribution of the gasoline. It is unlike *Walling v. Goldblatt Bros.,* 128 F. 2d 778, where the warehouse was only a detached stockroom for retail stores of a retailer. There the stream of commerce ended at the warehouse for the most part. Here it reached at River Rouge only an intermediate stage preliminary to its final disposition to the petitioner's customers.

We decline, as the Supreme Court did in *Stafford v. Wallace, supra,* p. 519,

> " * * * to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part."

After all, as Justice Holmes said in *Swift and Company v. United States,* 196 U. S. 375, 398, 25 S. Ct. 276, 49 L. Ed. 518, " * * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460; *Binderup v. Pathe Exchange,* 263 U. S. 291, 309, 44 S. Ct. 96, 68 L. Ed. 308; *Mid-Continent Petroleum Corporation v. Keen,* 157 F. 2d 310, 314; *Republic Pictures Corporation v. Kappler,* 151 F. 2d 543, 545; *Walling v. American Stores Co.,* 133 F. 2d 840.

[*Good Faith Held No Defense*]

Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point, it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense.

Prior to June 19, 1936, when the Robinson-Patman Act went into effect, the Clayton Act, Section 2,[1] provided:

> "That it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such

[1] 38 Stat. 730 (1914), 15 U. S. C. Sec. 13 (1934).

discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition * * * ."

Thus it will be seen that a discrimination in price made in good faith to meet competition was a defense under Section 2 of the Clayton Act, as was a showing that the discrimination was made because of cost savings, or proof of the other defenses given by the Act. But since large buyers could always get such price meeting by suppliers to justify a discrimination in price in their favor, the purpose of the Act to avoid such discrimination was easily evaded. Congress sought to change this bypass by changing the discriminatory price, made in good faith to meet the low price of a competitor, from a defense, as it then was, to a procedural aid to enable a seller to overcome the prima facie case made by showing a difference in price to customers in the same community for goods of the same quality. This was done by amending Section 2 of the Clayton Act by Section 2 (a) and (b) of the Robinson-Patman Act.[2] The amended Section 2 (a) still made it unlawful to make a discriminatory price, as before, and it kept as a defense the cost savings and other defenses of the old Clayton Act, but took out of the defense category the provision for making a lower price to meet competition. As to this, it was provided in Section 2 (b) as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This amendment, it is clear, provided that if a discrimination in price were shown, the burden of justifying it was upon the party making the discriminatory price, and he could meet this prima-facie case by showing that he acted in good faith to meet the low price of a competitor. That it was not intended as a defense is apparent from the Conference Report resolving the disagreement of the two Houses. The purpose of Congress is so clearly set out in the Conference Report that we quote it as follows:

"The Senate bill contained a further proviso: 'That nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition.' This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission is included in subsection (b) in the conference text as follows:

" '*Provided, however,* that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.' "

(Congressional Record, June 15, 1936, p. 9414.)

The Chairman of the House Conferees stated on the floor of the House as he presented the Conference Report:

"It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural.

* * *

"If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely

[2] 49 Stat. 1526, (1936), 15 U. S. C. Sec. 13 (1946).

> at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product."

(Congressional Record, June 15, 1936, p. 9418.)

The intent of Congress is clear and the language used to express its intent, it seems to us, is not ambiguous. That Section 2 (b) is as the Conference Report says it was intended to be, seems to be the view of the Supreme Court as expressed in *Trade Comm'n v. Staley Co.,* 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338, which reversed this Court in *A. E. Staley Mfg. Co. v. Federal Trade Commission,* 144 F. 2d 221, wherein we held the prima-facie case had been rebutted. Chief Justice Stone said (p. 752):

> "It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of 'rebutting' the Commission's 'prima-facie case.' Prior to the Robinson-Patman amendments, Sec. 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."

The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out. The effect of it was to rebut the prima-facie case made by the Commission's proof of the petitioner's discriminatory prices. If nothing further appeared in this record, the case might well have ended there. The reason for making the discrimination was effective to rebut the prima facie case in price discrimination, but it still remained a discrimination, and that discrimination affected competition on the retail level among the retail customers of the wholesalers to whom the petitioner has sold. The discrimination in price in favor of the parties in this case, which the petitioner had a right to make as against its competitors was then used by the petitioner's customers to work havoc among competitors on the retail level. The petitioner had given a club to its wholesalers which they passed on to their retailers to bludgeon their competitors. This is what the Commission is trying to stop, and it is towards the elimination of this evil that the cease and desist order is directed.

The Commission here considered the other evidence as to the effect on competition of this continuing discrimination and found, and it was justified in finding, that the discrimination not only may but did affect competition. There is substantial evidence in this record that the petitioner's favored wholesalers were in a position to do and did do injury to competition. Where as here the discrimination is between purchasers who are in competition, and the competition which is alleged and proved to be injured is among the retail customers of the favored purchasers and other retailers, the fact that the seller's discriminatory price was made to meet his own competition is not controlling. The discrimination continued here and its effect was direct and harmful to competition and was properly condemned by the Commission's order, notwithstanding the petitioner's discrimination in price was made in good faith to meet competition of its own.

The case of *Samuel H. Moss, Inc. v. Federal Trade Commission,* 148 F. 2d 378, does not, as we understand it, hold that Section 2(b) is a defense in all events. It holds only that a lower price discrimination made in good faith to meet competition, standing alone, may be a defense. If there were no further showing that the lower price lessens or tends to prevent competition, the justification in the discrimination would be made out. But in the instant case, the Commission went further and showed that the petitioner's discrimination in price to its wholesale customers did have the effect to substantially lessen competition or to injure, destroy, or prevent competition. Note, however, that it would have been necessary for the Commission to prove only that such discrimination in price *may* have that effect. *Trade Comm'n v. Morton Salt Co.,* 334 U. S. 37, 68 S. Ct. 822, 92 L. Ed. 948. It is not actual injury alone, but the prospect reasonably to be expected of injury to competition which the statute seeks to prevent.

We agree with the Commission that the showing of the petitioner that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level.

[*Prohibition as to Sales to Jobbers or Wholesalers Modified*]

The petitioner objects to Paragraph 6 of the cease and desist order. This paragraph reads as follows:

> "6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

This paragraph is intended to eliminate the effects of the discriminatory price made to these customers, Citrin, Wayne, and Stikeman, who do a wholesale business. To avoid the force of this paragraph, the petitioner may do one of two things. First, discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted, or unjust.

Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes to its own retailers. The petitioner does not have to make price control agreements with anyone. It has only to govern its own conduct to avoid the impact of an unlawful discrimination. To govern its conduct, the order makes the petitioner deal with its wholesalers at its peril as to what they might do with the gasoline in the future. The petitioner has no control and can have no control over the price of the gasoline after it is sold to the wholesalers. The latter may put any price on it they may choose. They may give it away if they like. The petitioner should not be required to police its wholesalers and to sell to them at the petitioner's peril. The petitioner should be liable if it sells to a wholesaler it knows or ought to have known is engaging in or intends to engage in the competitive practices condemned by this proceeding. Under the order as drawn, the petitioner would be liable if afterwards the wholesaler should resell at a price lower than the petitioner charged its retailers. If the petitioner is to be hailed into court for a violation of the Commission's order, the petitioner must be guilty of knowingly choosing a customer who is using or intends to use its price advantage to undersell the petitioner in its prices made to its retailers.

We would modify Paragraph 6 to read as follows:

> "By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

[*Order Enforced as Modified*]

The order as modified will be enforced, and judgment thereon will be entered accordingly.

[¶ 62,383] Thomas B. Eastman, et al. v. Yellow Cab Company, et al.

In the United States Court of Appeals for the Seventh Circuit. No. 9607. October Term, 1948, January Session, 1949. March 11, 1949.

On appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Sherman Act

Sufficiency of Complaint—Cab Business—Local Service Rendered to Interstate Passengers.—A taxicab company's action against other cab companies and the City of Chicago alleging, among other things, conspiracy to limit taxicab licenses and to prevent new operators from entering the business, is remanded to the trial court for further proceedings. Travel in local taxicabs by interstate passengers between railway stations may come within the definition of interstate commerce. Therefore, construing the complaint in the light most favorable to the plaintiff, the Court holds that it states a claim under the Sherman Act upon which relief can be granted.

See the Clayton Act annotations, Vol. 1, ¶ 1640.125.

For plaintiffs-appellants: Richard Wolff, M. E. Cedar.

For defendants-appellees: Philip E. Ringer, M. Lester Reinwald, Morris Sostrin, Benjamin S. Adamowski, Julius Jesmer, Weymouth Kirkland, Howard Ellis, John M. O'Conner, Jr.

[*Allegations*]

Before KERNER and DUFFY, JJ., and BRIGGLE, D. J.

DUFFY, J.: This is an appeal from an order of the district court dismissing the complaint before trial. Nine defendants are named, but Yellow Cab Company, Checker Taxi Company, Parmelee Transportation Company, and the city of Chicago and two officials thereof are the principal defendants. The cab and transportation companies will be referred to as "Yellow," "Checker," and "Parmelee," respectively.

The complaint and amendments herein are unduly prolix, covering 41 pages of the printed record. However, referring to matters discussed on this appeal and rearranging them in chronological order, the allegations of the complaint may be summarized as follows: (1) That this action was instituted under Sec. 15 of the Clayton Act; in part under Amendment V, the United States Constitution; in part under Sec. I of the XIV Amendment of the United States Constitution; and also under the act entitled "Provisions Relating to Radio" (Sec. 301, 48 Stat. 1081, June 19, 1934); (2) that plaintiffs are owners and operators of taxicabs for hire on the streets of Chicago (the complaint sets forth at some length that plaintiffs are veterans of the armed forces of the United States and frequently refers to them as "plaintiff veterans"), and that Yellow and Checker combined with the city of Chicago to restrain and prohibit the plaintiffs from operating their vehicles, pursuant to a conspiracy to maintain a monopoly of the taxicab service in the hands of said defendant cab and transportation companies; (3) that the city of Chicago is the terminus of a large number of railroads; that it is necessary for a great majority of train passengers, including those traveling from one State to another, to get off the trains on which they travel to Chicago and go to another station, from two blocks to two miles distant, and there board other trains in order to complete their journeys; that a substantial number of such passengers in interstate commerce use taxicabs operated by defendants and plaintiffs in transporting themselves and their baggage from station to station; that because of the conspiracy of the defendants to restrain competition an acute shortage of taxicabs exists in Chicago which causes interstate passengers to miss train connections; (4) that taxicabs of the defendants operate largely in the downtown area of Chicago while taxicabs of plaintiffs, especially those equipped with two-way radios, operate throughout the city and in the outskirts of the city and on trips to the airports, and that the shortage of taxicabs existing interferes with interstate travel by plane; (5) that for periods from six months to two years plaintiffs have been rendering taxicab service to the public, and in an effort to provide better facilities and transportation, plaintiffs formed associations and invested large sums of money in garages, gasoline stations and two-way radio transmitting

equipment, and thus were able to fairly compete with Yellow and Checker; that defendants conspired to interfere with and prevent the operation by plaintiffs of their two-way radio-equipped taxicabs by interfering with the information of associations to which many plaintiffs belong and preventing the association name or the fact that the taxicab was radio-equipped from appearing by sign or insignia on such taxicabs, all resulting in an enormous loss of good will to plaintiffs, although taxicabs operated by defendant cab and transportation companies were permitted to and did continue to carry advertising necessary to maintain their own good will; (6) that a conspiracy commenced in January, 1929; that prior to said date, ordinances of the city of Chicago did not limit or restrict the number of taxicab licenses which might be issued, but that in September, 1929, the city enacted an ordinance providing that no taxicab licenses should thereafter be issued unless the Public Vehicle License Commission should, after hearing, declare that public convenience and necessity required the issue of such licenses; that in January, 1929, Yellow held 2,335 or 44% and Checker 1,750 or 33% of the outstanding licenses.

The complaint then refers to the ordinances enacted by the city of Chicago on May 18, 1934, and on December 22, 1937. The first of these, a comprehensive ordinance to regulate the operation of taxicabs in the city of Chicago, provided among other things for the issuance of licenses for a term ending December 31, 1940. Based upon this ordinance 4,108 taxicab licenses were issued, Yellow receiving 2,166 and Checker 1,500. The latter ordinance, passed on December 22, 1937, provided for a method of voluntary surrender of licenses to reduce the number outstanding to 3,000, and provided also that in the event the number of authorized licenses should later be increased above the 3,000 figure, said licenses should be issued to licensees ratably in proportion to the number voluntarily surrendered by such licensee. The ordinance further provided that authority to operate under the 1934 ordinance be extended to December 31, 1945, provided the licensee accepted the terms of the 1937 ordinance. Both Yellow and Checker did accept the terms, and Yellow surrendered 571 licenses (leaving it with 1,595) and Checker surrendered 500 (leaving it with 1,000).

On January 16, 1946, the City Council authorized the Public Vehicle License Commissioner to issue 250 permits for the operation of taxicabs, and provided that ex-service men were to be given preference and that the permits were to be issued only to individuals. On January 22, 1946, the Commissioner ordered Yellow to place in operation 234 of its licensed taxicabs which had not been operating, and Checker, 87 unoperated taxicabs, and directed that if this were not done within five days, the licenses for said cabs would be cancelled.

It is alleged that following March 18, 1946, 275 temporary one-year nontransferable licenses were issued to so-called "independents" with the consent of Yellow and Checker. In January, 1947, these temporary licenses were renewed for one year from their effective date. The complaint alleges further that 1,200 unlicensed taxicabs are being operated on the streets of Chicago and that the owners, including many of plaintiffs, are unable to obtain either regular or temporary taxicab licenses.

The complaint alleges that on February 5, 1947, the City Council found and declared that the demand for taxicab service in the city of Chicago was in excess of the 3,000 limit under the ordinance of December 22, 1937, and authorized Public Vehicle License Commissioner Gorman, one of the defendants herein, to issue sufficient additional licenses to bring the total to 5,500, under certain limitations and conditions however, which plaintiffs allege are discriminatory as to them and are a part of the conspiracy.

The complaint further alleges that the city of Chicago has arbitrarily ordered the plaintiffs and others like them to cease operation of their taxicabs on or before January 22, 1948, and that such order violates Sec. I of Amendment XIV, the Constitution of the United States.

The prayer of the complaint asks that the defendants be enjoined from interfering, hindering, or otherwise discouraging the plaintiffs and others like them from operating their taxicabs on the streets of the city of Chicago, and that such conspiracy in restraint of trade be adjudged unlawful, that the defendants be required to release and waive any rights they have under the ordinance of the city of Chicago dated December 22, 1937, and that licenses to operate their taxicabs be issued to the plaintiffs in like form as issued to drivers for defendant companies.

On February 13, 1948, the city of Chicago, and its officials listed as defendants herein, moved to dismiss the complaint for failure to state a claim upon which relief can be granted; and on the 16th of February a similar motion was filed in behalf of the defendant cab and transportation companies. Thereafter, on March 4, the court permitted an amendment to the complaint, adding a number of additional parties plaintiff and one additional defendant. A second motion to dismiss by the defendant transportation companies was filed on March 9, 1948, on the same grounds as the first. Thereafter plaintiffs moved to amend their complaint so as to allege that an ordinance passed by the city of Chicago on February 6, 1948, was in furtherance of the conspiracy previously alleged in the complaint, in that it deprived them of the right to advertise on their cabs that they belonged to a certain association, and prohibited them from referring to certain of their cabs as being equipped with two-way radio, and that it discriminated against plaintiffs in other respects. The prayer of the amendment asked that the court declare the ordinance of February 6, 1948, null and void as being in violation of the Constitution of the United States, and more particularly of the Sherman Act, and it sought to enjoin defendants from interfering, arresting or otherwise discouraging plaintiffs and others like them from operating their taxicabs on the streets of Chicago.

Plaintiffs moved for a further amendment to the complaint to allege that Illinois Cab Drivers' Assn. for Discharged Veterans, composed of 103 negro veterans who are engaged in the operation of taxicabs in the city of Chicago, made application for licenses to defendant Gorman, as Commissioner of Licenses, but that not a single member of the association was granted a license even though he carried the requisite amount of insurance and possessed the necessary other qualifications; that, upon information and belief, the reason for the denial of such licenses was the fact that the drivers were negroes, and that such denial was due to discrimination because of color prejudice, in violation of the XIV Amendment, the Constitution.

On March 9, 1948, the court heard the motions for amendment to the complaint and also the motion of plaintiffs for a temporary restraining order. The court granted leave to file the amendments to the complaint, and then entered the following order:

> "Further ordered, that said complaint and the amendments thereto be and they are hereby dismissed for lack of jurisdiction."

It will be noted that the amended complaint was dismissed on the court's own motion "for lack of jurisdiction." Rule 12(h), F. R. C. P., provides:

> "* * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. * * *"

Although three motions were pending to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, the matter that was before the court at the time the order of dismissal was entered was a motion of the plaintiffs for a temporary restraining order.

[*Appeal*]

The briefs filed by the parties on this appeal do not limit arguments to the question of jurisdiction as such, but discuss from a broader aspect the issue whether the complaint does state a claim upon which relief can be granted. Of course if an examination of the complaint reveals that the court lacks jurisdiction of the subject matter, it follows that no relief can be granted.

In arriving at its decision to dismiss, the trial court apparently relied upon determinations made by other courts in various lawsuits involving the ordinances described in the complaint, as well as on the decision of the United States Supreme Court in an antitrust case (*United States v. Yellow Cab Co.*, 332 U. S. 218) commenced by the United States government against the same defendants named herein, except the city of Chicago and its officials.

The ordinance of September, 1929, which first created the Public Vehicle License Commission, and which provided that no taxicab licenses should be issued thereafter unless the commission found public convenience and necessity required such proposed service, was declared valid by a three-judge district court. *Capitol Taxicab Co. v. Cermak*, 60 F. (2d) 608.

The ordinances of May 18, 1934, and of December 22, 1937, as extended, were sustained by the Supreme Court of Illinois as a valid exercise of the city's police power.

Yellow Cab Co. v. City of Chicago, et al., 396 Ill. 388, 71 N. E. (2d) 652. (The 1937 ordinance was due to expire on December 31, 1945, but was extended in June, 1945, for another five year period.) The suit was brought by Yellow and Checker against the city of Chicago, and the court held that the acceptance of the 1937 ordinance by Yellow and Checker constituted a contract, and that the city of Chicago was precluded from issuing taxicab licenses in excess of 3,000 without the consent of Yellow and Checker until it had first reissued to them licenses for those surrendered by them in 1938. The court also held that the ordinances did not create a monopoly in the taxicab business in the city of Chicago, but did point out that no taxi operator and no person who desired to enter the taxicab business had complained in that case about a monopoly.

In *United States v. Yellow Cab Co.*, 332 U. S. 218, the complaint, which sought to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Act, was dismissed by the district court for failure to state a claim upon which relief might be granted (69 F. Supp. 170). The Supreme Court, dividing its decision into three parts, sustained in part and reversed in part the decision of the trial court. The court held in Parts I and II that the complaint did state a cause of action under the Sherman Act entitling the United States to a trial on the merits. Part I had to do with interstate purchases exclusively from one defendant of the replacements of some 5,000 taxicabs in four cities. Part II concerned the alleged existence of an agreement that Yellow and Cab Sales would not compete with Parmelee for contracts with railroads to transport passengers and their baggage between railroad stations in Chicago.

However, defendants herein rely strongly on Part III of that decision. In that case the complaint contained allegations similar to those contained in the complaint herein, as hereinbefore stated, and alleged a conspiracy to limit taxicab licenses in the city of Chicago, and the preventing of new operators from entering the cab business.

In order to understand just what the Supreme Court decided, it seems advisable to quote at some length from the opinion (332 U. S. 218, at page 230):

> "The interstate commerce toward which this aspect of the conspiracy is directed is claimed to arise out of the following facts. Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.
>
> "We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the city.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

If the Supreme Court had chosen to say no more, we would have no hesitation to adopt this ruling as applicable, and hold that the case at bar did not fall within the ambit of the Sherman Act and that the relief prayed for thereunder could not be granted; however, the court did say more, for the opinion states (pp. 232-233):

> "We do not mean to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. In *Stafford v. Wallace supra*, 528, the court made plain that nothing in the *Knight* case was authority for the proposition that 'if such an agency (local cab service) could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint.' Likewise, we are not to be understood in this case as deciding that all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal ken. A conspiracy to burden or eliminate transportation of passengers to

and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify the imposition of the Sherman Act or other federal laws resting on the commerce power of Congress.

"All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation. And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act.

"It follows that the complaint, insofar as it is based on such local taxicab service, fails to state a cause of action under the Sherman Act. * * *"

For the purpose of testing the sufficiency of the complaint we must assume, without deciding, that the allegations thereof are true. We, therefore, must assume that in Chicago a shortage of taxicabs exists which burdens the journeys of interstate passengers, and that such burdens result from the alleged conspiracy. The Supreme Court says (*United States v. Yellow Cab Co., supra,* p. 233):

"* * * A conspiracy to burden or eliminate transportation of passengers to and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify the imposition of the Sherman Act. * * *"

In that case the court's attention was focused on taxicab passengers whose journeys began or ended at a Chicago railway station, in contrast to the complaint in the case at bar wherein the interference with the interstate journeys of passengers merely traveling through Chicago is given the most emphasis. Although Parmelee operates with somewhat different type of motor vehicles, and has a contract with the railroads, it is difficult to discern any substantial difference in the status of an interstate passenger who uses a taxicab to travel from station to station, and the interstate passenger who uses Parmelee facilities. Yet the Supreme Court has squarely held that such Parmelee passengers are in interstate commerce. The court said (*United States v. Yellow Cab Co., supra,* p. 228):

"The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods moved from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. * * *"

Construing the complaint in the light most favorable to plaintiffs, we hold that it does state a claim under the Sherman Act upon which relief can be granted. It is of course no valid objection that all of the relief asked for in the complaint and the amendments thereto cannot be granted.

Likewise it is not a sufficient objection for defendants to urge that the travel in taxicabs by interstate passengers between railroad stations in Chicago has only a slight effect on interstate commerce. Quoting again from *United States v. Yellow Cab Co., supra* (p. 225),

"But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of commerce affected. (Citing cases) And Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. * * *"

[*Equal Protection Clause*]

We now reach for consideration that part of the complaint which alleges a violation of plaintiffs' rights under the XIV Amendment. The portion of Section I of said amendment here applicable reads:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although plaintiffs make some argument that their claim arises under the due process clause, it is apparent that they mainly rely on the equal protection clause.

It must be conceded that the control and regulation of taxicabs used by the public is a valid exercise of the police powers of a city. The equal protection clause of the XIV Amendment permits a State, or a subdivision thereof, a wide discretion to classify

in the adoption of police regulations. A classification which has a reasonable basis does not offend against that clause. To be condemned such classification must be clearly arbitrary and unreasonable. *Bachtel v. Wilson,* 204 U. S. 36, 41. The inequality prohibited is only such as is actually and palpably unreasonable and arbitrary. *Frost v. Corporation Commission of Oklahoma,* 278 U. S. 515, 522. He who asserts that a classification is arbitrary has the burden of proof that it does not rest upon any reasonable basis. *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 79.

The original complaint charges that the city's order directing plaintiffs to cease operating their taxicabs on or before January 22, 1948, was arbitrary and discriminatory and violated Section I of Amendment XIV, in that its adoption and other actions of defendants resulted in a failure to provide a uniform method of evaluation of the applications for licenses, arbitrary refusal to grant permits to qualified applicants, and failure to grant to successful applicants licenses equivalent to those held by Yellow and Checker, and that by reason thereof the plaintiffs were damaged.

In the amended complaint the ordinance of February 6, 1948, is alleged to be in furtherance of the conspiracy described in the complaint, and adopted for the purpose of prohibiting competition between plaintiff taxicab operators and the defendant taxicab companies, and various alleged discriminations are set forth which plaintiffs allege are in violation of their rights under the XIV Amendment. Emphasis is laid on the provision of the ordinance requiring each plaintiff driver obtaining a license to operate his cab independently while Yellow and Checker are permitted to much more economically operate their vehicles with relief drivers, and on the fact that Yellow and Checker may use and advertise their association name but that this privilege is denied to the plaintiffs. There are other allegations of discrimination. Based on all of them the plaintiffs in effect portray the situation of strongly entrenched taxicab interests keeping their competition unorganized so that they will be able to retain their present dominant position, and specifically of defendant taxicab companies not fearing competition so long as they can prevent concerted and organized effort on the part of any other competing persons or groups, and that this very situation does exist, as alleged in the complaint, by reason of the conspiracy between Yellow and Checker and the city.

Defendant city of Chicago contends that the courts have held the ordinances of 1934 and 1937 to be contracts with Yellow and Checker and that the provisions contained in the licenses held by them were by reason thereof necessarily granted. However, in view of the city having extended the expiration date of these ordinances on several occasions, we feel that even though the city be bound by contract with Yellow and Checker, that is no reason why the licenses which have been and are issued to others engaged in the same business should be limited by restrictions and conditions which are different and alleged to be discriminatory.

While the federal government does not have the right to regulate certain matters exclusively within the control of the State, it does have the right, by virtue of the XIV Amendment, to prevent any such regulation from being arbitrary and discriminatory. *Power Manufacturing Co. v. Saunders,* 274 U. S. 490; *Adams v. Tanner,* 244 U. S. 590; *Glicker v. Michigan Liquor Control Commission,* 160 F. (2d) 96.

Again liberally construing the complaint in favor of the plaintiffs, we hold that it contains sufficient allegations which, if true, set forth a claim upon which relief can be granted under the equal protection clause of the XIV Amendment.

Only the amendment permitted on the day the order of dismissal was entered remains now for consideration. This amendment alleged that the Illinois Cab Drivers' Assn. for Discharged Veterans is an association composed of 103 negro veterans; that members thereof made application for taxicab licenses to defendant Gorman, Commissioner of Licenses; that although they were interviewed they were thereafter notified to cease operating their cabs on the streets of Chicago (which cabs were then being operated without a license); that no member of the association was granted a license; that no reason was given for the failure to grant such licenses; that, upon information and belief, the only reason for the denial was the fact that such applicants were negroes; that the city acted arbitrarily and maliciously, in violation of the rights of such applicants under the XIV Amendment. Although defendant Gorman is not alleged to have taken affirmative action in granting or rejecting the applications, the amendment asks that

his action be declared null and void, as violative of the Constitution of the United States.

The trial court might well have rejected this amendment. It does not allege that the members of the association are plaintiffs in this action (although it might be inferred that some of them are); it does not contain an allegation of a conspiracy or a monopoly; it makes no claim of any kind against defendants Yellow, Checker or Parmelee. It complains only of the inaction of defendant Gorman in not granting applications for licenses. There is nothing in the ordinances themselves which set up any discrimination based on color prejudice. We think that in its present form the amendment does not state a claim upon which these plaintiffs are entitled to relief.

The order of the trial court dated March 9, 1948, dismissing the complaint for lack of jurisdiction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

[¶ 62,384] Harry Norman Ball, Trustee, v. Paramount Pictures, Inc.

In the United States District Court for the Western District of Pennsylvania. Civil Action No. 2963. December 13, 1948.

Sherman Antitrust Act

Movie Industry—Decree Enjoining Antitrust Violations.—Conspiracies entered into by motion picture companies in order to monopolize the exhibition of first run pictures are declared to be illegal and in violation of the Sherman Act. The defendants are enjoined from monopolizing the exhibition of first run pictures, from performing any contracts between the distributor and the exhibitor having the effect of such monopolization, from conspiring to protect or perpetuate any such monopoly and from licensing their feature motion pictures for first run performance without giving the plaintiff an opportunity to negotiate for such pictures equal to and in all respects the same as the opportunity afforded any other exhibitor.

See the Sherman Act annotations, Vol. 1, ¶ 1021.597, 1220.273.

For plaintiff: Thorp, Bostwick, Reed & Armstrong.

For defendant: Schnader, Harrison, Segal & Lewis; Smith, Buchanan & Ingersoll; Reed, Smith, Shaw & McClay.

Decree

And now, to wit, December 13, 1948, it is ordered, adjudged and decreed as follows:

1. The monopoly of exhibition of motion pictures on first run in the Borough of Ambridge, Pennsylvania, engaged in by the defendants and the conspiracies and attempts to bring about such monopoly and the contracts, combinations and agreements of the defendants, among themselves or with others, resulting in such monopoly and in the restraint of interstate trade and commerce as found by the Court are declared to be illegal and are enjoined as in violation of the Act of Congress of July 2, 1890, known as the "Sherman Anti-Trust Act", as amended and supplemented by the Act of Congress of October 15, 1914, known as the "Clayton Act".

2. The defendants herein and each of them, and each and all of their respective parent, associated and subsidiary corporations, each and all of their respective officers and directors, each and all of their respective agents, servants and employees, and all persons acting or claiming to act on their behalf, or any of them, are enjoined and restrained from, directly or indirectly:

(a) Monopolizing or attempting to monopolize the exhibition of feature motion pictures on first run in the Borough of Ambridge, or from entering into, engaging in or consummating, directly or indirectly, expressly or impliedly, by means of discrimination in prices and terms, or by any other means or device, any such monopolization or any such restraint of interstate trade or commerce.

(b) Enforcing, continuing, performing or acting under any provisions in existing contracts or license agreements between the distributor defendants and the exhibitor defendants having the effect of such monopolization, and entering into, executing or

performing, directly or indirectly, expressly or impliedly, any provisions in any other such license agreements, franchise or arrangements whatsoever having the same effect.

(c) Conspiring to protect or perpetuate any such monopoly in the exhibition of motion pictures on the first run in the Borough of Ambridge, or such restraint of, or agreement or conspiracy to restrain such interstate trade or commerce in motion pictures, or entering into, engaging in, accomplishing or consummating, directly or indirectly, expressly or impliedly, and agreements or conspiracies having the effect of illegality.

(d) Licensing their feature motion pictures for first run performance in the Borough of Ambridge to any one or more of the defendants without giving plaintiff an opportunity to inspect and negotiate for said pictures equal to and in all respects the same as the opportunity afforded any other exhibitor.

3. This decree is final, but jurisdiction of this cause is retained for the purpose of enabling any party to move to modify any of the provisions of this decree other than those relating to damages or counsel fees.

4. The defendants shall pay the plaintiff the costs of suit.

[¶ 62,385] W. B. Griffin v. R. M. Vandegriff.

In the Supreme Court of Georgia. No. 16524. March 14, 1949.

Georgia Constitution

Restrictive Covenant in Employment Contract—Lessening of Competition—Constitutional Prohibition.—A covenant in an employment contract obligating an employee not to engage in the same business for a fixed period after his employment terminates, will not be enforced since it has the illegal effect of lessening competition.

See the Georgia Constitutional Provisions, Vol. 2, ¶ 8181.

For appellant: H. O. Hubert, Jr.

For appellee: E. A. Wright.

By the Court:

DUCKWORTH, Chief Justice. 1. "All contracts and agreements which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement." Constitution of Georgia, article 4, section 4, paragraph 1 (Code, Ann., § 2-2701).

2. A contract between an employer and an employee, fixing the terms of the employment, and containing a clause obligating the employee not to engage for himself or as an employee of another in the same kind of business for a fixed period after the employment terminates, has the effect of defeating or lessening competition and, hence, offends the above provision of the constitution and is void.

3. The petition of an employer seeking injunctive relief and damages against the employee because of an alleged breach of such a void contract set forth no cause of action, and the court erred in overruling the defendant's general demurrer thereto.

Judgment reversed. All the Justices concur, except HAWKINS, J., absent for providential cause.

[¶ 62,386] J. C. Pirkle Machinery Co., Inc. v. Robert V. Walters.

In the Supreme Court of Georgia. No. 16527. March 16, 1949.

Georgia Constitution

Restrictive Covenant in Employment Contract—Lessening of Competition—Constitutional Prohibition.—A restrictive covenant in a contract of employment is held to lessen competition and therefore is void as contravening the state constitutional prohibition against contracts which encourage monopoly.

See the Georgia Constitutional Provisions, Vol. 2, ¶ 8181.

For appellant: J. C. Bowden.

For appellee: O. J. Coogler, Newell Jones.

By the Court:

WYATT, Justice: J. C. Pirkle Machinery Company sought to enjoin Robert V. Walters, a former employee, from violating the negative restrictive covenants of an employment contract and to recover damages for the breach of the restrictive covenants. *Held:*

1. Under the ruling in *Griffin v. Vandegriff*, — Ga. — (Case No. 16524, decided March 14, 1949), the contract in question, in which an employee covenanted not to engage in a competitive business for a period of ten years, was void; and the trial judge did not err in sustaining a general demurrer to the plaintiff's petition.

Judgment affirmed. All the Justices concur.

[¶ 62,387] American Amusement Company v. L. J. Ludwig.

In the United States District Court, District of Minnesota, Fourth Division. No. 2818 Civil. January 26, 1949.

Sherman Antitrust Act

Good Faith—Immaterial Allegations—Motion to Strike Allowed.—In an action to obtain a declaratory judgment as to the enforceability of a pooling agreement, a motion to strike out an allegation of good faith was allowed since it had no bearing on the existence of an antitrust violation. What is done under the contract, not whether the parties specifically intended to violate the Act, controls.

See the Sherman Act annotations, Vol. 1, ¶ 1640.689.

In support of the motion: Benedict Deinard (of Leonard, Street & Deinard), of Minneapolis, Minnesota.

In opposition to the motion: Joseph W. Finley (Bundlie, Kelly, Finley & Maun, of counsel), of St. Paul, Minnesota.

[*Nature of Motion*]

NORDBYE, GUNNAR H., Judge: Plaintiff has commenced against defendant an action for a declaratory judgment pursuant to Section 264(d) of the Judicial Code, 28 U. S. C. A. § 2201. Defendant now moves under Rule 12(f) of the Federal Rules of Civil Procedure to strike Paragraph II and part of Paragraph VIII of the complaint upon the grounds that such allegations are immaterial.

Paragraph II alleges that the matter in controversy exceeds $3,000 exclusive of costs and interest. Both parties recognize that this allegation, read with the rest of the complaint, attempts to base jurisdiction upon the existence of a federal question under Section 1331 of the recent Judicial Code revision. 28 U. S. C. A. § 1331. Paragraph III of the complaint alleges that the action is one "arising under an Act of Congress regulating commerce and protecting trade and commerce against restraints and monopolies (to wit, Sections 1 and 2 of the Sherman Act, 26 Statutes 209, as amended 50 Statutes 693, 15 U. S. C. Sections 1 and 2)." This paragraph, as both parties recognize, alleges jurisdiction under 28 U. S. C. A. § 1337, which confers jurisdiction upon this Court in anti-trust cases. Defendant moves to strike Paragraph II as immaterial because, he claims, only Paragraph III can form the jurisdictional basis of this action.

Defendant moves to strike the last sentence of Paragraph VIII because it alleges that plaintiff in good faith entered into the pooling arrangement concerning which plaintiff now seeks a declaratory judgment as a result of anti-trust decisions by the Supreme Court. Defendant bases its motion upon the ground that good faith is no defense to an anti-trust liability and therefore is immaterial to this action.

1.

Should Paragraph II Be Stricken?

Plaintiff contends that the Court may entertain jurisdiction under both Sections 1331 and 1337 of 28 U. S. C. A. if jurisdic-

tion exists under both. Assuming that may be correct, the real question is whether jurisdiction exists under both sections. Defendant contends that each section states an independent and mutually exclusive basis of jurisdiction. That is, defendant argues that the sections are not repetitious of each other in any degree and that each statute states a separate, not over-lapping basis of Federal District Court jurisdiction. Actions lying under one section do not lie under another, defendant claims. The soundness of defendant's claim becomes the issue on this part of the motion.

Well settled rules of statutory construction require that statutes pertaining to the same matters must be construed together. Sections 1331 and 1337, therefore, must be construed in the light of each other. For both relate to jurisdiction. Section 1337 is not limited in its scope in so far as any amount in controversy is concerned. Under it, actions involving more than $3,000 or less than $3,000 can be brought. See *Parker v. Brown,* 317 U. S. 341, 349; 35 C. J. S. 847. From its wording, the intent is to extend it to all actions arising under federal statutes regulating commerce and protecting against restraints and monopolies. Thus, Section 1337 covers a specific type of case and applies to all of them. Section 1331, however, covers a general field of cases. In terms it applies to all cases arising under federal laws and involving more than $3,000. To conclude that Section 1331—a general statute—supersedes, when applicable, a section specifically applying to actions arising under acts regulating commerce or restraints and monopolies would be holding that Section 1337 is limited to actions involving less than $3,000. Such a construction is contrary to the intent of that section and cannot be adopted. See *Parker v. Brown,* 317 U. S. 341, 349. To conclude that Section 1331 is concurrent with Section 1337 would be unsound with respect to cases involving less than $3,000, for Section 1331 applies only if more than $3,000 is involved, and it would make the sections repetitious of each other with respect to actions involving more than $3,000. A court cannot favor an interpretation which causes repetition unless such intent of the statute is clear. Such intent is not clear here. On the contrary, neither Section 1337 nor Section 1331 purports to be repetitious of the other. Section 1337 purports by its form and by its inclusion of "any" (all) actions arising under federal statutes regulating commerce or restraints and monopolies to be independent and exclusive. It is separate from Section 1331, thus being separate in arrangement as well as form. That its substance also was intended to be separate is apparent from the fact that the $3,000 jurisdictional amount required by Section 1331 need not exist in order for jurisdiction to exist under Section 1337. 35 C. J. S. 847. Moreover, Section 1337 is not the only provision which states a specific basis of jurisdiction in this Court under a specific law. For other sections like Section 1338 (patents, copyrights, trade marks, and unfair competition), Section 1339 (postal matters), Section 1334 (bankruptcy matters and proceedings), and others do the same thing. That Congress would not intend all the specific statutes to be concurrent seems quite clear from their very nature and existence. For then no real purpose for their existence would be apparent with respect to actions involving more than $3,000. No reason suggests itself why Congress would intend, without so indicating, that the specific statute should be limited to less than its terms. The recent revision of the Judicial Code was designed to clarify. If Congress had considered the specific statutes surplusage with respect to actions over $3,000, it undoubtedly would have indicated that.

Under all the circumstances, therefore, it seems reasonable to conclude that Section 1331 does not apply to anti-trust matters covered by Section 1337. The general rule that the specific limits the general must be applied here. Consequently, reading Section 1331 with Section 1337, as it must be, requires the conclusion that Section 1337 prevails over and limits Section 1331. Such an interpretation gives effect to each provision and achieves the purpose of interpretation—a harmonious statutory scheme. Plaintiff's contention would cause unnecessary repetition or unintentional limitation of specific sections. Defendant's motion to strike Paragraph II of plaintiff's complaint seems proper and should be granted. It is so ordered.

2.

Should the Paragraph VIII Allegation of Good Faith Be Stricken?

Courts have held often that good faith is no legal defense and has no bearing on the existence of an anti-trust violation. *Paramount v. United States,* (1930) 282 U. S. 30,

44; *United States v. Masonite Corp.*, 316 U. S. 265, 275. Consequently, an allegation of good faith is immaterial in determining if this pooling contract between plaintiff and defendant violated the Anti-trust Act. What is done under the contract, not whether the parties specifically intended to violate the Act, controls. Plaintiff contends that the question of good faith may become important. But no reason or fact is given for such a conclusion. Upon the facts now presented, no basis exists in support of the allegation's materiality. The situation is not one in which the contract is completely unexecuted and the recovery of money paid thereunder is sought. Plaintiff here seeks to determine the enforcibility of the contract and if it can refuse to perform without incurring liability to defendant for such refusal. *Brashears v. Giannini*, 22 Pac. 2d 47, cert. den. 290 U. S. 700, 54 S. Ct. 22, which concerned the National Prohibition Act, consequently is distinguishable. Neither does the plaintiff's claim that this situation is like one in which a new law is enacted after the making of a contract aid it. The statute was in effect when this contract was made. The mere fact that a decision of the Supreme Court may have indicated to plaintiff after the contract was made that it violated the Anti-trust Act does not mean plaintiff can plead good faith. That same situation confronts every person who, in good faith, seeks to plead good faith in an anti-trust action. If plaintiff's contention were sound, then no one need be very concerned about violating a statute until someone else has been apprehended for a similar violation and the court had held the violation to exist. In effect, the act of the court, not the legislature, would be what created the violation of the act, according to plaintiff's contention. The unsoundness of such a claim is obvious.

Although, as plaintiff notes, motions to strike must not be granted liberally, no reason appears here for permitting immaterial matter to continue in the pleading now or later. Striking the matter now will prevent confusion from arising and will avoid questions as to its propriety from retarding the actual hearing proceedings which assumedly will be held later. If the matter is immaterial to the anti-trust violation, it is immaterial now and immaterial later, in so far as the facts now before the Court establish. Defendant's motion to strike the last sentence of plaintiff's Paragraph VIII concerning good faith is proper and should be granted. It is so ordered.

An exception is reserved to the plaintiff.

Dated this 26th day of January, 1949.

[¶ 62,388] Willie Mitchell, doing business as Mitchell Cab Company v. Harold J. Gibbons et al.

In the United States Court of Appeals for the Eighth Circuit, No. 13,820. March 7, 1949.

Appeal from the United States District Court for the Eastern District of Missouri.

Sherman Antitrust Act

Taxicab Business—Conspiracy in Labor Disputes—Antitrust Violation Not Established.—An injunction to restrain alleged antitrust violations was refused in a cab company's action against labor officials when it was clear that their concert of action and intent was simply such concert as is necessarily implied in the existence of labor organizations and that the purpose of their action was to organize the company's drivers in a labor organization rather than to restrict the supply of the taxicab services for the public or to control the market or raise prices.

See the Sherman Act annotations, Vol. 1, ¶ 1280.275.

For appellant: Wayne C. Smith, Jr. (Boedeker & Weil, Edgar G. Boedeker and Justin J. Weil were with him on brief).

For appellees: Emily Cronheim and Francis Heisler.

[Allegations]

WOODROUGH, C. J.: This appeal is taken to reverse the decree of the District Court which dismissed the plaintiff's action with costs for want of jurisdiction appearing on the face of his amended complaint. The action was brought against C. I. O. local and national labor unions, officers and agents to

enjoin them from continuing conspiracy to molest or interfere with the peaceful conduct of plaintiff's taxicab business in the City of St. Louis, Missouri, which plaintiff carried on under a franchise granted to him by the City. The business included transportation of occasional passengers in interstate commerce from St. Louis, Missouri, to East St. Louis, Illinois, and jurisdiction in the federal court was asserted on the ground that the alleged conspiracy of the defendants constituted violation of the Sherman Anti-Trust Act, 15 U. S. C. A. Sections 1-7 inclusive, as amended by the Clayton Act, 15 U. S. C. A. Sections 12-27 inclusive and Section 44, and that jurisdiction to enjoin its continuance was vested in the Federal court by the provisions of said Acts and of the Judicial Code, 28 U. S. C. A. Section 41, new Title 28 U. S. C. A. Sections 1331, 1336. The sufficiency of the amount in controversy was alleged and that irreparable damage was threatened for which there was no adequate remedy at law.

The defendants' motion to dismiss was on the ground, i. a., that the allegations of plaintiff's amended complaint presented only a labor dispute existing between plaintiff and defendants and acts growing out of such labor dispute and a suit for injunction governed by the restrictions upon the power of Federal judges to grant injunctions imposed by the Norris-LaGuardia Act, 29 U. S. C. A. Sections 101, *et seq.*, Taft-Hartley Act, 29 U. S. C. A. Sec. 151, *et seq.* It was not claimed in the District court, and is not contended here, that plaintiff's amended complaint stated a case for injunction within the restrictions of said Acts.

The lengthy amended complaint includes allegations to the effect that the plaintiff under the franchise granted to him to operate taxicabs for hire is engaged in the taxicab business as a carrier of passengers for hire and operates some thirty taxicabs of the value of $51,000 in carrying on the business, with storage facilities maintained therefor. The defendants are and have been attempting to unionize plaintiff's taxi drivers and to effect their object have resorted to threats, intimidation and violence towards said drivers and destruction of the property in their charge and threaten to and will, unless restrained, continue such unlawful conduct until plaintiff's business is destroyed. Particular instances of violence are set forth ascribed to the defendants generally and alleged to have been perpetrated in pursuance of and to effect the object of the conspiracy sought to be enjoined. The only fair inference from these allegations is that defendants' common object is simply to organize the plaintiff's taxidrivers in a labor union and that the plaintiff opposes and resists and there exists a labor dispute between plaintiff and defendants and controversies growing out of it where no injunction could be granted by the Federal court except as restricted by the Norris-LaGuardia and Taft-Hartley Acts.

But the amended complaint also contains allegations to the effect that the plaintiff in carrying on his taxicab business does not pay wages to the men who drive the cabs. He gets the work done by them and they get their compensation for their work under a plan of leasing the cabs to individual drivers who earn the difference between fares collected from passengers and the charges which plaintiff requires them to pay. The drivers work within the area of plaintiff's franchise without being restricted to districts and pick up passengers when and where they can and there is no immediate supervision over them as they make their various trips, and it is alleged as conclusion that the plaintiff is not the employer of the drivers and they are not his employees but that each of them is an independent contractor and therefore the controversies between the parties here do not grow out of a labor dispute. Plaintiff contended in the District Court and now contends that instead of a labor dispute the defendants' concert of intent and action should be deemed a conspiracy to directly restrain and prevent the intrastate and interstate commerce in violation of the Sherman Act as amended and outside the scope of the Norris-LaGuardia Act.

[*Labor Dispute Involved*]

We do not find facts stated in the complaint to support such holding. It is not shown how many men are required or engaged in driving the thirty taxicabs used in plaintiff's business, nor are any of the details of management and supervision of said business set forth, but clear allegations of the amended complaint establish that plaintiff's taxicab business for which he seeks protection by injunction is an integral unit of capital investment, management, supervision and labor carried on by him, and the cab drivers earn their living out of it solely by their labor—they perform the work of

driving the taxicabs. That work is the same work commonly done in the same way as the work done for a living by all chauffeur members of defendant labor unions. They have no part in the capital investment nor in the management or control of the business. The plaintiff, as he alleges in the complaint, "operates the taxicabs" and the drivers are the hands or performers of work whose relations with plaintiff as to working conditions, compensation and self-organization are directly within the purview of the labor relations laws. Defendants' attempt to organize them and plaintiff's resistance result in the existence of a labor dispute.

Plaintiff has stressed the case of *Columbia River Packers Assn. v. Hinton,* 315 U. S. 143, as supporting a contrary conclusion. We think it does not. It was there asserted that what the court found to be "a dispute among business men over the terms of a contract for the sale of fish" was "a labor dispute" and the court decided that it was not. No such situation can be drawn from plaintiff's allegations in this case. Only one business is pictured and sought to be protected here and that business is carried on by the plaintiff. He can only carry it on with the labor of his taxi drivers, and the labor of human beings is not a commodity or article of commerce. The dispute is solely and entirely as to the terms and conditions on which the drivers shall work, the initial particular being the matter of union organization which has given rise to the suit for injunction. Appellant contends that although such holding may have been proper under the decision of the Supreme Court in *N. L. R. B. v. Hearst Publishers,* 322 U. S. 111, and that such "is the effect of the *Hearst* case", nevertheless a contrary ruling is required under the provisions of the Taft-Hartley Act of 1947 amendatory of the Wagner Act in Title 29 U. S. C. A. Section 152 (9)[1] and Section 152 (3)[2]. But the amendments relied on do not justify refusal to apply the law to the facts pleaded here in accordance with the Supreme Court decisions in the *Hearst* case. The case was decided by the Supreme Court in full recognition of the principle that the relationship of employer-employee differs from that of independent contractors, and the conclusion there that a labor dispute existed upon facts analogous in principle to those here presented is binding on this court.

A divided court has held in the Seventh Circuit in *Party Cab Company v. United States,* — F. (2d) —, decided January 18, 1949, that a taxicab company operating through drivers who work on terms similar to those pictured here was not subject to Social Security tax in respect to the earnings of the drivers. It was pointed out that the company did not pay them wages and did not know the amount of their earnings derived in part from tips and that the public paid them such compensation as they received and it was concluded that they were not employees in respect to whose compensation the company could be taxed under the Act. But we do not consider the decision to be authority for the plaintiff's contention here that the present controversies do not grow out of a labor dispute.

[*Labor Agitation not an Illegal Combination*]

We think it is clear that the concert of intent and action alleged to exist among defendants here is simply such concert among them as is necessarily implied in the existence of their labor organizations which may not "be held to be illegal combinations or conspiracies in restraint of trade" by the express terms of the Sherman Act as amended. As this court said in *Garment Workers Union v. Donnelly Garment Co.,* 119 F. (2d) 892,

> "Unless the intent of a union or the necessary effect of its activities in attempting the destruction of the interstate commerce of an employer by a secondary boycott or in any other way, in order to effect the

[1] Section 152. Definitions.

When used in this subchapter—

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

[2] (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parents or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to chapter 8 of Title 45 and section 225 of Title 28, or by any other person who is not an employer as herein defined.

unionization of his employees, is to control the market or to raise prices or to substantially diminish the supply of goods or otherwise to prejudice or injure the consuming public in some substantial way, such activities are not proscribed by the Sherman Act."

The amended complaint here makes it perfectly clear that the object of the defendants in this case is to organize the plaintiff's taxi drivers in a labor union and has no relation to the supply of taxicab services for the public or to control the market or raise prices and no case for injunction under the Sherman Act is stated against them.

This Court had occasion in *Amalgamated Association, etc. v. Dixie Motor Coach Corporation*, 170 F. (2d) 902, to consider the four Federal labor enactments (the original National Labor Relations Act; the National Labor Relations Act as amended; the Labor Management Relations Act of 1947; and the Norris-LaGuardia Act) and it appeared to us that "the terms of the four acts concerning labor relations and labor management relations and the limitations on the use of injunctive process at the instance of private parties in respect to such labor relations coincident with the powers conferred on the Labor Board to seek and obtain such process in the public interest, prescribe a consistent pattern to provide for a uniform administration of the labor relations laws in the public interest by public authority."

[*Injunction Denied*]

It is stated that the plaintiff in this action has instituted proceedings before the Labor Relations Board based upon substantially the same claims presented by his complaint here and that the proceedings are now pending. If so, and if dispute over the terms and conditions of work by plaintiff's taxi drivers give rise to proper occasion for injunctive relief, such relief may be accorded consistently with the pattern provided by the laws. The judgment of the trial court denying injunction here and dismissing the case is affirmed.

Affirmed.

[¶ 62,389] Fogel v. Bolet.

New York Supreme Court, New York County. Special Term, Part x. 121 N. Y. L. J. 1052, March 23, 1949.

New York Fair Trade Act

Injunction Refused—Violations by Plaintiff.—A photographic supply retailer's action against his competitor to restrain him from selling below prices fixed by fair trade agreements is dismissed since the aggrieved retailer had violated the said contract himself.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.817.

General Lack of Enforcement as a Defense—Hardship in Individual Cases.—The fact that a statute creates inequities is not a ground for a court's refusal to enforce it. Therefore, it is of no avail for the defendant to show that the various products in the photographic supply industry are sold without regard to any fair trade contracts, or to argue that should injunctive relief be granted it would cause irreparable damage to him without enforcing or carrying out the spirit or letter of the provisions of the Fair Trade Act.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.831.

Former Affiliation of the Plaintiff—Failure to Prosecute as a Defense.—Lack of diligence with which the complaining retailer may have policed the trade, in his former capacity as an officer of a fair trade committee of his trade association, is not germane to his individual right to maintain an action against his competitor for selling below established prices set by fair trade agreements.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.83.

Photographic Suppliers Retail Business—Suit Not a Conspiracy.—When a member and former official of a fair trade committee of a trade association, engaged in retail selling of cameras, brought action against his competitor for price cutting, it was held that the mere financing of a lawsuit and hiring counsel by an association does not create a conspiracy which invalidates any proceeding brought by one of its members in a court of equity to further the objectives of such organization in which the individual bringing the suit has a vital interest.

See the New York Fair Trade Act annotations. Vol. 2, ¶ 8604.05.

[*Review of Pleadings and Facts*]

ISIDOR WASSERVOGEL, Official Referee: This is an action brought by plaintiff pursuant to the Feld-Crawford Law (chap. 976, Laws of 1935), wherein he seeks an injunction permanently restraining and enjoining defendant from continuing the alleged breach of the terms of certain "fair trade contracts" and schedule of prices annexed to them.

Plaintiff and defendant are engaged in the business of selling at retail cameras and photographic products. In terms of distance, defendant is plaintiff's closest competitor; their stores are located approximately two blocks apart, at No. 68 Cortlandt street and at No. 92 Liberty street, Borough of Manhattan, City of New York, respectively.

The action is based upon six "fair trade" contracts entered into by six manufacturers of cameras and allied photographic equipment. Such contracts fix the minimum retail price at which dealers are authorized by these manufacturers to advertise, offer for sale or sell any of the items listed therein to the public. It is defendant's "price-cutting" of the stipulated retail prices that plaintiff seeks to enjoin.

Evidence of defendant's alleged violations was obtained by shoppers employed by the Fair Trade Committee of the New York Guild of Photographic Dealers, Inc., of which plaintiff is an active member and former officer. Defendant does not deny violating the above fair trade agreements. He admits, rather, that underselling plaintiff and his other competitors on the fair trade products is an essential part of his business. Defendant contends, however, that plaintiff and other members of the Fair Trade Committee have combined, not for the purpose of enforcing fair trade contracts in order to protect themselves within the framework of the Feld-Crawford Law, but as part of a conspiracy to restrain and interfere with competition in the marketing and sale of cameras and photographic supplies in the City of New York by persons who, like defendant, are not members of said organization.

Defendant further contends that plaintiff, as well as other members of the Fair Trade Committee, advertised, authorized, offered and approved the sale of merchandise at less than the minimum retail price fixed by the manufacturers thereof, by reason of which, it is asserted, the benefits of the statute have been waived and abandoned, and that plaintiff comes into this court of equity with unclean hands, and is, therefore, not entitled to the relief which he seeks.

The fair trade statute, as the Feld-Crawford Law is commonly known, is incorporated in article 24a of the General Business Law, and the relief is particularly sought herein under section 369-b thereof, which provides that:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section three hundred and sixty-nine a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Ineffectual Price Maintenance*]

Defendant has shown that all attempts to maintain retail resale prices in the City of New York in the camera and allied photographic fields have broken down and failed and that the industry, as a whole, is in a confused and chaotic state so far as pricing and price maintenance are concerned. Defendant has testified and the evidence warrants the conclusion, that the various products in this industry are sold throughout the city at open competitive prices without regard to any fair trade contracts and prices fixed therein. In view of these circumstances defendant contends that should injunctive or other equitable relief be granted to plaintiff it would cause irreparable damage to him without enforcing or carrying out the spirit or letter of the provisions of the Fair Trade Act.

[*Purpose of Price Maintenance*]

The desirability of uniformity in business practice and the principle of price maintenance as a method protecting a legitimate interest have long been recognized by both the Legislature and the courts of this state. The Fair Trade Act, adopted in 1935, was designed to meet these needs and to prevent destructive price wars among retailers, such conduct being considered unfair competitive practice and against the best interests of our economic system (*Old Dearborn Co. v. Seagram Corp'n*, 299 U. S. 183; *Bourjois Sales Corp'n v. Dorfman*, 273 N. Y., 167; *Port Chester Wine & Liquor Shop, Inc., v. Miller Products*, 253 *App. Div.*, 188; *Stockman v. Wilson Distilling Co.*, 175 Misc., 314, aff'd 261 App. Div., 969; *Weisstein v. Freeman's Wines & Liquors, Inc.*, 169 Misc., 391).

The statute in its original enactment purported to protect trade mark owners, distributors, retailers and the general public against injurious and uneconomic practices in the distribution of articles of a standard quality under a distinguished trade mark, brand or name (Unconsolidated Laws, sec. 2201, *et seq.*). Section 2 of the Fair Trade Act, upon which plaintiff relies, created a new cause of action in that it evinced a legislative purpose to have that action inure to the benefit of others than the producer of the product (*Port Chester Wine & Liquor Shop, Inc., v. Miller Products, supra*). The wisdom of permitting price-fixing arrangements and interdicting price-cutting competition were matters for the Legislature to determine. Once that body of lawmakers has enunciated the public policy of this state the fact that the statute creates inequities is not a ground for a court's refusal to enforce it (*Nat. Distillers Products Corp'n v. Columbus Circle Liquor Stores, Inc.*, 166 Misc., 719; *Port Chester Wine & Liquor Shop, Inc., v. Miller Products, supra*).

Defendant's contention in the respect above referred to, therefore, cannot be sustained. The consequences of price-cutting by a retailer fall most heavily upon the competing retailer who, ostensibly, is observing his contract obligations. He is deprived of his sales and his good will in the neighborhood may be irreparably harmed as a result of the activities of his competitors. It is inconceivable that an individual retailer is to be regarded as responsible for conditions of the industry throughout the city or under an obligation to attempt to bring about compliance with the law by all of his competitors. No such burdens rest upon plaintiff as a condition to equitable relief herein.

[*Legal Action by Association Not a Conspiracy*]

I hold that the diligence or lack of diligence with which plaintiff may have policed the trade, in his former official capacity as a member of the trade association, is in no wise germane to his individual rights as a retail storekeeper to maintain the instant action. Defendant's affirmative defense that he is a victim of a conspiracy of his competitors, organized as a trade association, was considered by Mr. Justice Steuer at Special Term, Part III, of this court, in granting plaintiff's motion for a temporary injunction (N. Y. L. J., February 2, 1949, p. 411). Likewise in a ruling by Mr. Justice Hofstadter, rendered at Special Term, Part I, of this court (N. Y. L. J., February 24, 1949, p. 688), upon defendant's motion to examine plaintiff and his employees before trial, item No. 3 of the examination, relating to the combination and conspiracy of plaintiff and members of the Guild, was denied to defendant. I hold that the mere financing of a lawsuit and hiring of counsel by an association does not create a conspiracy which invalidates any proceeding brought by one of its members in a court of equity to further the objectives of such organization in which the individual bringing the suit has a vital interest.

[*Clean Hands Doctrine*]

The principle expressed by the "clean hands" maxim of equity, which is also urged by the defense, is one of the elementary and fundamental conceptions of equity jurisprudence and furnishes one of the most important rules affecting the entire field of equitable relief (*Farlon Realty Associates v. Woodsam Associates*, 294 N. Y., 846; *Wolfenstein v. Fashion Originators Guild of America*, 244 App. Div., 656; *Pomeroy's Equity Jurisprudence*, sec. 397 *et seq.;* 30 C. J. S., sec. 93).

In the instant action the record discloses that plaintiff is, himself, guilty of violations of the price maintenance agreements which he seeks to enforce herein. At the time of the argument of the motion for a temporary injunction, defendant presented, by way of affidavit, but one instance of a violation by plaintiff of the fair trade contracts here involved. As stated by Mr. Justice Steuer (*supra*):

> "A practice by plaintiff's employees of the same tactics would put a different complexion on the interpretation * * *."

Upon the trial of this action, evidence was given by one Biller, a former salesman and floor manager employed by plaintiff. His testimony negatives the contention advanced by plaintiff that the isolated instance of a violation referred to on the motion for a preliminary injunction was merely a breach of duty by one of the salesmen in his employ. The record demonstrates affirmatively that other sales of a similar nature were made by plaintiff and his staff below fixed prices. The witness Biller testified that plaintiff instructed his salesmen to try to adhere to the Feld-Crawford Act "if they possibly could on any sales, but not to lose a sale." Biller admitted making at least two dozen sales himself below the stipulated prices during 1948. The witness further testified as follows:

"Q. What were your instructions from Mr. Fogel as to sales below the Feld-Crawford prices? A. To be careful as to whom we were selling and to make sure we knew the account or the customer * * *. Q. And did he tell you, you could sell it below list price if you knew the customer? A. Yes * * *. Q. You were asked here with regard to sales below the list price. Did you ever tell your employer that you had made such sales? A. Yes. Q. Did you at any time during your employment in Mr. Fogel's store, sell camera items at below Fair Trade prices? A. Yes. Q. And did you at any time during your employ see any other employee of Mr. Fogel's store sell camera items at below Fair Trade prices? A. Yes. Q. Who made such sales? A. Mr. Goldberg. Q. Who else? A. Mr. Shapiro * * *. Q. Did you ever observe Mr. Fogel make such sales at below Fair Trade prices on camera items * * *? A. Yes * * *. Q. Can you recall the names of any customers that Mr. Goldberg sold to? A. Yes * * * Mr. Wolf—Bertram Wolf * * * Mr. Zalin—Maurice Zalin * * * Mr. Spingola * * * Louis Alverez. Q. What did he buy? A. He bought a Bell and Howell projector—he bought Bell and Howell projectors and Eastman-Kodak 35-millimeter cameras. Q. And did he get a discount below the list price? A. Yes—twenty per cent. on the Eastman-Kodak and fifteen per cent. on Bell and Howell. Q. Do you know any other specific sales? A. Yes—Mr. Arthur Field. Q. What did he buy? A. An Eastman-Kodak movie camera. Q. What was the list price? A. Approximately $187. Q. And what price did he buy it for—what price did he pay for it? A. Fifteen per cent, below the list price * * *. Q. Were you ever told by Mr. Fogel that when a sale was below list price, you were not to make out a sales slip to a customer—you are not to give a sales slip to a customer? A. Yes. Q. And can you tell us how many times that question was discussed? A. Two dozen times."

Plaintiff met this testimony by categorical denials by himself and by two of his salesmen, although one admitted violating a price-fixing agreement for which he was admonished by plaintiff. No reason has been shown why the credibility of the witness Biller should be questioned. As a salesman and manager of plaintiff's store, he had certain authority which he exercised in the consummation of sales of camera and photographic equipment. He testified, and plaintiff has not shown why his testimony should be doubted, that he reported most of his sales to plaintiff personally if they were below list price and if he thought they warranted plaintiff's attention. It might be inferred from this that only very unusual circumstances would warrant calling plaintiff's attention to particular sales, and that one below the fixed price evidently did not require any special comment. Biller was not an interested party to this action, nor has he any present connection with either plaintiff or defendant, having left plaintiff's employ under normal circumstances to assume a better position for higher wages. His testimony, was straight-forward, despite a seeming reluctance to testify. Although he supplied a number of names of customers to whom cut-price sales were made, none of them was called by plaintiff in rebuttal.

[*Relief to Plaintiff Denied*]

While a court of equity endeavors to maintain, promote, and enforce the interests of justice, it nevertheless stringently demands good faith, fairness, and uprightness from the litigant parties who come before it either as plaintiffs or defendants. Equity will not open its doors to one who seeks to enforce alleged rights arising from a contract which he himself has breached or violated (30 C. J. S., sec. 99, p. 497; *Edward Thompson Co. v. American Law Book Co.*, 122 Fed., 922, *Fav v. Lambourne*, 124 App. Div., 245).

The fact that plaintiff has a relatively small business in comparison to defendant's, and could in no way affect the latter if they both continued to engage in price-cutting activities, is not here material. The requisite in determining whether a party comes into court with clean hands is not alone the actual or probable injury to him, but also his moral intent and good faith.

Upon equitable principles, therefore, and upon the evidence before me, I hold that plaintiff is not entitled to the relief he seeks in this action. Judgment is rendered for defendant dismissing the complaint on the merits. No costs are awarded.

Submit decree within ten days on three days' notice.

The foregoing are the facts found by me and constitutes the decision of the court as required by section 440 of the Civil Practice Act.

[¶ 62,390] **United States v. Women's Sportswear Manufacturers Association, et al.**

In the Supreme Court of the United States. October Term, 1948. March 28, 1949. No. 37.

Appeal from the United States District Court for the District of Massachusetts.

Sherman Antitrust Act

Contract to Employ Only Association Members—Restraint upon Free Choice—Control of the Market.—In an action brought by the government against a trade association of stitching contractors, a contract whereby twenty-one jobbers promised to employ only association members in good standing with a named garment workers' union and to refrain from dealing with nonmembers ought to be cancelled, in the opinion of the Supreme Court. The manifest purpose and intent of the contract was to restrain the jobbers from free choice among stitching contractors and the effect of the agreement was to restrain competition and to control prices and markets.

See the Sherman Act annotations, Vol. 1, ¶ 1230.151.

Ready to Wear Industry—Activities of Jobbers—Interstate Commerce.—The women's sportswear industry is carried on by the activity of jobbers who engage in nation-wide competition for orders by means of traveling salesmen who solicit throughout the country. Upon receiving an order, the jobber cuts the material, sends it to a contractor who does the stitching and returns the completed garment to the jobber, who ships it to the customer. The cloth is obtained outside the state, it is manufactured into garments within the state, but the finished product is sold and shipped to customers outside the state. Thus the industry in Massachusetts subsists on a constant influx of cloth and outgo of garments. The resulting current of commerce is interstate in character.

See the Sherman Act annotations, Vol. 1, ¶ 1021.539.

Restraint at Intrastate Level—Effect on Interstate Commerce—Trade Association Contract Cancelled.—Even though a trade association of garment workers and its members might not themselves be engaged in interstate commerce, the court enjoined them from imposing restrictive conditions on jobbers in the industry in violation of the Sherman Antitrust Act. Restraints to be effective do not have to be applied all along the line of movement of the interstate commerce. The source of the restraint may be intrastate, the application of the restraint may be intrastate, but neither matters if the necessary effect is to stifle or restrain commerce among the states.

See the Sherman Act annotations, Vol. 1, ¶ 1021.310, 1021.651.

Reversing the decision of the United States District Court for the District of Massachusetts, reported at 1946-1947 TRADE CASES ¶ 57,650.

For appellant: Philip B. Perlman, Solicitor General; Wm. Amory Underhill, Assistant Attorney General; Robert L. Stern, Robert G. Seaks.

For appellees: Harry Bergson.

[*Review of Proceedings*]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The District Court, after trial, has denied the Government's plea for an injunction, and other relief, against appellees under the Sherman Act.[1] 75 F. Supp. 112. The cause is brought here by direct appeal, as Congress has authorized.[2] Defendants below and appellees here are an unincorporated trade association, its officers and members. There is no serious controversy as to facts. Our review must determine whether or not they establish the Government's right to the relief which has been denied.

We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among states. The industry involved is women's sportswear. It is carried on by jobbers, who maintain sales offices in New

[1] Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1.

[2] 15 U. S. C. § 29; 28 U. S. C. § 2101.

York and engage in nation-wide competition for orders, chiefly by means of traveling salesmen who solicit throughout the country. Upon receiving an order, the jobber buys the fabrics and cuts them to the customer's fancy. In most cases he then sends the cut material to a contractor who does the stitching, puts on such accessories as the buttons and the bows, and returns the completed garments to the jobber who promptly ships them to the customer.

[*Interstate Character of Jobber Industry*]

That the jobbers maintain a current of commerce, substantial in volume and interstate in character, seems clear. The Boston area ranks fifth in this country's production of women's sportswear. Its jobbers obtain about 80% of the cloth used from sources outside of Massachusetts. At least 80% of the finished sportswear is sold and shipped to customers outside of that State. Thus the industry in Massachusetts subsists on a constant influx of cloth and outgo of garments which pass through the hands of the stitching contractors for an essential operation.

[*Nature of Restraints*]

Our next inquiry is whether the accused combination, which is made up of stitching contractors, has imposed upon this interstate trade restraints of a character and magnitude to violate the Sherman Act. The Association is made up of members who handle at least 50% of all sportswear produced in Boston. The cost of this contractor's operation is about 25% of the jobber's sale price, and its variations are reflected in wholesale and retail prices. The Association's executive director took steps to induce jobbers to enter into a written agreement, among other things, to employ only members of the Association, refrain from dealing with nonmembers, and accept no secret price rebates. When the jobbers hesitated, stoppage of production was threatened and when they refused because they were advised that it would violate antitrust laws, the Association ordered contractors to stop work for three jobbers, which was done, and work for them was not resumed until the jobbers obtained a state court injunction. The proposed agreement was then revised and ultimately was signed by twenty-one jobbers who handle a gross annual volume of about $8,800,000, that being a substantial portion of the Boston output.

The agreement in final form, together with the circumstances of its making, is alleged to constitute an illegal restraint of trade. Terms relevant to the issue require jobbers to give all of their work to available Association members who are in good standing with the International Ladies Garment Workers Union, provided such contractors are "comparable" as to price and quality of work with nonmember contractors having contracts with the same Union. The jobber is to furnish a written order specifying price and is forbidden to receive secret rebates. A jobber can give work to a nonmember only in continuance of an existing relationship. The jobber will give no new contract to any stitcher who ceases to be a member of the Association. The Association agrees to assist the jobber in getting sufficient contractors as the amount of his work "may equitably require," and the jobber agrees that he will divide his work "as equally and equitably as possible among the Association contractors engaged by him." The District Court found that one of the purposes of the Association was to maintain the standard of prices. The Government also recites evidence suggesting that the Association policed the membership to prevent price competition and excluded from membership "newcomers in the trade."

[*Restrictive Intent and Effect*]

In the light of its origin and the circumstances of the industry, it seems clear that the intent and effect of the agreement is substantially to restrict competition and to control prices and markets. It prohibits the jobbers from awarding work to others (with minor exceptions) unless their prices are not "comparable" to those of association members. It effects for Association members a virtual monopoly of work at "comparable" prices. Work given to members must be allocated "equitably," not by reference to price or quality of work. And it apparently contemplates boycott by the Association of jobbers who do not subscribe to these terms. That such a contract restrains trade in violation of the Sherman Act is obvious, even if the restraints in actual practice under it do not go beyond its express terms, which the evidence indicates to be likely.

[*Effect of Labor Provisions in Monopolistic Contract*]

It is argued that inclusion of the labor provisions makes the agreement immune

from attack under the antitrust laws. The stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He is an *entrepreneur,* not a laborer. *Cf. Columbia River Packers Association v. Hinton,* 315 U. S. 143. The labor provisions were incorporated into the second proposal after the first was rejected as violating the antitrust laws and seem to give nothing to labor that it was not already getting for itself from other as well as from these manufacturers. The restraints here went beyond limiting work to Union shops; it limited it to those Union shops also members of the Association. The trial court found no evidence that the Union participated in making the agreement. And if it did, benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires. *Allen-Bradley Co. v. Local Union No. 3,* 325 U. S. 797.

[*Intrastate Restraints Have Interstate Effects*]

The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

[*Contract Cancelled*]

The manifest purpose and intent of the contract in question was to restrain the jobbers from free choice among stitching contractors on equal terms. The business affected by the restraint is interstate commerce. The volume affected is substantial. While the restraint of the final contract is more moderate than the one first attempted and its dollar-and-cents effect on the commerce might be difficult to appraise, it is sufficient to warrant judgment canceling the contract and enjoining carrying out of the plan it embodies.

The judgment is Reversed.

[¶ 62,391] Joseph Giboney et al. v. Empire Storage and Ice Company.

In the Supreme Court of the United States. October Term, 1948. No. 182. April 4, 1949.

Appeal from the Supreme Court of Missouri.

Missouri Antitrust Act

Antitrade Restraint Law Applies to Labor Activity—Agreement Not To Sell to Nonunion Peddlers—Constitutional Power To Issue an Injunction.—In an effort to compel a wholesale ice distributor to refrain from selling ice to nonunion peddlers, unionized retail ice peddlers picketed the distributor's place of business. Since the sole and immediate object of the picket was to coerce the wholesaler into a course of action which would violate the state antitrust law, an injunction against further picketing was issued. The Court upholds the constitutional power of the state to enforce its antitrust policy, of affording all persons an equal opportunity to buy goods, by issuing an injunction prohibiting this labor activity.

See the Missouri Antitrust Act annotations, Vol. 2, ¶ 8475.

For appellants: Clif Langsdale, Clyde Taylor.

For appellee: Richard K. Phelps, Gage, Hillix & Phelps.

Affirming 1946-1947 Trade Cases ¶ 57,611.

[*Issue*]

Mr. Justice Black delivered the opinion of the Court.

This case here on appeal under 28 U. S. C. § 1257 raises questions concerning the constitutional power of a state to apply its anti-

trade restraint law[1] to labor union activities, and to enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which is in violation of the state law. The picketing occurred in Kansas City, Missouri. The injunction was issued by a Missouri state court.

[*Review of Facts*]

The appellants are members and officers of the Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with the American Federation of Labor. Its membership includes about 160 of 200 retail ice peddlers who drive their own trucks in selling ice from door to door in Kansas City. The union began efforts to induce all the nonunion peddlers to join. One objective of the organizational drive was to better wage and working conditions of peddlers and their helpers. Most of the non-union peddlers refused to join the union. To break down their resistance the union adopted a plan which was designed to make it impossible for nonunion peddlers to buy ice to supply their retail customers in Kansas City. Pursuant to the plan the union set about to obtain from all Kansas City wholesale ice distributors agreements that they would not sell ice to nonunion peddlers. Agreements were obtained from all distributors except the appellee, Empire Storage and Ice Company. Empire refused to agree. The union thereupon informed Empire that it would use other means at its disposal to force Empire to come around to the union view. Empire still refused to agree. Its place of business was promptly picketed by union members although the only complaint registered against Empire, as indicated by placards carried by the pickets, was its continued sale of ice to nonunion peddlers.

Thus the avowed immediate purpose of the picketing was to compel Empire to agree to stop selling ice to nonunion peddlers. Missouri statutes, set out in note 1, make such an agreement a crime punishable by a fine of not more than $5,000 and by imprisonment in the penitentiary for not more than five years. Furthermore, had Empire made the agreement, the ice peddlers could have brought actions for triple damages for any injuries they sustained as a result of the agreement under § 8308 of the Missouri Revised Statutes (1939).

About 85% of the truck drivers working for Empire's customers were members of labor unions. These union truck drivers refused to deliver goods to or from Empire's place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member.

Because of the foregoing facts shown either by admissions, by undisputed evidence, or by unchallenged findings, the picketing had an instantaneous adverse effect on Empire's business. It was reduced 85%. In this dilemma, Empire was faced with three alternatives: It could continue to sell ice to nonunion peddlers, in which event it would be compelled to wage a fight for survival against overwhelming odds; it could stop selling ice to nonunion peddlers thereby relieving itself from further conflict with the union, in which event it would be subject to prosecution for crime and suits for triple damages; it could invoke the protection of the law. The last alternative was adopted.

[*Allegations in Trial Court*]

Empire's complaint charged that the concerted efforts of union members to restrain Empire from selling to nonunion members was a violation of the antitrade restraint statute and that an agreement by Empire to refuse to make such sales would violate the same statute. It prayed for an injunction against the picketing. In answering appellants asserted a constitutional right to picket Empire's premises in order to force it to discontinue sale of ice to nonunion

[1] "*Combinations in restraint of trade declared a conspiracy.* Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article." Mo. Rev. Stat. Ann. § 8301 (1939).

And § 8305 provides that anyone violating § 8301 ". . . shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment." Mo. Rev. Stat. Ann. § 8305 (1939).

peddlers. They contended that their right to do so was "guaranteed by the First and Fourteenth Amendments" because there was "a labor dispute existing" between appellants and appellee, and because the picketers publicized only the truthful information that appellee was "selling ice to peddlers who are not members of the said defendant union."

The trial court heard evidence, made findings and issued an injunction restraining the appellants from "placing pickets or picketing around or about the buildings" of Empire.

The State Supreme Court affirmed. — Mo. —, 210 S. W. 2d 55. It agreed with the findings of the trial court that the conduct of appellants was pursuant to a local transportation combination used to compel Empire to stop selling ice to nonunion peddlers and that the purpose of the picketing was to force Empire to become a party to such combination. It held that such activities were unlawful because in violation of § 8301 of the Missouri statutes and further held that the injunction to prevent picketing for such unlawful purpose did not contravene the appellants' right of free speech.

[*Appellants' Argument*]

In this Court appellants do not raise problems similar to those discussed in *Near v. Minnesota,* 283 U. S. 697, relating to censorship prior to publication as distinguished from sanctions to be imposed after publication, nor are there objections to the form, language, or scope of the injunction. See *Milkwagon Drivers v. Meadowmoor Dairies,* 312 U. S. 287, 297-298, also dissenting opinion, 299-303. Attacking the Missouri statute as construed and applied, appellants broadly challenge the power of the state to issue any injunction against their conduct since, they assert, the primary objective of their combination and picketing was to improve wage and working conditions. On this premise they argue that their right to combine, to picket, and to publish must be determined by focusing attention exclusively upon their lawful purpose to improve labor conditions, and that their violation of the state antitrade restraint laws must be dismissed as merely incidental to this lawful purpose.

[*Constitutional Power To Prohibit Combining To Restrain Trade*]

First. That states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question. *Watson v. Buck,* 313 U. S. 387, 403-404. In speaking of the Missouri statutory antecedent of the statute here challenged, this Court said:

> "The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. . . . There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing such policy. To so decide would be stepping backwards."

International Harvester Co. v. Missouri, 234 U. S. 199, 209. Agreements and combinations not to sell to or buy goods from particular persons, or to dictate the terms under which transportation will be supplied, are well recognized trade restraint practices which both state and national legislation can and do prohibit. *Grenada Lbr. Co. v. Mississippi,* 217 U. S. 433, 440-441; *Eastern States Lbr. Assn. v. United States,* 234 U. S. 600, 612-614; *Fashion Guild v. Trade Comm'n,* 312 U. S. 457, 465; *United States v. Freight Assn.,* 166 U. S. 290, 324-325.

[*Union Not Immune from Antitrade Restraint Laws*].

Second. It is contended that though the Missouri statute can be applied validly to combinations of businessmen who agree not to sell to certain persons, it cannot be applied constitutionally to combinations of union workers who agree in their self-interest to use their joint power to prevent sales to nonunion workers. This contention appears to be grounded on the guaranties of freedom of speech and press stemming from the Fourteenth and First Amendments. Aside from the element of disseminating information through peaceful picketers, later discussed, it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people.[2]

[2] Appellants say, after quoting from a concurring opinion in *United States v. Hutcheson,* 312 U. S. 219, 243, "We believe, therefore, that it is perfectly clear that a state may not apply either statutory or common law policies concerning restraint of trade to illegalize com-

The objective of unions to improve wages and working conditions has sometimes commended itself to Congress and to state legislatures. To the extent that the states or Congress, for this or other reasons, have seen fit to exempt unions from antitrust laws, this Court has sustained legislative power to grant the exemptions. *International Harvester Co. v. Missouri,* 234 U. S. 199; *Allen-Bradley Co. v. Union,* 325 U. S. 797, 810-811; *United States v. Hutcheson,* 312 U. S. 219, 232-234; and see *Tigner v. Texas,* 310 U. S. 141. On the other hand, where statutes have not granted exemptions, we have declared that violations of antitrust laws could not be defended on the ground that a particular accused combination would not injure but would actually help manufacturers, laborers, retailers, consumers, or the public in general. *Fashion Guild v. Trade Comm'n,* 312 U. S. 457, 467-468. More than thirty years ago this Court said (*International Harvester Co. v. Wisconsin, supra,* at 209): "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions. . . ." See also *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 220-221; *Mandeville Farms v. Sugar Co.,* 334 U. S. 219, 242-243.

The foregoing holdings rest on the premise that legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general.[3] In making this determination Missouri has decided to apply its law without exception to *all* persons who combine to restrain freedom of trade. We are without constitutional authority to modify or upset Missouri's determination that it is in the public interest to make combinations of workers subject to laws designed to keep the channels of trade wholly free and open. To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. See *Allen-Bradley Co. v. Union,* 325 U. S. 797, 810. More than that, if for the reasons here contended, states cannot subject union members to such antitrade restraint laws as Missouri's, neither can Congress. The Constitution has not so greatly impaired the states' or nation's power to govern.

[*Injunction Not An Abridgment of Free Speech*]

Third. It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama,* 310 U. S. 88, 102, and *Allen-Bradley Co. v. Union,* 325 U. S. 797, 807, note 12. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said

binations among workingmen for the purpose of eliminating wage competition throughout a trade or industry." And petitioners further argue that a state may not "make it unlawful for an employer to acquiesce in union demands that he refrain from supplying goods to nonunion peddlers. . . ."

[3] In the *International Harvester Co.* case, 234 U. S. 199, the then Missouri statute was construed as inapplicable to combinations of purchasers and laborers. For this reason the statute was challenged as denying equal protection of the laws. Replying to the challenge, this Court said at p. 210: "Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine."

or decided in any of the cases relied on by appellants calls for a different holding.

Neither *Thornhill v. Alabama, supra,* nor *Carlson v. California,* 310 U. S. 106, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. In both these cases this Court struck down statutes which banned all dissemination of information by people adjacent to certain premises, pointing out that the statutes were so broad that they could not only be utilized to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy. But in the *Thornhill* opinion, at pp. 103-104, the Court was careful to point out that it was within the province of states "to set the limits of permissible contest open to industrial combatants." See *Lincoln Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, 536; *Allen-Bradley Local v. Board,* 315 U. S. 740, 748-751. Further emphasizing the power of a state "to set the limits of permissible contest open to industrial combatants" the Court cited with approval the opinion of Mr. Justice Brandeis in *Duplex Printing Co. v. Deering*, 254 U. S. at 488. On that page the opinion stated:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

After emphasizing state power over industrial conflicts, the Court in the *Thornhill* opinion went on to say at p. 104, that states may not "in dealing with the evils arising from industrial disputes . . . impair the effective exercise of the right to discuss freely industrial relations. . . ." This statement must be considered in its context. It was directed toward a sweeping state prohibition which this Court found to embrace "nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute." That the general statement of the limitation of a state's power to impair free speech was not intended to apply to the fact situation presented here is further indicated by the cases cited with approval in note 21 of the *Thornhill* opinion.[4]

Appellants also rely on *Carpenters Union v. Ritters Cafe,* 315 U. S. 722, and *Bakery Drivers Local v. Wohl,* 315 U. S. 769. decided the same day. Neither lends support to the contention that peaceful picketing is beyond legislative control. The Court's opinion in the *Ritter* case approvingly quoted a part of the *Thornhill* opinion which recognized broad state powers over industrial conflicts. In the *Wohl* case, the Court's opinion at p. 775 found no "violence, force or coercion, or conduct otherwise unlawful or oppressive" and said that "A state is not required to tolerate in all places . . . even peaceful picketing by an individual." A concurring opinion in the *Wohl* case, at pp. 776-777, pointed out that picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation. No opinions relied on by petitioners assert a constitutional right in picketers to

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[4] *Eastern States Lumber Dealers v. United States,* 234 U. S. 600, was cited in note 21. In that case the lumber association was a combination of retail lumber dealers found by the court to have conspired to prevent wholesale dealers from selling directly to consumers of lumber. The sole basis for the injunction was the distribution and dissemination of truthful information by the association to its members in an official report. This Court sustained the decree which broadly enjoined the distribution of this truthful information.

The cases cited in note 21 of the *Thornhill* opinion include the following, strongly emphasizing states' powers to regulate their internal industrial and economic affairs and rejecting contentions that challenged regulations violated the Federal Constitution. *Senn v. Tile Layers Union,* 301 U. S. 468; *West Coast Hotel Co. v. Parrish,* 300 U. S. 379; *Nebbia v. New York,* 291 U. S. 502; *Dorchy v. Kansas,* 272 U. S. 306; *Aikens v. Wisconsin,* 195 U. S. 194; *Holden v. Hardy,* 169 U. S. 366. Another case cited in note 21 of the *Thornhill* opinion was *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436. It also involved a violation of the federal anti-trust laws, and once again this Court sustained the power of the Government to enjoin trade practices deemed in violation of those laws. The only other case cited in note 21, *Labor Board v. New Port News,* 308 U. S. 241, sustained an order against an employer which restrained it from using its influence over employees to interfere with their activities.

take advantage of speech or press to violate valid laws designed to protect important interests of society.[5]

We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California,* 314 U. S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State,* 308 U. S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board,* 319 U. S. 533, 539; *Thomas v. Collins,* 323 U. S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins, supra,* at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. See *e. g., Fox v. Washington,* 236 U. S. 273, 277; *Chaplinsky v. New Hampshire,* 315 U. S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

[*State Regulation of Trade Paramount*]

The interest of Missouri in enforcement of its antitrust laws cannot be classified as an effort to outlaw only a slight public inconvenience or annoyance. The Missouri policy against restraints of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century. It is clearly drawn in an attempt to afford all persons an equal opportunity to buy goods. There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned. Appellants' power with that of their allies was irresistible. And it is clear that appellants were doing more than exercising a right of free speech or press. *Bakery Drivers Local v. Wohl,* 315 U. S. 769, 776-777. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.[6]

[5] Both parties here rely on the *Ritter* case. Empire contends that this Court affirmed the action of the Texas courts on the basis of the state's antitrust law. Appellants argue that this Court upheld the Texas injunction on the ground that the business picketed did not bear a sufficiently close relation to the labor dispute to justify picketing at that place. Since the Court relied on this ground, appellants contend that the Court impliedly rejected the contention that the injunction was justified because of an alleged violation of the antitrust laws. This Court's opinion in the *Ritter* case, as well as the dissents, did emphasize questions other than the antitrust act contentions. The Court of Civil Appeals of Texas had not mentioned the Texas antitrust laws in its first or second opinion in the *Ritter* case. 138 S. W. 2d 223, 149 S. W. 2d 694. A third opinion, denying rehearing, did make reference for the first time to the state's antitrust laws, but did not definitely point out in what way the picketers' conduct violated any specific provision of these laws. 149 S. W. 2d 694, 699. Under these circumstances nothing that was said in the *Ritter* opinion stands for the principle that speech and writings, utilized as a part of conduct engaged in only to break a valid antitrade restraint law, render that course of conduct immune from state control.

[6] "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery Drivers Local v. Wohl, supra,* at 776-777.

The opinion in *Thomas v. Collins,* 323 U. S. 516, 537-538 stated: ". . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. . . . But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to

What we have said emphasizes that this is not a case in which it can be assumed that injury from appellants' conduct would be limited to this single appellee. *Thornhill v. Alabama,* 310 U. S. 88, 104-105. Missouri, acting within its power, has decided that such restraints of trade as petitioners sought are against the interests of the whole public. This decision is in accord with the general ideas underlying all antitrade restraint laws. It is not for us to overrule this clearly adopted state policy.

While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. See *Associated Press v. United States,* 326 U. S. 1, 19; *Fashion Guild v. Trade Comm'n, supra,* at 465; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 242. We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen or others. Of course this Court does not pass on the wisdom of the Missouri statute. We hold only that as here construed and applied it does not violate the Federal Constitution.

Affirmed.

[¶ 62,392] Atlas Imperial Diesel Engine Co. v. Lanova Corporation.

In the United States District Court for the District of Delaware. Civil Action No. 980. August 24, 1948.

Sherman Antitrust Act

Licensing Agreement Not Prohibitory—Motion for Declaratory Judgment—Motion to Dismiss Granted.—In an action against its licensor, an engine manufacturer alleged that its licensing agreement, which limits its production to certain types of engines of given specifications, is contrary to the antitrust laws. The Court granted the defendant's motion to dismiss when it held that the license agreement between the parties was not invalid as being in restraint of trade or competition.

See the Sherman Act annotations, Vol. 1, ¶ 1270.101.

For plaintiff: C. S. Layton (of Richards, Layton & Finger), of Wilmington, Delaware.

For defendant: Hugh M. Morris and S. Samuel Arsht (of Morris, Steel, Nichols & Arsht), of Wilmington, Delaware, Denis B. Sullivan, of New York, New York, and Arthur H. Boettcher, of Chicago, Illinois.

[*Nature of Claim*]

LEAHY, District Judge: This is an action in which the plaintiff, a Diesel engine manufacturer, seeks a judgment declaring a certain license agreement with defendant invalid; declaring that no claim of any of the 39 patents under license is infringed by plaintiff's engines of a design upon which plaintiff has paid royalties to defendant under the license agreement; and further declaring that each of the 39 license patents is invalid. In addition, plaintiff seeks a judgment requiring defendant to refund all monies paid to plaintiff as royalties plus interest from date of payment. Plaintiff also prays for an injunction enjoining defendant from charging plaintiff or its customers with infringement of the license patents or from bringing suit against them under the patents.

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no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection."

A concurring opinion in *Thomas v. Collins,* at 543-544, stated this: "But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses."

Plaintiff and defendant are both Delaware corporations and jurisdiction is asserted under the patent laws "concerning the validity of Letters Patent of the United States and the question of their infringement by the plaintiff." It is also alleged that jurisdiction is conferred by the Declaratory Judgment Act.

Plaintiff claims that the license agreement is invalid because it "prohibits" plaintiff from manufacturing high speed types of Diesel engines having a piston displacement of more than 1,000 cubic inches, or aeroplane and passenger car engines and that such prohibition is in violation of the antitrust laws. The part of the license contract which Atlas calims supports this provision provides:

> "* * * said license being limited to stationary, marine, industrial and automotive engines with a piston displacement of not more than 1,000 cubic inches, aeroplane and passenger car engines excepted."

To this complaint defendant filed a consolidated motion. The components of such motion are that the complaint should be dismissed for failure to state a claim upon which relief can be granted or for lack of jurisdiction over the subject matter; or summary judgment should be entered in favor of defendant and that if the complaint be not dismissed, to strike specified parts of it; for a more definite statement or bill of particulars and for an order of inspection of documents and engines made by plaintiff.

[*Defense*]

More specifically, defendant argues that the complaint is based on the assumption that the license agreement "prohibits" and since it does not prohibit, there is no cause of action stated. The defendant also urges that this suit, being one to set aside or cancel a license, is not a suit under the patent laws and hence the court is without jurisdiction since there is no diversity of citizenship. In support of its motion to dismiss, defendant filed an affidavit of its President. The affidavit states defendant has not at any time charged plaintiff with infringement of any claim of any of the 39 patents and it has no knowledge that plaintiff has ever manufactured or sold Diesel engines of any type or design other than those covered by the license agreement. The averments of the affidavit have not been refuted or counteracted.

To the claim of plaintiff for declaratory judgment as to whether engines of high speed type larger than 1,000 cubic inches displacement or for aeroplane or passenger automotive uses would infringe any claim of the license patents, defendant asserts that there is no allegation in the complaint that plaintiff has made or sold such an engine or that it intends presently to make or sell such engines and the allegation that it "is desirous" of making and selling such engines is insufficient to raise a controversy within the meaning of the Declaratory Judgment Act.

To the allegation that such license patents were procured by fraud because the patentee knowingly claimed more than that of which he was the original inventor, defendant urges that plaintiff is not free to attack the patents within the scope of the license and no facts are alleged showing a controversy outside the scope of a license.

It should be pointed out that two weeks prior to this action defendant brought an action in the Superior Court of New Castle County, Delaware, against plaintiff, to recover unpaid royalties due by plaintiff to defendant under the license agreement. In the State action special pleas to the declaration were demurred to. In sustaining the demurrers, Judge Carey held that the license agreement did not "prohibit" and that the contract did not restrain trade or competition. See *Lanova Corp. v. Atlas Imperial Diesel Engine Co.,* Del., 55 A. 2d 272. No final judgment has been entered in the State action.

[*Motion to Dismiss Granted*]

Since I have concluded that the motion to dismiss should be granted, it is not necessary to consider the other problems raised by the consolidated motion.

The matter is now here at the pleading stage and I am not unmindful of the admonition of Judge Biggs in *Federal Telephone and Radio v. Associated Telephone and Telegraph,* 3 Cir., — F. 2d —, that when a case is at the pleading stage "the allegations of the complaint must be tested on a broad basis". I think, however, that even thus tested a motion to dismiss must be granted here. There is nothing to show that the license is invalid and plaintiff, as licensee, can not attack the license patents within the scope of the license. Since no final judgment has been entered in *Lanova Corp.*

v. Atlas Imperial Diesel Engine Co., supra, at this time there can be no application of the doctrine of *res judicata.* Nevertheless, the Delaware Court held that the license agreement between the parties here did not "prohibit" and that it was not invalid as being in restraint of trade or competition. I take the same view of the license agreement and I think the matter is reenforced by the circumstance that Atlas did not seek to amplify their allegations in the instant case after the Delaware Court rendered its decision. Accordingly, I assume that nothing more can be alleged. Therefore, I think that the license agreement is valid and that it does not violate the anti-trust laws.

[*Licensee Estopped from Attacking License Patents*]

The case of *Sola Electric Co. v. Jefferson Co.,* 317 U. S. 173, relied on by plaintiff, is not in point here. In that case the license contained a provision forbidden by the anti-trust laws if not justified by a valid patent, whereas in this case the license contains no such provision. I do not understand that the *Sola* and other recent cases have demolished the rule that a licensee is estopped from attacking the license patents within the license area. The paragraphs which allege that the patents are invalid are, therefore, irrelevant.

[*Lack of Jurisdiction*]

Moreover, although perhaps not strictly necessary to the decision of the case, this court has no jurisdiction of the subject matter. There is no diversity of citizenship. I do not think this case is one properly brought under the patent laws. Therefore jurisdiction is lacking because obviously the provisions of the Declaratory Judgment Act create no substantive rights and do not enlarge the jurisdiction of the district courts of the United States. *Chicago Pneumatic Tool Co. v. Zeigler,* 3 Cir., 151 F. 2d 784. A suit involving a license agreement is not necessarily a suit under the patent laws even if a patent or claims have to be construed in such a suit. *MacGregor v. Westinghouse Electric & Mfg. Co.,* 45 F. Supp. 236, aff'd, 3 Cir., 130 F. 2d 870;[1] *Pratt v. Paris Gas Light & Coke Co.,* 168 U. S. 255, 260. The Courts of the State are the proper forums to decide the questions relating to the validity of a patent license even though subsidiary questions as to the scope and validity of the license patents are involved. And the presence of such subsidiary questions does not convert the controversy into one arising under the patent laws.

[*No Justiciable Controversy*]

In the field not covered by the license, plaintiff bases its claim to relief upon the allegation that it "is desirous of manufacturing and selling in interstate commerce its said high speed type engines of a size larger than one thousand cubic inch displacement and for aeroplane and passenger automotive use of a design which defendant has and now is contending comes within the scope of its said patent monopoly." It is obvious that the allegation does not establish a justiciable controversy. *Cf. dictum* in *Dewey & Almy Chemical Co. v. American Anode,* 3 Cir., 137 F. 2d 68, 70. The existence of "desire" does not establish an "immediate intent" to engage in the enterprise. Further, plaintiff does not charge that defendant has given notice to it or any of its customers of an intent to charge it or them with infringement of any claim of any of defendant's license patents. The unrefuted affidavit of the President of defendant denies such notice. The affidavit further avers that defendant has no information with respect to any act of Atlas upon which defendant could base any such claim of infringement against plaintiff or any of its customers. Accordingly, in the field outside the license there is obviously no actual controversy between the parties.[2]

I am accordingly of the opinion that the complaint should be dismissed.

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[1] Nothing that was said in *MacGregor v. Westinghouse Electric & Mfg. Co.,* 329 U. S. 402, adversely affects this Circuit's view.

[2] The case is easily distinguishable from *Federal Telephone and Radio v. Associated Telephone and Telegraph,* 3 Cir., — F. 2d —, where there were advertisements which could be construed as threatening plaintiff or its customers with infringement suits.

[¶ 62,393] **Warren O. Englebrecht, doing business as Warren's Grocery v. Ernest Day, Mrs. Ernest Day and John Doe Day.**

In the Supreme Court of the State of Oklahoma. No. 33869. July 5, 1949. (An opinion of March 29, 1949, was withdrawn, and this substitute opinion adopted.)

Oklahoma Unfair Sales Act

Advertising Below Cost—Repugnant Clauses—Act Unconstitutional.—A retail grocer successfully defended an action brought against him by another grocer who sought an injunction to restrain his advertising merchandise below cost, by attacking the constitutionality of the Oklahoma Unfair Sales Act, under which the action was brought. The Court holds that by declaring that intent to injure is not an essential ingredient of the offense of selling below cost, the Legislature has violated the due process clause of the state and federal constitutions, and the Act is therefore unconstitutional and void. The Court finds that there is nothing to displace the presumption that the Legislature would have adopted the Act with the words "or effect" omitted, and that after severing the repugnant clause, the Act is not enforceable as law. At common law the individual has the right to dispose of his property at such price as he and his purchaser may agree upon. Any act of the legislature which restricts that right is in derogation of the common law and must be strictly construed.

See the Oklahoma Unfair Sales Act, Vol. 2, ¶ 8688.

For plaintiff: R. M. Mountcastle, Muskogee, Oklahoma, George Miskovsky, Oklahoma City, Oklahoma.

For defendants: Kelly Brown, Muskogee, Oklahoma.

Amicus Curiae: Hal F. Rambo, Tulsa, Oklahoma.

Syllabus

1. An act of the Legislature which makes it a crime, or declares it to be contrary to public policy so as to call for injunctive relief for a retail or wholesale merchant to advertise, offer to sell or sell any item of merchandise at less than cost thereof to the seller, with intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition or injure public welfare, is unconstitutional and void as violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and violative of the due process clause, Section 7, Article II of the Constitution of the State of Oklahoma.

2. The unconstitutionality of a portion of an act of the Legislature does not defeat or affect the validity of the remaining provisions unless it is evident that the Legislature would not have enacted the valid provisions with the invalid provisions removed, if with the invalid provisions removed the rest of the act is plain and fully operative as law.

3. The effect of a provision in an act of the Legislature that the invalidity of any sentence, clause or provision in the act shall not affect the remaining portions, is to create a presumption that, omitting the unconstitutional portions, the remaining portions would have been enacted by the Legislature.

4. Where an act in contravention of public policy of the State as declared by one section of an act is made a crime by another section of the same act, the striking out of any material part of the section which declares the public policy, works a change of that policy so as to defeat the basis for declaring the act a crime and renders the act unconstitutional.

5. That part of subdivision (e), 15 O. S. 1941 § 592, which reads:

> ". . . and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this State shall not be used in determining the cost to the retailer and cost to the wholesaler."

is invalid and unconstitutional as too indefinite and uncertain to establish or prescribe a rule of conduct.

[*Review of Facts, Allegations and Arguments*]

O'NEAL, J.: This is a proceeding in equity by Warren O. Englebrecht, doing business as Warren's Grocery, hereinafter referred to as plaintiff, against Ernest Day and others, hereinafter referred to as defendants, for an injunction restraining alleged violation by defendants of the Oklahoma "Unfair Sales Act", 15 O. S. 1941 §§ 591-597, inc.

Plaintiff is engaged in the retail grocery business in Muskogee, Oklahoma. Defendants Ernest Day and Mrs. Ernest Day are husband and wife and are also engaged in the retail grocery business in Muskogee, Oklahoma. Defendant "John Doe" Day is a brother of defendant Ernest Day and was acting as manager of the retail grocery store owned and operated by defendants Ernest Day and Mrs. Ernest Day.

Plaintiff filed his petition in the District Court of Muskogee County April 7, 1948, and therein alleges that defendants did on April 5, 1948, advertise for sale, offer for sale and sell at retail certain articles of merchandise (nine in number) separately named, at less than cost to the retailer as defined in said Act. Plaintiff further alleges that defendants had stated that they would continue to advertise for sale, offer for sale and sell at retail the foregoing items of merchandise and other items in their store in violation of the terms, restrictions and provisions of said Act. He further alleges that the items referred to were advertised for sale, offered for sale and sold at prices which cannot be justified by prevailing market conditions within the State of Oklahoma, and that said items of merchandise were advertised for sale, offered for sale and sold to the general public as "bait" with the intent or effect of inducing the purchase of other merchandise; that defendants specifically intended to violate said Act in resorting to what is commonly known as "bait" or "loss leader" merchandise with the hope of deceiving the public by luring them with this "bait" or "loss leader" merchandise into their store, hoping thereby that unsuspecting customers thus lured into the store would purchase other merchandise at unreasonably high mark-up, and that said advertising for sale, offering for sale and selling were made with the intent or effect of inducing the purchase of other merchandise and with the intent of unfairly diverting trade or otherwise injuring the plaintiff who is a competitor, and with the intent or effect to impair and prevent fair competition and injure public welfare and with the intent to substantially lessen competition and unreasonably restrain trade.

A temporary restraining order and later a temporary injunction were issued.

Defendants filed a general and special demurrer to the petition. The special demurrer attacked the constitutionality of the Unfair Sales Act as a violation of the Federal and State Constitutions. The demurrer came on to be heard and, pending the hearing on the demurrer, plaintiff asked and was granted leave to amend his petition by striking out the words "or effect" wherever they were used in the petition in connection with or following the words "with the intent", so as to make the petition charge that the alleged advertising for sale, offering for sale and selling said items of merchandise were with the intent of inducing the purchase of other merchandise and with the intent to impair and prevent fair competition and injure public welfare.

After the petition was so amended, defendants refiled their demurrer thereto. After further hearing the court sustained the demurrer on the ground that the Act, (15 O. S. 1941 §§ 591-597, inc.) under which the cause was instituted and prosecuted, is unconstitutional and void for the reason that section 593 contains language rendering the same unconstitutional by setting out the clause "or effect" after the clause "with the intent". Plaintiff excepted and elected to stand upon the petition as amended, whereupon the cause was dismissed and plaintiff appeals.

Four assignments of error are presented under two propositions. The first is that the Oklahoma Unfair Sales Act, 15 O. S. 1941 §§ 591-597, inc., is constitutional.

Plaintiff, conceding that although the general policy of an Act of the nature of the one herein involved is for the Legislature to pass upon and not a proper subject for consideration by this court, goes quite at length into the question of the desirability of such legislation and its beneficial effects and evils of the practice of selling merchandise at less than cost to the seller and "loss leader" practices. In this connection plaintiff quotes from an article by the late Justice Brandeis, published in 1913, entitled "Cut-Throat Prices, the Competition That Kills."

In reply thereto defendants go somewhat at length into the alleged history and general purpose of such legislation and assert in substance that such legislation, now adopted in some 32 states, and its enforcement, has in a general way been promoted by groups such as Retail Merchants Associations for their protection and that such legislation generally tends to prevent competition and protect merchants already in business and especially members of such associations against newcomers who enter the field as their competitors. Defendants further assert that such legislation has all the earmarks of monopoly or intended monopoly. In reply to the argument of plaintiff, including the quotation from the article by Justice Brandeis, defendants quote from the Yale Law Journal, January, 1948 issue, to the effect that several years' experience under such statutes, reveal them as particularly undesirable and that while the courts have generally agreed that they were intended "to prevent monopoly" or "to prevent anarchy in commerce" the record has not shown their sanction to protect small sellers from large scale campaigns of under-selling, but to the contrary the laws have been used primarily by trade associations and larger units in order to prevent local price cutting and to enforce a disciplinary system of price leadership which these units desire to establish; and "Moreover, there is some evidence that the acts have been utilized as a means of raising prices."

[*Court Not Concerned with Public Policy of Statute*]

But in this case we are not concerned with the question of policy or the exigency of such acts generally. Some of the earlier acts in some of the states were held to be unconstitutional as restrictive of the right of the individual to sell his property at whatever price he could agree upon with his purchaser. Other acts were declared unconstitutional because the business regulated was not affected with the public interest, such as operating public utilities. But since the decision in *Nebbia v. New York,* 78 L. Ed. 940, 89 A. L. R. 1469, it is generally recognized that there is no closed class or category of business affected with the public interest and that the function of courts under the Fifth and Fourteenth Amendments to the Federal Constitution is to be determined in each case whether under the circumstances the regulation is a reasonable exertion of governmental regulations, or is arbitrary or discriminating and that the phrase "affected with the public interest" as used in decisions upholding public regulation of business affected with the public interest means only that an industry for adequate reasons is subject to control for the public good.

Nebbia v. New York, supra, holds:

> "So far as the due process requirement is concerned, a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing maximum prices.
>
> "The Constitution does not secure the liberty to conduct a business so as to injure the public at large or any substantial group."

Nebbia v. New York, supra, deals only with the statute which authorizes the State of New York to create a commission with power to fix a maximum and a minimum price for which milk can be sold to consumers in that state.

After the decision in *Nebbia v. New York, supra,* a number of states have enacted statutes generally intended to prevent the sale of merchandise by wholesalers or retailers at less than cost to the seller and declaring such practice to be contrary to public policy and unfair competition. It is now generally held that:

> ". . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal . . ." 89 A. L. R. 1483."

A number of the earlier statutes on the subject were declared unconstitutional, not because of the lack of authority or power of the Legislature to regulate such matters, but because of some specific provision or omission of the Act.

The Act here involved is Title 15, Chapter 14, Session Laws 1941, and contains seven sections exclusive of the emergency clause and is the same as 15 O. S. 1941 §§ 591-597, inc.

It is because of the provisions of section 3 of the Act (15 O. S. 1941 § 593) that the trial court held the Act unconstitutional. Said section provides:

> "It is hereby declared that any advertising, offer to sell, or sale of any mer-

chandise, either by retailers or wholesalers, at less than cost as defined in this Act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

Section 594 makes a violation of the Act by any retailer or wholesaler a misdemeanor punishable by fine not to exceed $500.00. Section 595 provides for injunctive relief in an action by any person who is damaged or who is threatened with loss or injury by reason of a violation of the Act. Section 595 exempts from the provisions of the Act some eight classes of sales, none of which is herein involved. The particular words or clause which the trial court held rendered the Act unconstitutional is an inclusion of the words "or effect" immediately after the words "with the intent" in section 3 of the Act, section 593, 15 O. S. 1941, so as to make sales by retailers or wholesalers at less than the cost to the seller as defined in the Act contrary to public policy, and a violation thereof a crime, and to constitute a tort subject to injunctive restraint, where such sales are made with the effect of inducing the purchase of other merchandise or unfairly diverting trade from a competitor or otherwise injuring a competitor, impair or prevent fair competition, injure the public welfare or with the effect of inducing the purchasing of other merchandise etc., although there be no such intent on the part of the seller. But in either event the result of such advertising for sale, offering to sell or selling must be to tend to deceive any purchaser or prospective purchaser or to substantially lessen competition or to unreasonably restrain trade or to create a monopoly in any line of trade.

In *Daniel Loughran Co., Inc., et al. v. Lord Baltimore Candy & Tobacco Co., Inc., et al.,* (Md.), 12 Atl. 2d 201, the constitutionality of an act of the Legislature of the State of Maryland containing in almost identical language all of the essential provisions in the Act here under consideration was in question.

Therein it is said:

"At common law the right of the individual to dispose of his property or his services at such price as he and the purchaser may agree upon is firmly established, and inasmuch as the Act now under consideration is in derogation of that common right, it must be strictly construed. . . ."

But under our law 12 O. S. A. § 2, and 25 O. S. A. § 29, statutes in derogation of the common law shall be liberally construed to promote their object.

The Act here under consideration, and particularly section 3 thereof (§ 593, 15 O. S. 1941) changes or modifies the common law rule or public policy as to the right of the individual to dispose of his property or service at such price as he and the purchaser may agree upon. As to sales by retailers and wholesalers, it establishes or declares a public policy contrary to and in derogation of the common law rights and therefore must be liberally construed.

The section of the Maryland Act declaring the public policy of that state contained the words "with the intent, effect, or result" etc. In the *Lord Baltimore Candy & Tobacco Company* case, *supra,* the Act was held unconstitutional, apparently upon the ground of uncertainty of a provision relating to the determination of cost identical to that appearing in subdivision (e), 15 O. S. 1941, § 592, which provides:

". . . purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this State shall not be used in determining the cost to the retailer and (or) cost to the wholesaler."

The Maryland Act was also held unconstitutional because of the inclusion of the words "effect, or result" after the words "with the intent,". Later the Maryland Act was amended by striking out the provisions with reference to market conditions in the state in connection with determination of cost and omitting the words "effect, or result" after the words "with the intent," in the section declaring the public policy of the state so as to limit sales condemned by the Act to sales, etc. made with the intent to unfairly divert trade, etc. .

Under liberal construction the uncertainty of the provision relating to the determination of cost, hereinafter discussed, still exists.

In *People v. Victor,* (Mich.), 283 N. W. 666, an Act which made it unlawful for any person in the State engaged in the manufacture, distribution or sale of bakery products or petroleum products with the intent to injure or destroy a competitor, to give, offer to give or advertise the intent to give away any commodity for the purpose of promoting the sale of any other product, was declared unconstitutional, but the question of "with intent or effect" was not there involved.

In *Great Atlantic & Pacific Tea Co. v. Ervin, Atty. Gen., et al.,* (Minn.) 23 Fed. Supp. 70, a Minnesota statute containing many provisions similar to the provisions of the Oklahoma statute was declared unconstitutional on six different grounds.

In *McElhone v. Geror,* (Minn.) 292 N. W. 414, the Supreme Court of Minnesota upholds a later Act of the Legislature amending the Act condemned in *Great Atlantic & Pacific Tea Co. v. Ervin, Atty. Gen., et al., supra.* The Act as amended prohibited sales at less than cost for the purpose or with the effect of injuring competitors and destroying competition. With respect thereto, the court in *McElhone v. Geror* said:

> "The present statute prohibits sales at less than cost for the purpose or with the effect of injuring competitors and destroying competition. Intent to injure is not essential to violation. This is not fatal to the Act. Sales below cost which have the effect of injuring competition may be prohibited regardless of intent."

In *State ex rel. English v. Ruback,* (Neb.), 281 N. W. 607, the Supreme Court of that state held invalid a statute which contained a section making it unlawful to sell or advertise for sale any article or product or service or output of a service at less than the cost thereof to the vendor, or to give, offer to give or advertise the intent to give away any article, product or service or output of a service trade where the effect of such sale etc. "may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors.", and the sale etc. condemned was made unlawful without either "intent" or "effect". With respect thereto the court said:

> ". . . Does the language of section 3 of the unfair practices act possess the requisite definiteness to properly define a legal offense? It contains no definition of criminal intent, or of evil or criminal purpose, or of guilty knowledge. It is to be remembered that innocence must always be presumed. Under the terms of such section 3, criminality must be determined and punishment inflicted wholly without reference to the intent, purpose or actual knowledge of the seller, solely because, as a result of what is done, such act 'may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors.' "

In said cause the Court quoted with approval from *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 10, 47 S. Ct. 506, 508, 71 L. Ed. 893, 52 A. L. R. 163, the following:

> " 'It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.' "

Said Act was condemned for the further reason that the provision "may lessen" etc. includes a mere possibility. It was held that this provision rendered that section of the Act indefinite, uncertain and void and insufficient to sustain a prosecution thereunder. In effect, the decision in that case is that intent is a vital element of any statute creating or defining a crime and that "effect" without intent is insufficient.

In *State v. Packard-Bamberger & Co., Inc.,* 123 N. J. L. 180, 8 Atl. 2d 291, the Supreme Court of New Jersey held that the Unfair Sales Act of that state was unconstitutional, but the question of "intent or effect" was not therein involved. The Act was held unconstitutional on other grounds.

In *Serrer v. Cigarette Service Co.,* (Ohio), 74 N. E. 2d 853, the Supreme Court of Ohio held the Unfair Sales Act of that state unconstitutional on various grounds, but not including the question of "intent or effect."

Plaintiff cites *Rust et al. v. Griggs,* (Tenn.), 113 S. W. 2d 733, and asserts that the court in that case sustained the Tennessee Act which contains almost identical language as that contained in section 3 of the Oklahoma Act, including the words "to lessen cost as defined in this Act with intent or effect of inducing the purchase of other merchandise" etc. Examination of that case will disclose that the Act there under consideration was assailed as unconstitutional on some seven or eight grounds, but the "with intent or effect" provision was not one of them. That provision was not assailed and was not discussed or passed upon. The only place it appears in the opinion is a quotation from the section which contains the words. It can hardly be said that the question was an issue or decided by that court.

Plaintiff also cites *People v. Pay Less Drug Store,* (Calif.), 153 P. 2d 9: *Associated Merchants of Montana v. Ormesher,* (Mont.), 86 P. 2d 1031; and *State v. Langley,* (Wyo.), 84 P. 2d 767. These cases go only to the question of policy of the Act and method of ascertainment of cost. The question of "intent or effect" was not in any of said cases.

[*Intent a Necessary Ingredient*]

From all of the cases cited it appears that wherever the statute contained the words "with intent or effect" or "with the intent, effect, or result" etc. and the constitutionality of the Act was challenged on that ground or on that ground with others, such Act is generally held to be unconstitutional. The apparent exception is *McElhone v. Geror, supra,* wherein the Supreme Court of Minnesota said:

> ". . . Intent to injure is not essential to violation. This is not fatal to the act. Sales below cost which have the effect of injuring competition may be prohibited regardless of intent."

We are unwilling to agree with the Supreme Court of Minnesota in that statement.

[*Inclusion of Words "or effect"*]

The trial court did not err in holding the Act, 15 O. S. 1941, § 591-597 inc. unconstitutional because section 593 contained language setting out the clause "or effect" after the clause "with intent". The reason is that said provision is violative of the "due process" clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and is also violative of the "due process" clause, section 7, Article II, of the Constitution of the State of Oklahoma.

Under the second proposition plaintiff contends that the court erred in sustaining the demurrer to the petition as amended by striking out the words "or effect" wherever they appear therein after or in connection with the words "with intent."

[*Severability Rule*]

It is asserted that under the separability section, section 7 of the Act, (15 O. S. 1941 § 597) the words "or effect" may be stricken or eliminated and the remaining part of the Act still be valid and fully operative and enforceable. The rule is:

> "The unconstitutionality of a portion of an act of the Legislature does not defeat or affect the validity of the remaining provisions unless it is evident that the Legislature would not have enacted the valid provisions with the invalid provisions removed if with the invalid provisions removed the rest of the act is fully operative as a law." *Sterling Refining Co. v. Walker,* 165 Okl. 45, 25 P. 2d 312.

In *Sterling Refining Co. v. Walker, supra,* this court also held:

> "The effect of a provision in an act to the effect that the invalidity of any part or portion thereof shall not affect the remaining portions is to create a presumption that, omitting unconstitutional portions, the remaining portions would have been enacted by the Legislature."

[*Intention of Legislature*]

Under these rules, if it is not evident that the Legislature would not have adopted the Act omitting the objectional words "or effect", and the Act omitting said words is plain and enforceable, then the Act must be sustained as though said words were not included. The separability section creates the presumption that the Legislature would have adopted the Act with the words "or effect" omitted. We find nothing in the record to overcome that presumption. Therefore, we hold that it is not evident that the Legislature would not have enacted the Act in question had the words "or effect" been omitted therefrom wherever they followed or appeared in connection with the words "with the intent."

[*Statute Not Enforceable*]

The question arises, would the Act as written except with the words "or effect" omitted wherever they appear after or in connection with the words "with the intent" be enforceable and fully operative as law? We think not.

[*Review of Sections*]

As noted before, section 3 of the Act, section 593, 15 O. S. 1941, goes only to the declaration of a public policy of the State of Oklahoma differing from the public policy at common law. Section 4 of the Act, section 394, 15 O. S. 1941, and section 5 of the Act, section 595, 15 O. S. 1941, provide for the enforcement of the Act. Section 594 makes it a misdemeanor for any retailer or wholesaler in contravention of the public policy as declared in the Act to advertise, offer for sale or sell any item of merchandise at less

than the cost thereof to the retailer or wholesaler as the case may be as defined in the Act. Section 595 provides the remedy of injunction to prevent and restrain a violation of the Act. It is not made an offense to advertise, offer for sale or sell any item of merchandise at less than cost to the seller alone. It must be "in contravention of the policy of this Act." That means the policy of the Act as declared in section 593 as written and enacted by the Legislature. To change the public policy by changing section 593 by omitting the words "or effect" would be to declare a public policy different from that declared by section 593, and, therefore, what would be left would not be the public policy necessary to base a criminal prosecution on, and would not be fully operative and enforceable as a law.

[*Ruling on Section for Guidance of the Legislature*]

It is not urged by defendants that subdivision (e), 15 O. S. 1941 § 592 is unconstitutional. But defendants' demurrer searches the entire record and in view of the fact that the Legislature may desire to amend and re-adopt the Act, we deem it advisable to consider said subdivision (e). That part of said subdivision which provides:

> ". . . And purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this State shall not be used in determining the cost to the wholesaler."

has been held unconstitutional where challenged, especially in *Daniel Loughran Co. Inc. et al. v. Lord Baltimore Candy & Tobacco Co. Inc. et al., supra.*

[*Trial Court Decree Affirmed*]

We think the reasons given in that case for holding said provisions unconstitutional are sound. Therefore, in addition to affirming the decree of the trial court, we hold that part of subdivision of 15 O. S. 1941 § 592, quoted above, unconstitutional and void.

Affirmed.

Concur: Davison, C. J., and Welch, Corn, and Luttrell, JJ.

Dissent: Arnold, V. C. J., and Gibson, Halley, and Johnson, JJ.

[¶ 62,394] United States v. Phillips Screw Company, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil No. 47C147. March 28, 1949.

Sherman Antitrust Act

Consent Judgment—Patents for Cross-Recessed Screws—Monopoly Practices Enjoined.—A consent judgment entered in an action charging screw and screw driver manufacturing companies and a patent holding company with conspiring to restrain interstate trade enjoins the defendants from making or performing any contract which fixes prices, allocates customers or markets, limits imports or exports, limits production, or restricts sales. The defendants agree to refrain from methods unilaterally dictating the price of cross-recessed head screws or drivers, and from quoting domestic prices on any other basis than F.O.B. at the actual place of manufacture. License agreements relating to patents are terminated and defendants are ordered to grant non-exclusive licenses to manufacture cross-recessed head screws and drivers on a reasonable royalty basis.

See the Sherman Act annotations, Vol. 1, ¶ 1530, 1530.50, 1590.

For plaintiff: Otto Kerner, Jr., Willis L. Hotchkiss, Jr.

For defendants: T. A. Reynolds, Winston, Strawn & Shaw; John Lord O'Brien; Beverly B. Vedder & Ferris E. Hurd; Pope & Ballard; Cranston Spray; Special Appearance Wm. A. McAffee, Cleveland, Ohio; George J. O'Grady, Daily, Dines, White and Fiedler; Gardner, Carton & Douglas; Moore, Olson & Trexler; Snyder, Chadwill & Fagerburg; Lord, Bissel & Kaydk.

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on January 16, 1947; all the defendants herein (except Scovill Manufacturing Company) having appeared and filed their respective answers

to such complaint denying the substantive allegations thereof; and all the parties herein, by their respective attorneys herein, having severally consented to the entry of this final judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue,

Now, THEREFORE, without any testimony or evidence having been taken herein, and without trial or adjudication of any issue of fact or law herein, and on consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter herein and of all parties hereto, and the complaint herein states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended.

II.

[*Definitions*]

The following terms shall, as used in this judgment, have the following meanings.

A. The term "Phillips" means the defendant Phillips Screw Company.

B. The term "American" means the defendant American Screw Company.

C. The term "Cross-recessed Head Screws" means screws and bolts having a cross-shaped recess in the center of the screw or bolt heads. The term includes blanks which have the same type of recess punched into the heads thereof as the completed products but which are not threaded or otherwise completed.

D. The term "Cross-recessed Head Drivers" means driving tools the tips of which are shaped to fit the recesses in the heads of Cross-recessed Head Screws. The term includes such tools either in the form of hand drivers, in the form of detachable bits for use in power drivers, or in the form of blades or bars the tips of which are shaped to fit the recesses in Cross-recessed Head Screws but which have not otherwise been finished into hand drivers or detachable bits.

E. The term "Defined Patents" means United States letters patent and patent applications, as follows: (1) the letters patent and patent applications listed in Appendix A hereof; (2) all divisions, continuations, reissues and extensions of any of the foregoing patents and patent applications; (3) all patents issued on such applications; and (4) all patents relating to Cross-recessed Head Screws or Drivers acquired or applied for by Phillips or American within five years from the date of this judgment.

F. The term "Technical Information" means the methods and processes used by American at the date of this judgment in its commercial practice under the Defined Patents.

G. Reference herein to any defendant shall be deemed to include such defendant, its successors, subsidiaries, assigns, officers, directors, agents, members, employees, and each person acting or claiming to act under, through or for such defendant.

III.

[*Acts Enjoined*]

A. Each defendant is hereby enjoined and restrained from directly or indirectly entering into, adhering to or maintaining any contract, combination, agreement, undertaking or arrangement among themselves or with any other manufacturer of Cross-recessed Head Screws or Drivers relating to Cross-recessed Head Screws or Drivers:

(1) to fix, establish, determine or maintain prices or other terms or conditions of sale with respect either to initial sales or with respect to resales;

(2) to allocate customers, markets, sales quotas or territories;

(3) to limit or prevent imports into or exports from the United States, its territories or possessions;

(4) to limit production through quotas or otherwise;

(5) to restrict sales; or

(6) to refrain from manufacturing any type of Cross-recessed Head Screw or Driver.

B. Each defendant is hereby enjoined and restrained for a period of three years from the date of this judgment from:

(1) publishing any price list specifying, or otherwise systematically suggesting, resale prices on Cross-recessed Head Screws or Drivers; and

(2) by any other means or methods unilaterally dictating, regulating or attempting to dictate or regulate the price or terms or conditions of sale at which any person other than itself sells Cross-recessed Head Screws or Drivers.

C. Each defendant is hereby enjoined and restrained from publishing, printing, quoting or charging domestic prices for Cross-recessed Head Screws or Drivers on any basis other than (1) F.O.B. at the actual place of manufacture or origin of shipment of said products or (2) on a basis, which at destination at no time shall be higher than the said F.O.B. price plus actual transportation and other delivery charges, with every purchaser having an option to purchase F.O.B. at the actual place of manufacture or origin of the product.

IV.

[*Cancellation of License Agreement*]

A. Each of the license agreements between American and any of the defendants relating to any of the Defined Patents is hereby cancelled and terminated, provided, however, that any rights to monetary payments which shall have accrued thereunder at the date of the entry of this judgment shall be unimpaired by anything in this judgment.

B. Phillips and American are hereby severally enjoined and restrained from performing, enforcing or threatening to enforce any provisions of any license agreement under any of the Defined Patents with any person not a defendant herein (1) prohibiting export or sale for export, (2) relating to selling prices or other terms or conditions of sale, (3) preventing or impeding the manufacture, use or sale of screws or drivers other than those manufactured pursuant to said agreements, or (4) inconsistent with the provisions of Section A of Article III of this judgment.

C. Phillips and American are hereby severally ordered and directed to send, within thirty days after the entry of this judgment, to each person who is not a defendant herein and who is licensed under any Defined Patent or under any foreign patent corresponding thereto, a copy of this judgment.

D. Phillips and American are hereby severally ordered and directed to use reasonable efforts to cause to be cancelled all existing license agreements under any of the Defined Patents between either of them and any person who is not a defendant herein and to join in the cancellation of any such agreement with any such person desiring same.

V.

A. The license agreements referred to in the complaint herein between Phillips and/or American and Guest, Keen and Nettlefolds, Ltd., and between Phillips and/or American and The Steel Company of Canada, Ltd., are hereby cancelled and terminated. Phillips and American are hereby severally enjoined and restrained from adhering to, performing, reviving or renewing said agreements.

B. Phillips and American are hereby severally ordered and directed forthwith to initiate and carry on in good faith and with diligence negotiations to accomplish, and in fact to accomplish within one year from the date of the entry of this judgment, the cancellation and termination of the license agreements referred to in the complaint herein between Phillips and/or American and J. Osawa & Co.

C. In any event, Phillips and American are hereby severally enjoined and restrained from claiming or asserting that any license or right received by Phillips or American under any of the agreements referred to in this Article V is exclusive, and from performing, enforcing or attempting to enforce any provisions of any of said agreements which (1) prohibits export or sale for export or (2) relates to selling prices or other terms or conditions of sale.

D. Phillips and American are hereby severally enjoined and restrained from enforcing or attempting or threatening to enforce:

(1) any rights under any foreign patent corresponding to any Defined Patent to prevent the sale or use in or import into another country of Cross-recessed Head Screws or Drivers lawfully made in the United States, its territories or possessions; and

(2) any rights under any Defined Patent to prevent the sale or use in or import into the United States, its territories or possessions of Cross-recessed Head Screws or Drivers lawfully made in another country under any foreign patent corresponding to such Defined Patent.

VI.

[*Suit for Patent Infringement Enjoined*]

Phillips and American are each hereby enjoined and restrained from instituting or threatening to institute, maintaining or continuing any suit or proceeding for acts of infringement of any of their respective patents or patent rights relating to Cross-recessed Head Screws or Drivers alleged to have occurred prior to the date of this judgment.

VII.

[*Granting of Non-Exclusive Licenses Ordered*]

A. Phillips and American, depending on which has the right to grant licenses thereunder, are hereby severally ordered and directed to grant to any applicant therefor, a non-exclusive license to manufacture, use and sell Cross-recessed Head Screws and Drivers under any, some or all of the Defined Patents, without any limitation or condition whatsoever, except that:

(1) a reasonable charge, in the form of a royalty or otherwise, and non-discriminatory as between such applicants, may be made in respect of any patents so licensed;

(2) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of money due and payable thereunder;

(3) the license may be non-transferable; and

(4) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof on sixty days' notice in writing to the licensor.

B. At the request of any applicant for a license under the provisions of paragraph A of this Article VII, the licensor shall include a non-exclusive grant of immunity from suit under every foreign patent, to the extent the licensor has or acquires the power to do so, corresponding to every United States patent included in the license, for any product manufactured, used or sold pursuant to the license.

C. American is hereby ordered and directed on request to supply, without charge, Technical Information to every licensee under this Article VII who shall manufacture under such license.

D. On receipt of a written request for a license or licenses under the provisions of paragraph A of this Article VII, Phillips or American, as the case may be, shall advise the applicant in writing of the royalty or other charge which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree on a reasonable royalty or charge within sixty days from the date such request is received, the applicant therefor may forthwith apply to this Court for determination of a reasonable royalty or charge, and Phillips or American, as the case may be, shall, on receipt of notice of the filing of such application, promptly give notice thereof to the Assistant Attorney General in charge of the Antitrust Division. Any license granted as a result of an application to the Court, as above provided, shall be retroactive to the date of such application or, at the applicant's option, provided that the applicant is a defendant herein, retroactive for any prior unlicensed period. The reasonable royalty rates or charges, if any, as once finally determined by the Court with respect to any Defined Patents shall apply to all licenses of the same patents thereafter granted, and any licensee who, at the date of such determination by the Court holds a license under the same patents, shall have the right, at its option, to have such royalty rates or charges applied retroactively, with respect to its operations, to the date of the application to the Court which resulted in such determination.

E. In any such proceeding under paragraph D of this Article VII, the burden of proof shall be on Phillips or American, as the case may be, to establish the reasonableness of the royalty or other charge requested by it. Nothing in this judgment shall be construed as importing any validity or value to any of the Defined Patents.

F. Nothing in this Article VII shall be deemed to prevent Phillips and American from executing or carrying out an agreement by which either will be permitted to license the patents of both Phillips and American to any applicant who desires to acquire rights under patents belonging to both parties.

G. Phillips and American are each hereby enjoined and restrained from making any disposition of any of the Defined Patents or rights with respect thereto which deprives it of the power or authority to grant licenses as hereinabove in this Article VII provided, unless it requires, as a condition of such disposition, that the purchaser, transferee, assignee or licensee, as the case may be, shall observe the requirements of Articles VII and VIII hereof and such purchaser, transferee, assignee or licensee shall file with this Court, prior to the consummation of the transaction, an undertaking to be bound by said provisions of this judgment.

H. Phillips and American are hereby severally ordered and directed to send to

each applicant for a license under Article VII hereof a copy of this judgment promptly after the application is made.

VIII.

[*Purposes of Compliance*]

A. For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, be permitted

(1) access, during the office hours of any such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents there located relating to any of the matters contained in this judgment; and

(2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, each defendant shall submit such reports in writing with respect to the matters contained in this judgment as may from time to time be necessary to the enforcement of this judgment.

B. Each of the defendants is hereby severally ordered and directed to file with this Court and with the Assistant Attorney General in charge of the Antitrust Division, within ninety days after the date of the entry of this judgment, a report of all action taken by it to comply with or conform to the terms of this judgment.

C. The information obtained by the means permitted by this Article VIII shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

IX.

Jurisdiction of this cause is retained for the purpose of enabling the parties to this judgment to appeal to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

APPENDIX A

United States of America Patents and Applications of Phillips Screw Company

Patent Number	Date of Issue
1,908,080	May 9, 1933
1,908,081	May 9, 1933
2,046,343	July 7, 1936
2,046,837	July 7, 1936
2,046,838	July 7, 1936
2,046,839	July 7, 1936
2,046,840	July 7, 1936
2,066,484	January 5, 1937
Des. 104,473	May 11, 1937
2,402,342	June 18, 1946

Application Number	Date of Filing
688,649	August 6, 1946
688,650	August 6, 1946
688,651	August 6, 1946
688,652	August 6, 1946

United States of America Patents and Applications of American Screw Company

Patent Number	Date of Issue
2,022,573	November 26, 1935
2,029,944	February 4, 1936
2,066,372	January 5, 1937
2,082,085	June 1, 1937
2,084,078	June 15, 1937
2,084,079	June 15, 1937
2,090,338	August 17, 1937
2,165,424	July 11, 1939
2,165,425	July 11, 1939
2,322,262	June 22, 1943
2,359,898	October 10, 1944
2,400,684	May 21, 1946

Application Number	Date of Filing
470,671	December 30, 1942
694,715	September 4, 1946
782,875	October 29, 1947

[¶ 62,395] **Transamerica Corporation v. Thomas Bayard McCabe, Marriner S. Eccles, M. S. Szymczak, Ernest G. Draper, Rudolph M. Evans, James Kimble Vardaman, Jr., and Lawrence Clayton.**

In the United States District Court for the District of Columbia. Civil Action No. 4175-48. November 3, 1948.

Clayton Act

Failure to Show Irreparable Damage—No Relief Until Administrative Remedy Exhausted.—The Court denied relief to a plaintiff seeking a declaratory judgment and injunctive relief against members of the Board of Governors of the Federal Reserve System with respect to a proceeding instituted by the Board under the provision of Section 11 of the Clayton Act, in which the plaintiff is charged with violation of Section 7 of that Act. The plaintiff claimed that the complaint in the administrative proceedings failed to charge a violation of law with sufficient particularity to enable a defense and that a more particular statement had been denied. He argued that the statutory judicial review provided was not adequate and that he would suffer irreparable injury if resort to judicial remedy was delayed until after the administrative proceeding. The Court found that his complaint did not show such irreparable injury as would justify an exception to the well recognized rule that relief by judicial action may not be had until an administrative remedy has been exhausted, and where there is full and adequate statutory review of administrative action, recourse to the District Court for equitable relief to prevent such administrative action can not be had.

See the Clayton Act annotations, Vol. 1, ¶ 2031.

For plaintiff: Fulton, Walter & Halley, Washington, D. C.; Samuel B. Stewart, Jr., Hugo A. Steinmeyer, San Francisco, Calif.

For defendants: J. L. Townsend, G. H. Chase, Washington, D. C.

Memorandum

MORRIS, J.: This is an action in which the plaintiff seeks a declaratory judgment and injunctive relief against the defendant members of the Board of Governors of the Federal Reserve System with respect to a proceeding instituted by the Board under the provision of Section 11 of the Clayton Act, 15 U. S. C., Section 21,[1] in which the plaintiff is charged with violation of Sec-

[1] Sec. 11, Clayton Act, U. S. C., Sec. 21, Title 15.

Authority to enforce compliance with sections * * * 18 * * * of this title by the persons respectively subject thereto is hereby vested: * * * in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; * * *

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 18 * * * of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

* * *

tion 7 of the Clayton Act, 15 U. S. C., Section 18.[2] The complaint in the instant action asserts that the complaint in the administrative proceedings fails to charge a violation of law with sufficient particularity to enable the plaintiff, respondent therein, to make proper answer and defense thereto; that the plaintiff has sought a more particular statement with respect to the alleged violation, which has been denied by the Board; and that the complaint in the administrative proceedings does not set forth "the legal authority and jurisdiction under which the hearing is to be held." The plaintiff insists that in this situation the declaratory judgment and injunctive relief sought should be granted to prevent irreparable injury, and that such relief should be granted on the further ground that the complaint in the administrative proceedings is insufficient to meet the requirements of the Administrative Procedure Act, approved June 11, 1946, 5 U. S. C., Section 1001, *et seq.*

Upon motion a rule was issued to the defendants to show cause why a temporary restraining order and preliminary injunction should not be granted. Before the return of this rule, the defendants filed a motion to dismiss the complaint upon the ground that this Court is without jurisdiction to interfere at an interlocutory stage in the administrative hearing authorized by the Clayton Act. A hearing was had upon the rule to show cause and the motion to dismiss on October 20, 1948. By leave of Court brief and supplementary brief were filed by the plaintiff.

At the threshold it must be pointed out that the statute which authorizes the administrative proceeding here in question specifically provides for complete judicial review of any order directing the plaintiff to cease and desist from any violation of the Act, or to divest itself of any stock held in violation thereof.[3] It is well established that ordinarily relief by judicial action may not be had until an administrative remedy has been exhausted, and certainly where there is full and adequate statutory review of administrative action, recourse to the District Court for equitable relief to prevent such administrative action cannot be had. *Myers v. Bethlehem Shipbuilding Corp.*, 303

[2] Sec. 7, Clayton Act, U. S. C., Sec. 18, Title 15.

No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying-on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

* * *

[3] Sec. 11, Clayton Act, U. S. C., Sec. 21, Title 15.

* * *

If such person fails or neglects to obey such order of the Commission or board while the same is in effect, the Commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree, affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts,

U. S. 41, *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, and *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U. S. 802. It is here insisted by the plaintiff that the statutory judicial review is not adequate, and that the plaintiff would suffer irreparable injury if resort to a judicial remedy is delayed until after the administrative proceedings. The complaint does not show such irreparable injury as would justify an exception to the well recognized rules just stated. Several cases are cited which sanction the exercise of equitable intervention in situations which are not here shown to exist. The Supreme Court stated in the case of *Myers v. Bethlehem Corporation, supra,* at page 51:

> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

Moreover, the Supreme Court has said, with particular respect to administrative proceedings where statutory judicial review is provided,

> "Whatever may be the scope allowed generally for equity to intervene upon the ground of inadequacy of legal remedies, where no explicit congressional command exists for following a prescribed procedure, the problem when such a mandate is present is entirely different from one tendered in its absence. The very fact that Congress has made the direction must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. *Aircraft & Diesel Corp. v. Hirsch, et al.*, 331 U. S. 752, at page 774."

It is urged that the lack of *subpoena* power in the Federal Reserve Board would work to the prejudice of the plaintiff in securing and offering evidence needed to meet the allegations of the complaint. Should the plaintiff, during the course of the administrative proceedings, be deprived of a fair and adequate hearing because of the lack of such *subpoena* power, I have not the slightest doubt that the Court of Appeals, either in proceedings to enforce the Board's order, or to review the same, would be competent to require the evidence which was lacking, or give relief to the plaintiff because of the failure to supply the same.[3]

The plaintiff insists that the Administrative Procedure Act qualifies the rules stated in the authorities here cited, as to which said Act was not operative. In so far as it affects the application of the rules to the situation here involved, I am in no doubt that the Administrative Procedure Act left judicial review, when statutory judicial review is provided, where it found it. Unquestionably this Act imposed certain procedures upon administrative action, and equally without question the Act requires a reversal of administrative action where its procedures have not been in accordance with the Act, and prejudice to the aggrieved party has resulted. There can be no doubt that, if the complaint in the administrative proceedings here is as inadequate as the plaintiff insists and, by reason thereof, the rights of the plaintiff are prejudiced by the Board's action, relief can be had when the judicial power comes into play upon the enforcement or review of such action. The requirements of the Administrative Procedure Act are no less important and effec-

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or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in sections 346 and 347 of Title 28.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the Commission or board shall be exclusive.

[3] For footnote see page 63,104.

tive because they are to be enforced by the reviewing court, where statutory review is provided, rather than by a court of equity before final action in the administrative proceedings. The latter would require consideration almost *in vacuo.*

For the reasons stated, I must conclude that this Court does not have the power to grant the relief sought by the plaintiff, and the complaint must, therefore, be dismissed.

[¶ 62,396] **Liquor Stores, Inc., and Webb's City, Inc., v. Continental Distilling Corporation.**

In the Supreme Court of Florida. January Term, A. D. 1949. En Banc. April 5, 1949.

Florida Fair Trade Law

State Price-Fixing Statute Unconstitutional—Public v. Private Interest—Invasion of Constitutional Rights of Consumer and Retailer.—In an action for injunctive relief brought by a distilling company to enjoin a liquor retailer from selling brand name whiskey below prices established by fair trade contracts with other retailers, it was held that the act which authorized such agreements was a price-fixing statute and an unconstitutional exercise of the state's police power. The act was declared arbitrary and unreasonable and in violation of the right to own and enjoy property, while the contract sued upon was pronounced void and contrary to public policy.

A further ground for denying relief was found in the undenied allegation that the parent corporation, of which the plaintiff is a subsidiary, utilizes numerous brands and is taking advantage of this act to create monopolies in alcoholic liquors and coerce this intervenor to pay arbitrary, excessive and unreasonable prices thereby fixing prices and wholly stifling competition. The contract is therefore contrary to public policy and void and relief should be denied even if the act were not unconstitutional. An additional basis for dismissal was the plaintiff's failure to make a case under the act which requires proof of competition between manufacturers or producers of the same general commodity and that competition is free and open.

A concurring justice points out that the purpose of price fixing is to prevent ruinous competition which exists in times of overproduction. It was not contemplated by the Legislature of 1939 that this Act would operate in periods of scarcity. Under present conditions, contracts fixing a minimum sales price of commodities would be considered as a restraint upon free and open competition unless the contrary was shown.

This concurring justice also states that a state may not punish those who enter into agreements in restraint of trade or which tend to restrict competition and then grant immunity to a class who enter into agreements having the same obnoxious impact upon the public interest. The special privileges and immunities granted to the plaintiff by the Act, under present economic conditions serve a private interest and contravene constitutional guarantees.

Another concurring justice states that price-fixing legislation is only valid when emergencies which threaten the general welfare, like war or threat of economic chaos, require its enactment. The basis for such law actually should be present not only at the time of its passage but the law should exist only so long as the situation which gave rise to it continues. Without appropriate predicate, legislation of this kind is unconstitutional from its inception, and absent a limitation on its life span it could become so by virtue of changed or improved conditions.

See the Florida Fair Trade Law, Vol. 2, ¶ 8164, and Resale Price Maintenance Commentary, Vol. 2, ¶ 7128.

For petitioner: J. Lewis Hall, Tallahassee, Fla.; Whitaker Brothers, Tampa, Fla.

For respondent: Parker, Foster & Wigginton, Tallahassee, Fla.; Richard L. Fruchterman, Philadelphia, Pa.

For intervenor-respondent: S. Henry Harris, St. Petersburg, Fla.; Reeves, Allen & Johnson, Tampa, Fla.; Ausley, Collins & Truett, Tallahassee, Fla.

[*Statute Not In Interest of General Welfare*]

ADAMS, C. J.: If the decision of this case is to rest upon precedents from other jurisdictions then the conclusion is not difficult. We confess they lead to an approval of the act. Our first duty, however, is to our own constitution as well as the superior federal law. This court has, perhaps more so than many others, been alert to any trespass upon the citizens' constitutional rights. See *State v. City of Stuart,* 97 Fla. 69, 120 So. 335, 64 A. L. R. 1307. This legislation is a species of the relatively recent national recovery legislation. It was conceived at a time when there were surpluses and general need for such a law in certain basic commodities. The courts approving similar acts scarcely had an opportunity to observe its effects other than as its proponents visualized its operation *in future.* We are in a more favored position as we have the benefit of the actual consequences flowing from its application.

There is yet another reason why we are constrained to reexamine the precedents to the contrary. That is, few of the cases treat the proposition of *whether the legislation is within the scope of the police power.* The courts generally have accepted the premise of the proponents of the act; that it is in the interest of the general welfare to protect the property right in the trade mark and brand. We may concede, though it is not beyond question and not necessary to discuss here, that the owner of a trade mark and brand has a property right deserving the protection of law. Undoubtedly he has up to a point. Although without this act he has the protection afforded by law in common to all other properties. Is he entitled to more? If he may claim additional advantage, then he must look to the law emanating from the police power. If the vantage sought is personal as distinguished from the *general public* then the police power may not be invoked. The police power has been wisely restricted to those things which of necessity affect the public morals, public health or public safety. When a statute is brought into question resting upon the police power the courts have the power and duty to inquire whether it is within constitutional limits. To be valid it must apply to the general public as distinguished from a particular group or class. The idea of general welfare should banish the thought that the state may subordinate the right of one group of citizens to advance the welfare of another. The legislature is the judge of the wisdom of the regulation but the court may say whether the act is within constitutional limits. It is particularly a judicial question whether the legislative act is for a private or public purpose. The right to own, hold and enjoy property is nearly absolute. The statute cannot be the means of leveling unequal fortunes, neither can it favor one segment of the people at the expense of another. These principles are fundamental. See 11 Am. Jur., Constitutional Law, Sec. 245 *et seq.* If the stronger and more influential may impose their wills upon minorities where the general welfare does not require such legislation then the weaker and less fortunate will soon be vanquished. Constitutional law never sanctions the granting of sovereign power to one group of citizens to be exercised against another unless the *general welfare* is served. The effect of this act is to grant by indirection sovereign power to one person (not necessarily a citizen) to be exercised against another.

[*Power Vested in Interested Party*]

This statute is, in fact, a price fixing statute. The power to fix the price is vested in an interested person who is not an official. There is no review of his act. He is required to consult with no one and in no sense is required to take into consideration the cost of the article or the reasonableness thereof. We need look no further than our own jurisdiction for precedents to turn the decision. We have many times been confronted with price fixing statutes in one form or another. Throughout all our holdings we have recognized as basic that for a statute such as this to be upheld there must be some semblance of a public necessity for the act and it must have some relation to the public health, morals or safety. Further, the price fixing agency must be duly constituted by law and due notice of its action. All of which contemplates that the prices fixed must have some regard to reason besides having a public concern. *State v. Ives,* 123 Fla. 401, 167 So. 394; *Scarborough v. Webb's Cut Rate Drug Company, Inc.,* 150 Fla. 754, 8 So. 2d 913; *Miami Laundry Co. v. Fla. Dry Cleaning and Laundry Board,* 134 Fla. 1, 183 So. 759, 119 A. L. R. 956. (The latter case related to health and sanitation in the laundry business.)

[*General Welfare Not Served*]

Many of the precedents from other jurisdictions on similar acts were made upon

the proponents' statement that the general welfare would be served. The exact contrary is now perfectly apparent as will appear from a study of *Summary and Conclusion of the Federal Trade Commission,* December 13, 1945. We quote from Page LXI:

> "The essence of resale price maintenance is control of price competition. Lack of adequate enforcement of the anti-trust laws leaves a broad field for the activities of organized trade groups to utilize it for their own advantage and to the detriment of consumers. * * *"

[*Act Must Conform to State Constitution*]

Some of the states have given a broader sphere of operations to the police power than we have. Some authorities inquire only whether the general welfare is in some measure served. This elevates the state over the individual. Under this concept constitutional guaranties are of no effect to minorities and majorities have no need for them. Then, too, some of the state courts have receded from their holdings because of the United States Supreme Court. See *Bourjois Sales Corporation v. Dorfman,* 273 N. Y. 167, 7 N. E. 2d 30; *Old Dearborn Distributing Company v. Seagram-Distillers Corporation* and *McNeil v. Joseph Triner Corporation,* 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476. The gist of the holding in this case was that the state act did not, on the grounds considered, contravene the Federal Constitution. The court of last resort of each sovereign state is the final arbiter as to whether the act conforms to its own constitution whereas the federal courts are concerned only with whether the act offends the Federal Constitution. See 11 Am. Jur., Constitutional Law, Sec. 103.

[*Benefits Derived By Retail Groups Only*]

It is also well to note that when this type of law was first promulgated its purpose was to protect long established brands which had acquired a substantial value. As time passed and one court after another approved them, perhaps because another court had, little if any inquiry was made of the original purpose. Now new brands by the thousands are created overnight to get the advantage of the act. It is well to remember also that this act applies to every kind of article including such necessities as food and drugs. In that connection it is enlightening to read fully the *Summary of the Federal Trade Commission* relative to the means employed by certain retail groups to coerce the manufacturers to fix prices for the retailer's benefit and to the detriment of both the manufacturer and the consuming public.

[*Act Is Arbitrary, Contract Is Void*]

Our conclusion is that the act is arbitrary and unreasonable and violates the right to own and enjoy property; one economic group may not have the sovereign power of the state extended to it and use it to the detriment of other citizens. In that case the legislation serves a private rather than a public purpose. The sovereign power must not be delegated to a private citizen to be used for a private purpose and especially where there is no state supervision. There is yet another reason why relief should be denied this plaintiff. The answer discloses that this plaintiff is one of about forty subsidiary corporations—all owned and controlled by a parent corporation, Public Industries, Inc., a Pennsylvania Corporation; that this parent corporation and four other corporations control eighty to ninety percent of the alcoholic liquors in the United States; that these several corporations utilize numerous brands and are taking advantage of this act to create monopolies in alcoholic liquors and coerce this intervenor and others to pay arbitrary, excessive and unreasonable prices thereby fixing prices and wholly stifling competition. This allegation is not controverted. His contract is, therefore, contrary to public policy and void, and relief should be denied even though the act is not unconstitutional. The act in terms provides that before a contract can be enforced under it (1) there must be competition between manufacturers or producers of the same general commodity; (2) that competition must be free and open. This plaintiff has not only failed to make a case under the act but the answer makes a complete defense.

The writ is issued and the order is quashed.

TERRELL, HOBSON and BARNS, J.J., concur.

SEBRING, J., concurs in conclusion and judgment.

BARNS, J., concurring with opinion, with ADAMS, C. J., THOMAS, SEBRING and HOBSON, J.J., concurring.

HOBSON, J., concurs specially with opinion, with TERRELL and SEBRING, J.J., concurring.

CHAPMAN, J., dissents.

BARNS, J., concurring: Plaintiff, Continental Distilling Corporation, brought its injunction suit at Tampa, Florida. The chancellor overruled the several motions by defendants, Liquor Stores, Inc., and Webb's City, Inc., to dismiss plaintiff's bill. The defendants-petitioners now seek a review of such order by certiorari.

The bill alleges that Continental Distilling Corporation is the maker, manufacturer and distributor of whiskies, and in particular is the manufacturer, distiller and owner of the trademark, brand and name of a whiskey known as "Philadelphia Blended Whiskey," which is sold to various wholesalers and retailers throughout Florida and the United States; that the plaintiff-respondent, termed the "owner" entered into a contract with two retail concerns in Jacksonville, Florida, termed the "retailer," who are not parties to the suit, which contract, among other things provided:

> "*Retailer shall not*, directly or indirectly, at any time, *offer for sale or sell* within Florida any of said beverages which Retailer has heretofore purchased, now has on hand, or may hereafter purchase or otherwise in any way acquire, and which bear, or the labels or containers of which bear, any trademark, brand name, insignia or the name of the said Continental Distilling Corporation, at *other than the resale prices* therefor to consumers in Florida, or at any other than the terms and conditions of such resales, *from time to time designated by Owner;* and Owner shall have the right at all times, and from time to time to revise or change any and all such resale prices and terms and conditions of resale, any such revisions or changes to become effective on such date as shall be specified by Owner on not less than two days' prior written notice mailed to Retailer, postage paid, to Retailer's address as herein stated. Such resale prices and terms and conditions of resale shall be in accordance with written schedules furnished from time to time to Retailer by Owner and/or Owner's wholesaler in Florida authorized for the purpose, and such schedules shall constitute a part of this agreement; and at all times the schedule last delivered to Retailer pursuant to this agreement shall govern the resale prices and terms from time to time list additional goods and brands in any such schedule, with designated resale prices and terms and conditions of resale to consumers, and all the provisions of this agreement shall apply to any and all such additions." (Italics supplied.)

And by Paragraph 6 of the bill further alleges:

> "6. That pursuant to the requirements of Chapter 541, Florida Statutes, Ann., 1941, *your complainant established* the minimum resale price of 'Philadelphia Blended Whiskey' of $4.10 per one-fifth gallon to be charged by all retailers selling direct to the consumers throughout the trade area comprising the State of Florida, which minimum price so established by your complainant is in effect throughout the State of Florida; that on September 1, 1947, October 20, 1947, and March 5, 1948, your complainant addressed to each retail whiskey dealer in the State of Florida a letter advising such dealers that the minimum retail price of 'Philadelphia Blended Whiskey' to be charged by them in the retail sale of said whiskey, was the sum of $4.10 per one-fifth gallon, which letters, so addressed and containing the minimum price to be charged for the whiskey above mentioned were sent through the usual course of the United States mail to the retail whiskey dealers throughout the State of Florida, including the defendant, Liquor Stores, Inc., 812 South Boulevard, Tampa, Florida." (Italics supplied.)

The bill further charged that Liquor Stores, Inc., has violated such agreement by advertising and selling "Philadelphia Blended Whiskey" at $3.49 per fifth, when the price fixed by plaintiff-respondent was $4.10 per fifth, and that the acts and doings of Liquor Stores, Inc., are:

> "* * * contrary to the expressed provisions of Chapter 541, Florida Statutes, Ann., 1941, and is resulting in irreparable injury and damage to your complainant in the following respects:
>
> (a) The Good Will established by complainant through the expenditure of substantial sums of money in advertising its product under the trademark, brand and name of 'Philadelphia Blended Whiskey' is being destroyed.
>
> (b) Other retail liquor dealers who are selling your complainant's products at prices not less than the minimum retail sales price heretofore *set and esatblished by your complainant* in accordance with the 'Fair Trade Act' would be compelled to violate their agreements with your complainant and be compelled to violate the Fair Trade Act by selling your complainant's products below the minimum retail sale price in order to meet the unfair competition created by the acts of the defendant. (Italics supplied.)

(c) The cutting of prices by the defendant below the minimum retail sales price will cause the public and consumers to believe that your complainant's products, including 'Philadelphia Blended Whiskey,' is not worth the uniform minimum retail sales price, in consequence of which said retailers will be unable to sell your complainant's products bearing its trademark, brand and name at the minimum retail sales price so set and established.

(d) The public will become confused as to the various brands of such products being sold in open competition with the products distilled and manufactured by your complainant and bearing complainant's trademark, brand and name. * * *"

After the commencement of the suit against Liquor Stores, Inc., the petitioner, Webb's City, Inc., was allowed to intervene as a defendant, who, like Liquor Stores, Inc., appears not to have signed any price fixing contract with the plaintiff-respondent.

The plaintiff-respondent predicates its right to an injunction upon a law enacted in 1939, which is now Chapter 541, F. S. 1941, F. S. A., and known as the "Florida Fair Trade Law," containing provisions relative to price fixing, as follows:

541.03—Contract may govern price of sale or resale. "No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Florida by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(2) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(3) That the seller will not sell such commodity:

(a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(b) To any retailer, unless the retailer will agree not to sell the same except to consumers for use and at not less than the stipulated minimum price." Section 541.03, F. S. 1941, F. S. A.

541.05—Owner alone may establish resale price. "No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provision of this chapter, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity, or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name." Section 541.05, F. S. 1941, F. S. A.

541.07—Suit at law for violation of chapter. "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, and whether the particular lot of such commodity so advertised, offered for sale or sold, was or was not at any time sold to a party to a contract that stipulated the price of such commodity under the provisions of this chapter is unfair competition and is actionable at the suit of any person damaged thereby." Section 541.07, F. S. 1941, F. S. A.

After the enactment during the early and middle '30s by the various states of laws similar to Chapter 541, F. S. 1941, F. S. A., the Federal law was amended as stated in *American Jurisprudence,* as follows:

"Following the pattern of the state legislatures, the Congress of the United States in 1937 enacted a similar statute, commonly referred to as the Miller-Tydings Act, by way of amendment to the Sherman Anti-Trust Act, declaring in effect that the fixing by agreements of the minimum resale price of such commodities shall not be deemed unlawful by reason of any thing contained in the Sherman Act, whenever such agreements are lawful where the resale is made." 52 Am. Jur.—Trademarks, Tradenames, etc., Sec. 177—p. 649.

The statute relative to price fixing by producers and distributors are applicable only to the commodity as it flows into commerce from producer or distributor to the ultimate consumer through the retailer, and do not

relate to cross-agreements between producers or distributors of commodities.

> "The statute does not legalize horizontal price-fixing agreements entered into between the same class of persons, such as between manufacturers, or between wholesalers or under state and Federal anti-trust acts. The only resale price maintenance permitted by the act is vertical, that is, by agreements entered into between a producer or manufacturer or wholesaler on the one hand and the retailer or other intermediate handler in a straight vertical line on the other. The law does not authorize cross-agreements between competitors, and whatever agreements are permitted all face one way." Ib.—Sec. 180—p. 651.

The agreements made unlawful and above referred to are termed "horizontal" agreemental agreements, but "vertical" agreements by the producer or distributor, or as by him authorized for "price fixing," are made lawful, and also the sale below the stipulated price is termed "unfair competition" and actionable. See Chapter 541, F. S. 1941, F. S. A.

The true legislative intent and purpose of Chapter 541, F. S. 1941, F. S. A., was to permit price fixing by the producers and distributors of the identified commodities, as follows:

Section 541.03 *supra,* provides that contracts relating to sale or resale of the identified goods shall not be "deemed in violation of any laws" by reason of any provision:

> "(1) That the buyer will not resell * * * *at less* than the minimum price stipulated by the seller.
>
> (2) That the buyer will require of any dealer to whom he may resell * * * that he will *not,* in turn, *resell at less than* the minimum price stipulated by the seller.
>
> (3) That the seller will not sell such commodity:
>
> (a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and *at not less than* the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or
>
> (b) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and *not less than* the stipulated minimum price.

Section 541.04 prescribes that "for the purpose of preventing evasion of the resale *price restrictions* imposed" by contract certain specified acts "shall be a violation of such resale price restrictions."

Section 541.05 specified that *"no minimum resale price"* shall be established except by "the owner of the trademark, brand or name used" or by an "authorized distributor especially authorized to establish said price by the owner of trademark, brand or name."

Section 541.07 prescribes that it "is unfair competition" for anyone wilfully and knowingly to advertise for sale or to sell such identified goods *"at less than* the price stipulated in *any"* (price fixing) contract entered into pursuant to the provisions of this chapter "whether the person so advertising, offering for sale or selling is or is not a party to such contract, and whether the particular lot of such commodity so advertised, offered for sale or sold, was or was not at any time sold to a party to a contract that stipulated the price of such commodity."

Statutes relating to and prohibiting sales of commodities below cost in certain cases have been enacted and entitled: "Unfair Sales Act," "Unfair Practice Act," and "Fair Sales Act," but we are *not now concerned* with such a regulation of competition.

The U. S. Supreme Court, in reviewing in the *Dearborn-Seagram* case a decision of the Supreme Court of Illinois upholding the validity of a similar act under the circumstances then presented, in conclusion stated:

> "But it is unnecessary to pursue the subject further; for since the *sole purpose* of the present law is to afford a legitimate remedy for an *injury to the good will* which results from the use of trademarks, brands or names, it is obvious that its provisions would be wholly inapplicable to goods which are unmarked." (Italics supplied.) *Old Dearborn Co. v. Seagram Corp.,* 299 U. S. 183, 198, 57 Sup. Ct., 139 81 L. Ed. 109, 106 ALR 1476.

And observed, as to relief by the U. S. Supreme Court, that:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but

it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as *this court* is concerned." (Italics supplied.) Ib., Text 195-6.

And thereby gave weight to the statement found in *American Jurisprudence* as follows:

"It has also stated that the action of a State legislature in enacting a police regulation attacked as unreasonable, and of the highest court upholding its validity, indicates the existence of evils for which it is an apparent appropriate remedy." 11 Am. Jur., p. 1080, Sec. 304, citing *O'Gorman v. Hartford F. Ins. Co.,* 282 U. S. 251, 75 L. Ed. 324. 51 S. Ct. 120, 72 ALR 1163.

Public policy of Florida in re price-fixing. Agreements and contracts tending to fix prices and restrain trade have been unlawful in this State since it became a state. At present Sections 542.01-542.11, F. S. 1941, F. S. A., provide that combinations, confederations and agreements to fix or maintain prices of commodities tending to preclude free and unrestricted competition in the sale of such commodities are made criminal offenses and such agreements are declared invalid and offending the public policy of the sovereign State of Florida, and that the offenders should be subject to fine and imprisonment.

It is further provided by law that:

"Any contract or agreement in violation of the provisions of this chapter shall be void and not enforceable either in law or equity." Section 542.10, F. S. 1941, F. S. A.

The foregoing statute governing intrastate commerce of Florida corresponds to the Sherman Anti-Trust Acts of the Federal Statutes, relating to interstate commerce.

Unfair discrimination has been prohibited in this State since 1915, and the present provisions are:

540.01—Unfair discrimination and competition prohibited. "Any person doing business in the State of Florida, and engaged in the production, manufacture, sale or distribution of any commodity in general use, that shall, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this state by selling such commodity. at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is declared unlawful." Sec. 540.01, F. S. 1941, F. S. A.

540.06—Unfair commercial discrimination prohibited; penalty. "Any person, firm, company, association or corporation violating any of the provisions of Section 540.01, and any officer, agent or receiver of any firm. company, association or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not more than five thousand dollars or be imprisoned in the county jail not to exceed one year." Sec. 540.06, F. S. 1941, F. S. A.

The foregoing sections of Ch. 540, F. S. 1941, F. S. A., relating to intrastate commerce of Florida, correspond to the Robinson-Patman Act of the Federal Statutes, relating to interstate commerce, as stated in American Jurisprudence, as follows:

"A Federal statute known as the Clayton Act, as amended in 1936 by an enactment known as the Robinson-Patman Act, prohibits discrimination between purchasers in respect of the price of commodities marketed through the channel of interstate or foreign commerce, where the effect of such discrimination would be to lessen, injure. or destroy competition or tend to create a monopoly." 52 Am. Jur. —Trademarks, Tradenames, etc., Sec. 175, p. 645.

To hold Ch. 541, F. S. 1941, F. S. A., valid would be to say to the petitioners that horizontal agreements and contracts fixing prices or tending to stifle competition are void, as against public policy, and bind no one, and that those who execute them may be prosecuted criminally and subjected to fine or imprisonment and, if a foreign corporation, denied the right to do business in this State or, if a domestic corporation, charter forfeited; however, in respect to the same commodities, that vertical contracts or agreements fixing prices or tending to stifle competition are not only valid and binding on the parties who execute the contract and also upon all who are advised or informed as to the price fixed by the producer

or distributor; and, furthermore. he who stifles competition by vertical price fixing may procure the courts to aid him in doing so.

Chapter 541, F. S. 1941, F. S. A., purports to authorize price fixing in the vertical plane of branded or trademarked goods by producers or distributors, but all price fixing of commodities in the horizontal plane is illegal and criminal. See Ch. 542, F. S. 1941, F. S. A.

Section 541.07, *supra,* specifies that it shall be unfair competition for the retailer-vendee to sell the identified goods for less than the prices fixed by the distributor-vendor when the retailer in fact is not a competitor of the producer or distributor, but his patron, either directly or indirectly, and, according to the bill of complaint, the plaintiff is not suffering from any competition between it and the retailer but only because the retailers are in competition between themselves as to a commodity which it once owned and as to a commodity in which it now has no property interest.

It is true that the commodity in question may bear the trademark, brand or trade name of the plaintiff and it is recognized that trademarks, trade names and brand are utilized to promote good will for the purpose of inducing sales, but once the product is sold, with the trade name. trademark or brand on the commodity, then the purchaser becomes the owner of the commodity with the trademark, trade name or brand *attached and a part of it,* and the producer or distributor no longer retains what he has sold, and the purchaser is entitled to what he has bought, to be dealt with by him as granted by Sections 1 and 12 of the Declaration of Rights of the Florida Constitution, subject only to the proper exercise of the State and Federal police power in the protection of the property right which the owner of a trademark, trade name or brand may have in or franchises, or privileges, otherwise conferred by law.

The Supreme Court of the United States recognized that vertical price control was in restraint of trade, as re-stated in the headnote, as follows:

> "A system of contracts between manufacturers and wholesale and retail merchants by which the manufacturers attempt to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade. * * *" *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 31 Sup. Ct. Rep. 376, 55 L. Ed. 502.

And in reference to the effect as a restraint of trade the opinion by Chief Justice Hughes stated:

> "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. * * *
>
> "The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. *It is not entitled to special privilege or immunity.* It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." (Italics supplied.) *Dr. Miles Medical Co. v. John D. Park & Sons Co., supra,* text 408-9.

Justice Hughes further stated in the *Dr. Miles Medical Co.* case that:

> "The essential features of such a system are thus described by Mr. Justice Lurton (then Circuit Judge), in the opinion of the Circuit Court of Appeals in the case of *John D. Park & Sons Co. v. Samuel B. Hartman,* 153 Fed. Rep. 24, 42: 'The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can

obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about.'" *Dr. Miles Medical Co. v. John D. Park & Sons Co., supra,* text 399-400.

The vertical price fixing by the distributor, arrived at by contract and independent of any statute dealt with by the *Dr. Miles-Park* case, was condemned because such acts stifled competition and thereby were injurious to the public interest and void.

With the aid of Ch. 541, F. S. 1941, F. S. A., there would be little or no difference in the ultimate effect upon the public under the Dr. Miles-Park contract and under the distiller's contract; the effect upon the public of price fixing agreements is the same whether they be with or without the aid of a statute.

The Florida Fair Trade Act provides, Sec. 541.03, F. S. 1941, F. S. A.:

> "No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and *which commodity is in free and open competition with commodities of the same general class* produced or distributed by others shall be deemed in violation of any law of the State of Florida by reason of any of the following provisions which may be contained in such contract;" (Italics supplied.)

In the case of *Scarborough v. Webb's Cut Rate Drug Co.,* 150 Fla. 754, 8 So. (2d) 913, we said that price fixing may be sustained on the following basis:

> "So far as we have been able to find, no statute has been upheld which attempted to compel the producer of a trademarked commodity to enter into contracts with retailers fixing prices. Nor do we think that such provision could be upheld because it is contrary to the due process and equal protection clause of both State and Federal Constitutions. Const. Fla. Declaration of Rights, 1, 12; Const. U. S. Amend. 14. This is not all. Price fixing Acts have been upheld only upon the theory that such may be resorted to *protect the interest of the public and to prevent destroying competition in businesses or vocations, the success of which is materially affected with public interest.* * * * (Italics supplied.)

The purpose of such price fixing then was to prevent ruinous competition. Price fixing is legal when it is to the public interest and is accomplished by lawful means. Such competition can exist only in times of over-production, resulting in cut-throat competition for the available potential markets. It was not contemplated by the Legislature of 1939 that this Act would operate in periods of scarcity of consumer goods when there were not enough consumer goods to satisfy the demands of the public, with the same effect as in periods of over-production and abundance.

It is well recognized that a law under one state of facts may be reasonable but under another state of facts may be unreasonable. The public need of the Unfair Competition Acts during the early and middle '30s reflects reasonableness, and they do not appear so unreasonable for those times. These so-called Fair Competition Acts were enacted during the '30s and began in California in 1931, during a period when the entire United States was undergoing one of the most severe and prolonged depressions that the country had ever experienced, with a deflated currency as relating to purchasing power; when the inventories of the wholesale and retail merchants were high; the factories were idle, and unemployment of labor was great; and when credit policies had become restricted, all of which has resulted in an economy of abundance of goods and an economy of scarcity as to purchasing power; with many bankruptcies occurring and with business generally operating with a fear of bankruptcy and with the banking situation becoming so serious that the President closed all of the banks in one day and allowed only the reopening of such banks as were liquid enough to withstand runs. Conditions then were such that, in order to remedy the imbalance between commodities and purchasing power, pigs were killed and cotton and corn were plowed under; that grain was at times used by the producers for fuel instead of being sold at the market price. It was a time when the maxim that "competition is the

life of trade" had been supplanted by the term "ruinous competition" because of the general down-trend of prices, which was resulting in retail sales below cost.

"In a recent case the U. S. Supreme Court has held that the reasonableness of the exercise of the police power of the state must be considered in the light of the current economic conditions." 11 Am. Jur. 1080, citing *West Coast Hotel Co. v. Parrish* (1936), 300 U. S. 379, 81 L. Ed. 703, 57 Sup. Ct. 578. 108 A. L. R. 1330.

In the *Parrish* case, *supra,* the U. S. Supreme Court (per Justice Hughes) stated:

"We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere."

The Florida Fair Trade Act wisely provided that before anyone could enforce that Act as against another, certain conditions must exist. Those conditions are: (1) There must be *competition* between producers or manufacturers of the same general commodity; and (2) that *competition must be free and open.*

The present conditions are now somewhat reversed as to those of 1939 and most of the preceding ten years. We now have a dearth of goods where we had an abundance in the '30s; and we have money without purchasing power. where money had a high purchasing power during the '30s. As under those conditions the fixing of a minimum sales price was considered within the police power of the State, the fixing of maximum sales price might now be considered within the police power, e. g., OPA.

It is common knowledge that the world in 1945 emerged from a long drawn-out conflict, resulting in acute shortages in many items of commerce. The demand for some of those items has not yet been saturated by over-supply. So long as the *prerequisite conditions of free and open competition* as to the particular commodity do not exist, any contract attempted to be made under the provisions of the Fair Trade Act is void, as being contrary to public policy. It cannot be successfully contended that competition exists in a particular product when there has been a shortage of that product over a period of years and that shortage has not yet been overcome. It is not in the public interest that the Florida Fair Trade Act should be enforced on behalf of any manufacturer of a product in which there is *no competition* or in which the *competition is not free and open* as to price.

Those who attempt to enforce the provisions of this or any other Act of the Legislature must allege and prove that all prerequisite conditions have been complied with or that these conditions exist for the effective operation of the state. It becomes necessary therefore for plaintiff to allege and prove not only that there was a *contract* but also, as to the commodity in question, that there was *free and open competition.* That is a factual element that must be established before the contract may become effective, and before it may be enforced.

A producer or distributor may, by price fixing to remove competition between retailers as to "price" of a commodity, effectively remove such commodity from the status of "free and open" competition of the market as to market price. Under present conditions, contracts fixing a minimum sales price of commodities involved in the vertical or horizontal plane would be considered as a restraint upon free and open competition unless the contrary is shown.

Relative to classification. the U. S. Supreme Court, in the *Hartford-Harrison* case, held that a statutory discrimination between the mutual companies and the stock companies which write fire, casualty, etc., insurance in the State, forbidding stock companies to act through agents who are their salaried employees but permitting this to mutual companies, is repugnant to the equal protection clause of the Fourteenth Amendment. and that:

"The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Co. v. Coleman,* 277, U. S. 32, 37, 38.

"'. . . it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all the powers of the state which can effect the individual or his property, in-

cluding the power of taxation . . . It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." . . . That is to say, mere differences is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'

"Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Co. v. Baldwin,* 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Co. v. Harrison,* 301 U. S. 459, 461-2.

The validity of legislative classification depends upon the object and purpose of the law and the legal effect thereof according to the circumstances:

"When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. * * * The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (*Smith v. Cahoon,* 283 U. S. 553, 567) or that may appear by facts admitted or proved, * * * Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. * * * But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings." *Borden's Co. v. Baldwin,* 293 U. S. 194, 209-10, 55 Sup. Ct. 187, 79 L. Ed. 281.

This Court has held that the provision that all men are "equal before the law" has been generally interpreted to mean that:

". . . the rights of all persons must rest upon the same rule under similar circumstances and that it applies to the exercise of all the powers of the state which can affect the individual or his property including the power of taxation. It does not however forbid classification and the power of the State to classify for purposes of taxation is of wide range and flexibility, provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Mere difference is not enough; the attempted classification must rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." *State, ex rel. v. Knott,* 135 Fla. 206, 211-13, 184 So. 752.

To be "equal before the law" does not preclude the state from resorting to classification, provided the classification is reasonable, not arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation. The classification, in order to avoid the constitutional mandate, must be founded upon pertinent and rational basis and not upon a capricious and unreasonable basis.

A state may not prohibit and make punishable those who enter into agreements in restraint of trade or which tend to restrict competition and then great immunity to a class consisting of those who enter into vertical contracts and agreements having the same obnoxious impact upon the public interest. It is the effect of the contract or agreement that is to be considered.

When it is determined that contracts in restraint of trade are injurious and offensive to an interest which the state is entitled to protect, and legislation is enacted to protect that interest, then special privileges or immunities cannot be granted unless the granting of such special privileges and immunities is to serve the public interest or

purpose as distinguished from a private interest or purpose.

The special privileges and immunities granted plaintiff-respondent by Ch. 541, *supra,* under present economic conditions and statutory laws serve a private interest and contravene the constitutional guaranties.

Sections 1 and 2 of the Bill of Rights of the Constitution of Florida (as well as the Fourteenth Amendment to the U. S. Constitution) require that all shall stand "equal before the law" and that "no person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation." It seems obvious that such arbitrary selections for legislative favor as are contained in the Fair Trade Act were precisely what the constitutional provisions were designed to prevent.

The legislature has designated selling below the fixed price to be "unfair competition" (Sec. 541.07) for anyone, whether the person "selling is or is not a party to such contract" * * * and "actionable at the suit of any person damaged thereby."

"Equity regards substance rather than form." The mere designation of an act as "unfair competition" does not preclude judicial appraisal, and courts of equity will not be misled by mere devices or baffled by mere forms, but they will disregard names and penetrate disguises of form to discover the substance of an act or transaction. The bill fails to set forth facts sufficient to show unfair competition in fact.

For a court of equity to entertain plaintiff-respondent's bill would be to uphold and honor the special privileges and immunities attempted to be conferred by the statute when generally other acts of like force and effect are proscribed and made penal.

The writ of certiorari should issue and the order of the chancellor should be quashed.

HOBSON, J., concurring specially: It is my view that legislation of the type under consideration here (which is essentially price fixing of the worst character, i. e. the fixing of a minimum price floor as distinguished from a maximum price ceiling without a yardstick for the establishment of such minimum prices or any provision for public notice or hearing) may be valid but it is so only when emergencies which threaten the general welfare require its enactment. Such condition should be real and not fanciful. Resort to the drastic expedient of invoking the police power of a sovereign state by the passage of legislation of this character should not be permitted in the absence of concrete evidence of public necessity.

Some of the situations which the writer can now envisage which may give rise to valid legislation of this class are the exigencies of war or threats of economic chaos. It is true that courts of last resort in several states and the Supreme Court of the United States have upheld acts similar to this so-called Fair Trade Act. The fact that those laws were either enacted at a time when we were experiencing a depression national in its scope or were challenged when such was our economic status, is worthy of serious consideration in connection with the present litigation.

If not actually essential, by far the better procedure and that fraught with less danger of non-essential invasion of constitutional rights of the consumer and the retail merchant would be the finding as a predicate for such legislation that extremities requiring it exist as a matter of fact. If well founded this would assure validity at the time of its enactment but would not necessarily guarantee its permanency as valid legislation. The basis for such law actually should be present not only at the time of its passage but the law should exist only so long as the situation which gave rise to it continues. The duration of its existence should be from one legislative session to the next, at which time the law could be re-enacted if the necessity for it should still subsist. Without appropriate predicate, legislation of this kind is unconstitutional from its inception and absent a limitation on its life span it could become so by virtue of changed or improved conditions.

[*Validity of Legislation Rests on General Welfare*]

The validity of such legislation can be founded only upon, what was termed in the ancient days of the Roman Empire, the *summum bonum*—the greatest good for the greatest number—and what we now call general welfare. It is solely upon such premise that a legislative enactment, which is flagrantly violative of the established law of contracts, which destroys initiative on the part of the retail merchant and affects adversely the economic life of the common man and which portrays monopolistic, if

indeed they are not communistic, tendencies, can be sustained. Under normal conditions such legislation is not consonant with our philosophy and fundamental principles. It is not truly a "Fair" Trade Act so far as its effect upon the consuming public is concerned, but actually it is "unfair" and unconstitutional.

It is the failure to first investigate and make a determination of public necessity which causes such legislation to be fraught with shocking possibilities. An act of this type must be subjected to close scrutiny with respect to its constitutionality. Its genesis must find justification in, and its life depend upon, public necessity. By this I mean that the subject of the act and the purposes to be accomplished by it should bear, in a vital and practical sense, a reasonable relationship to the public health, safety, morals or similar element which is fundamentally and essentially a component part of the general welfare. Otherwise, a law of this nature not only offends certain of our constitutional provisions but it is also inimicable to some of our elementary democratic principles. It stifles individual initiative and allows no premium upon the personal ingenuity and efforts of the successful merchant—as distinguished from the lethargy of the mediocre—and sometimes, as here, it violates the basic law of contracts.

[*Right of Consuming Public v. Property Right in Trade-Name*]

The very technical and finespun theory of vertical contracts as distinguished from those which are horizontal does not appeal to, satisfy nor indeed protect the average citizen. He does not appreciate nor understand why the interest of the consuming public, which group is comprised of a vast majority of our people, should be subservient to the property right of the individual owner of a trade-name, mark or brand. It appears to the writer that his reasoning is sound. Admitting the existence of such property right the welfare of the "greatest number" should take precedence over that of a favored few if a choice must be made which will invade or infringe the constitutional guaranties of either group. The average citizen of whom I speak, the common man, if you please, believes in free enterprise and that the principles of supply and demand and of building a "better mouse-trap" have contributed in no small measure to making this Nation great.

[*Act Only Constitutional in Extreme Situations*]

If we are to have a "controlled economy" there may be a place for laws of the type here under consideration. But as I understand a "controlled economy" it should not exist absent emergencies which require it in the interest of the general welfare. In any event, a law which provides for the fixing of minimum prices should contain a yardstick as a guide for the establishment of such ground level prices.

The power to determine those prices should not be left to the unleashed discretion of the trade-name owner but should be confined within impregnable specified boundaries. A definite measuring stick should be set forth in the body of the act. This statute contains no such rule. No checkrein is included therein. The unrestrained whim or fancy of the trade-mark owner is the only criterion. There is no provision for the public to be heard or the public interests to be considered much less protected.

The law is not aimed directly at the "loss leader" problem. It goes far beyond such point. As I comprehend the expression "loss leader" it means that a retail merchant may advertise a well known trademarked article for sale at less than cost to entice patrons to his establishment who, while there, might purchase other merchandise upon which the retailer makes a profit and thereby more than overcomes his loss. If this or any such law should, by its express terms, only prohibit the "loss leader" practice it might be less offensive. We are not now confronted by such an act.

According to one of the parables contained in Holy Writ, a vineyard owner hired some laborers early in the morning at a penny a day. Others were employed, and came to work, later. At the end of the day the employer paid all of them the same wage. He was severely criticized. The answer which he gave was: "Is it not lawful for me to do what I will with mine own? Is thine eye evil because I am good?" Matthew 20:15. This philosophy is currently as fundamentally sound as it was in Biblical days. But it is suggested a trademarked article does not actually or in every sense belong to the retailer who purchases

it for resale because the trade-mark owner has a property right in the trade-mark and the good will, which may attach thereto, is his.

Let it be granted, as it should and must be, that our Constitutions do expressly provide protection to the property rights of every individual, just how far does such protection, as intended by the Constitution of Florida, extend? Is the theoretical protection provided by this act really contemplated by our constitutional guaranties? What is, or should be construed to be, the scope of the protection which is provided by our constitution to the property rights of the individual? Is such protection a shield or is it a sword which can be used to pierce and draw the life blood from the same constitutional rights of others who constitute by far the greater number of our citizens? It is my opinion that it should become a sword only in the event it is essential to the survival of the economic life of this body of free people. Laws of this character should not be passed under the pretense of protection to the property rights of the individual trade-name owner or in the alleged interest of the general welfare unless such protection is necessary or the general welfare really requires their enactment.

The owner of a trade-name, mark or brand does not need such protection—particularly when it transgresses the rights of others—because he has it within his power to protect himself. He need not furnish his product to the retailer who refuses to agree to his minimum resale price.

Why should we have protection, which he does not need, at the expense of the consumer? The statement was once made and it is profound that "When reason and the law part there is no law". When I contemplate the means employed by many selfish interests to bring about the ends which they desire my mind reverts to Cicero's outburst in one of his orations against Caliline when he said: "To what length will thou abuse my patience; to what extent wilt thy unbridled audacity affront itself?"

Such legislation is constitutional and can be constitutional only in extreme situations wherein our economic structure is seriously endangered. In some periods through which this Nation has passed no one should have questioned the propriety of such drastic measures for blood transfusions probably were essential to the preservation of a healthy body politic. It is another thing, however, to foist such legislation upon the general public in normal times under the guise of ultimate protection and benefit to the public when exigencies which might demand it are nonexistent.

It is my conclusion that the enactment of this law, which contains a provision for the fixing of minimum resale prices and provides that parties not parties to a contract must nevertheless be bound by such contract, was an unwarranted, unreasonable and arbitrary exercise of legislative power and should be declared invalid.

CHAPMAN, J., Dissenting: Challenged on this appeal on various grounds is the constitutionality of Florida's "fair trade law" authorizing contracts establishing resale prices on commodities bearing "trade-marks, names or brands", which is Chapter 19201, Acts of 1939, Laws of Florida, or Sections 541.01 to 541.08, inclusive, F. S. A.

The Act is viz:

"541.01. Short Title of Chapter.—This chapter may be known and cited as the 'Florida fair trade law'.

541.02. Definition of Terms Used in Chapter.—The following terms, as used in this chapter, are defined as follows:

(1) 'Commodity' means any subject of commerce.

(2) 'Producer' means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.

(3) 'Wholesaler' means any person selling a commodity, other than a producer or retailer.

(4) 'Retailer' means any person selling a commodity to consumers for use.

541.03. Contract May Govern Price of Sale or Resale.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced and distributed by others shall be deemed in violation of any law of the State of Florida by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(2) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(3) That the seller will not sell such commodity:

(a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(b) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

541.04. Inducements to Evade Contract Restrictions Prohibited.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this chapter (except to the extent authorized by said contract):

(1) The offering or giving of any article of value in connection with the sale of such commodity.

(2) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(3) The sale or offering for sale of such commodity in combination with any other commodity, shall be a violation of such resale price restrictions, for which the remedies prescribed by Sec. 541.07 shall be available.

541.05. Owner Alone May Establish Resale Price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provision of this chapter, by any person other than the owner of the trademark, brand or name used in connection with such commodity or distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name.

541.06. Exceptions.—No contract containing any of the provisions enumerated in Sec. 541.03 shall preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(1) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and when plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(2) When the goods are altered, secondhand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(3) By any officer acting under an order of court.

541.07. Suit at Law for Violation of Chapter.—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, and whether the particular lot of such commodity so advertised, offered for sale or sold, was or was not at any time sold to a party to a contract that stipulated the price of such commodity under the provisions of this chapter is unfair competition and is actionable at the suit of any person damaged thereby.

541.08. Law Not Applicable to Certain Contracts.—This chapter shall not apply to any contract or agreement between or among producers or distributors or (except as provided in subsection (3) of Sec. 541.03) between or among wholesalers, or between or among retailers, as to sale or resale prices."

The bill of complaint alleged, in substance, that the Continental Distilling Corporation was engaged in the business of distilling and selling intoxicating liquors in the State of Florida and other States of the Union, and one of its products was trademarked as "Philadelphia Blended Whiskey". It is alleged further that in the conduct of its business, the plaintiff under the provisions of the aforesaid Act entered into two contracts with certain retailers in Jacksonville, Florida, by the terms whereof the trade-marked product of the plaintiff known as "Philadelphia Blended Whiskey" should be retailed in the State of Florida at the price of $4.10 per one-fifth gallon. The plaintiff alleged that it notified the Liquor

Stores, Inc., of the execution and existence of the two contracts wherein the retail price of the trade-marked product "Philadelphia Blended Whiskey" was fixed at $4.10 per one-fifth gallon, but the defendant Liquor Stores, Inc., continued to advertise and sell the trade-marked whiskey *supra* at $3.49, being a sum less than $4.10 per one-fifth gallon, contrary to the two retail contracts which fixed the retail price under the "fair trade law".

One of the petitioners here applied for and, by appropriate order, was permitted or allowed to file in the court below such a pleading in the cause as any other defendant and pursuant thereto the Webb's City, Inc., filed an answer to the bill of complaint and also a motion to dismiss on several grounds. Likewise the Liquor Stores, Inc., filed a motion to dismiss and the cause was heard by the Chancellor below on the motions of the defendant to dismiss directed to the bill of complaint. Extensive and able arguments were presented to the Chancellor on the issues made by the pleadings and thereafter an order was entered overruling the motions to dismiss and the effect thereof was to sustain the constitutionality of Sections 541.01 to 541.08, inclusive, F. S. A.

The questions posed here for adjudication are viz:

1. Where the Legislature enacts a law in the exercise of its police power, in order to be valid and constitutional, must not such statute bear a reasonable or rational relation to the protection of the public health, morals, safety or welfare?

2. Where, in the exercise of its police power, the Legislature enacts a law which authorizes arbitrary individual restraint over ordinary articles of commerce and trade, including all necessities of life, is not such statute detrimental to the public welfare, and therefore, outside and beyond the power of the Legislature to enact?

3. Is Chapter 541, F. S. A., and more particularly Sections 541.03 and 541.07 violative of and repugnant to Sections 1 and 12 of the Declaration of Rights of the Constitution of Florida?

4. Is Chapter 541, F. S. A., and more particularly Sections 541.03 and 541.07 violative of and repugnant to Section 1, Article III, of the Constitution of Florida?

5. Is the "non-signer clause" provided for by Section 541.07, F. S. A., violative of and repugnant to the Miller-Tydings Amendment to the Federal Sherman Anti-Trust Act?

6. Is the Florida Fair Trade Act in violation of the Miller-Tydings Amendment to the Federal Sherman Anti-Trust Act relating to contracts between wholesalers and retailers?

7. Are the instruments attached to the bill of complaint and referred to as 'contracts' sufficient to support plaintiff's cause of action?

Attached to the bill of complaint and made a part thereof is a contract dated September 6, 1947, and signed by the Continental Distilling Corporation, called the "owner", and Avondale Liquor Wine Store, called the "retailer". One of the provisions thereof is that the contract "shall continue in full force and effect until terminated by either party after notice . . ., the retailer agrees not to sell or offer for sale in the State of Florida any beverages which bear, or the labels or containers of which bear, any trade-mark, brand name, insignia or the name of the said Continental Distilling Corporation, at other than the resale prices thereof to the consumers in Florida or at any other than the terms and conditions of such resales, from time to time designated by the owner, the owner shall have the right at all times, and from time to time revise or change any and all such retail prices, and terms and conditions of such resale, any such revision or change to become effective on such date as shall be specified by owner . . ." A price list of the plaintiff's whiskeys as agreed to by the parties is attached to the bill of complaint. A second contract of similar import signed by the plaintiff as owner and Barron's Bar of 382 Park Street, Jacksonville, Florida, as the retailer with price list attached is attached to and made a part of the bill of complaint.

It is contended under questions 1 and 2 *supra* that Florida's "fair trade law" cannot be sustained under the police power of the Florida Constitution. It is fundamental in statutory construction that the intent of the Legislature is to be found in the language of the Act and the intention sustained if found to be with the constitutional limitations, as courts have no power to legislate. *Curry v. Lehman*, 55 Fla. 847, 47 So. 18. The police power of a State embraces regulations designed to promote the

public convenience or general prosperity or the public welfare. *Atlantic Coast Line R. Co. v. Coachman,* 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047. It is argued that under the terms of the Act arbitrary power is granted to fix the minimum resale price "on all necessities of life". The answer to the contention is found in Section 541.03, F. S. A., and is viz.: "No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity and which commodity is in the free and open competition with commodities of the same general class produced and distributed by others". It is to be observed that contracts are restricted to brands and trade-marked products then in free and open competition with similar products.

Whether a particular Act enacted under the police power for the purpose of regulating a business, trade or profession is valid depends on whether or not the legislation is addressed to a legitimate end. If the measure of regulation attempted to be undertaken is reasonable and appropriate to a legitimate end for the protection of a basic industry of society and is not a subterfuge in the form of law designed to bring about some unjust advantage to particular individuals to the prejudice of the general rights of others in the same calling similarly situated, the courts have no authority to declare the regulation prescribed invalid, although they may strongly disapprove of the wisdom or policy of the measure adopted or may deem the regulation prescribed foolish or unwise. *State ex rel. Municipal Bond & Invest. Co. v. Knott,* 114 Fla. 120, 154 So. 143.

The economic interest of a state may justify the exercise of its continuing and dominant protective police power for the promotion of the general welfare, notwithstanding interference with lawful callings and even contracts. See *State ex rel. Municipal Bond & Invest. Co. v. Knott, supra.* It is generally recognized that the police power is an inherent attribute of sovereignty and exists without any reservation in the Constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good of society. Laws enacted under the police power of a sovereign state for the purpose of regulation may in some instances be harsh and oppressive without contravening constitutional limitations. The police power is no longer limited to measures designed to protect life, safety, health and the morals of the citizens, but extends to measures designed to promote the public convenience and general prosperity and includes economic measures regulating competition. *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469.

Under questions 1 and 2 of petitioners' brief arguments are presented on certain facts set out in the answer of Webb's City, Inc., and the contention is made that the terms and provisions of the Act are arbitrary and unreasonable and have no reasonable relation to the public safety, welfare, morals or health of the people of the sovereign State of Florida and the Legislature was without constitutional authority to enact the "fair trade" Act. Counsel for respondent filed a motion to strike from petitioners' brief certain facts so set out in the answer and which were not considered by the court below at the time the challenged order was entered. This Court entered its order of denial prior to hearing oral arguments on the merits. It now appears by the record that the Chancellor below heard the cause and made its order on the respective motions to dismiss filed by Liquor Stores, Inc., and Webb's City, Inc., and the facts so set out were not considered. We fail to find merit in this assignment.

The next contention is that Sections 541.01 to 541.08, inclusive, *supra,* and particularly Sections 541.03 and 541.07 are in conflict with and in derogation of Sections 1 and 12 of the Declaration of Rights of the Constitution of Florida and each thereof is repugnant to and in violation of Section 1 of Article III of the Constitution of Florida.

Section 1 of the Declaration of Rights is viz.:

> "Section 1. Personal Rights.—All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety."

Section 12 of the Declaration of Rights is viz.:

> "Sec. 12. Double Jeopardy; Compelling Testimony; Due Process of Law; Eminent Domain.—No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken without just compensation."

Section 1 of Article III of the Constitution is viz.:

"Section 1. Houses of Legislature; Meeting Place.—The Legislative authority of this State shall be vested in a Senate and House of Representatives, which shall be designated. The Legislature of the State of Florida and the sessions thereof shall be held at the seat of government of the State."

Arguments, in part, offered in support of this assignment are: (1) it deprives the retailers of the right to fix the prices of their commodities to the purchasing public; (2) the consuming public, by the terms of the Act, is deprived of the right to purchase the necessities at the lowest possible price; (3) the Act compels the purchasing public to pay prices fixed by the producer or manufacturer; (4) the Act authorizes arbitrary price levels fixed by the producer or manufacturer and in so doing confers legislative functions and destroys free and open competition; (5) minimum resale prices on articles are fixed without regard to cost or reasonableness and without any hearing; (6) the owner of labeled or branded articles may enter into a contract with a Florida retailer for the sale of the article at a fixed price and the contract becomes binding on all other retailers in Florida of the branded articles and this power infringes on the liberty of contract; (7) individual initiative is destroyed—approval is given to the lazy and unprogressive retailer—while the thrifty, alert and progressive retailer is penalized and the general public is deprived of cheaper prices and not benefited; (8) Section 541.07, F. S. A., authorizes a unilateral contract and the terms thereof made binding on all non-signers retailing the branded or trade-marked articles; (9) the provisions of the Act binding the non-signing retailer is unconstitutional; (10) the producer or manufacturer of trade-marked articles by the Act is permitted to determine what is in open and free competition, to the public detriment; (11) the Act grants to the producer of such articles delegated authority to fix the retail price thereof; (12) it is a price fixing Act and not a "fair trade" Act; (13) it is not in the interest of the public to fix the retail prices on branded articles but promotes the interest of the producer and manufacturer; (14) the Act is void because it fails to provide for a notice and hearing prior to fixing the retail price on the trade-marked article; (15) the Act discriminates between the retail signer of the retail contract and the non-signer, who is bound thereby under the terms of the Act. Authorities are cited to sustain many of the arguments *supra.*

It will be observed that the Act limits contracts to the sale or resale of commodities which bear, or the label or container of which bear trade-marks, brands or the name of producer or distributor of such commodities, which commodities are in free and open competition with commodities of the same general class produced and distributed by others. These contracts are authorized only between the producer or wholesaler and the retailer, provided the commodity is found in free and open competition with other commodities of the same general class. The act provides for vertical contracts only, as distinguished from horizontal ones, and competition in this manner is continuously maintained among the producers or wholesalers. Contracts cannot under the Act be lawfully made between producers of trade-marked articles.

Our study discloses that all the States of the Union since 1931, have adopted "fair trade acts", except the States of Vermont, Texas and Missouri. The courts of last resort of some fifteen States have sustained the respective Acts. Various questions were presented and argued before the courts of last resort where the respective Acts have been considered. It is difficult for us to close our eyes to rulings of courts of other jurisdictions when considering the merits of the arguments presented in the case at bar. The economic philosophy motivating the Florida Legislature in the enactment of the challenged Act is fully sustained as being within the police power of a sovereign state. Courts are not permitted to strike down a statute because it fails to square with their individual social or economic philosophies or theories, neither can we consider the question of public policy, wisdom or lack of wisdom or other motives which may address themselves to the legislative department of our government. The philosophy or predilection of Judges as to what the law should be in such instances is nothing more than an idle gesture.

The able arguments presented by counsel for petitioners in support of the unconstitutionality of the Act are fully answered by the following authorities: *Seagram-Distillers*

Corp. v. Old Dearborn Distilling Co., 363 Ill. 610, 2 N. E. (2d) 940; *Joseph Triner Corp. v. McNeil,* 363 Ill. 559, 2 N. E. (2d) 929, 104 A. L. R. 1435; *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177; *Ely Lilly & Co. v. Saunders,* 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308, and Annotations on pages 1335 to 1367; *Goldsmith, etc. v. Mead Johnson & Co.,* 176 Md. 682, 7 A. (2d) 176; *Johnson & Johnson v. Weissbard Bros.,* 121 N. J. Eq. 585, 191 A. 873; *Bourjois Sales Corp. v. Dorfman,* 273 N. Y. 167, 7 N. E. (2d) 30, 110 A. L. R. 1411; *Pro-Phy-Lac-Tic Brush Co. v. Vidgoff,* Oregon Circuit Ct. for the County of Multnomah, Oct. 19, 1939; *Weco Products Co. v. Reed Drug Co.,* 225 Wis. 474, 274 N. W. 426; *Sears v. Western Thrift Stores of Olympia, Inc.,* 10 Wash. (2d) 372, 116 Pac. (2d) 756; *Fisher, Inc. v. Canfield,* Colorado Dist. Ct. for the City & County of Denver, No. A28837, Div. 2; *Gray, Ltd. v. Johnson Wholesale Perfume Co., Inc.,* 45 F. Supp. 744; *Miles Laboratories, Inc. v. Seignious,* 30 F. Supp. 549; *Miles Laboratories, Inc. v. Owl Drug Co.,* 67 S. D. 523, 295 N. W. 292; and *Pepsodent Co. v. Krauss Co.,* 200 La. 959, 9 So. (2d) 303; 52 Am. Jur. pp. 643-659.

The next contention is that Florida's "fair trade law" conflicts with and is in derogation of Section 1 of the Miller-Tydings Amendment of the Sherman Anti-Trust Act. The pertinent portions thereof quoted in petitioners' brief are viz:

> "'Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, that nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes", approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers or between persons, firms, or corporations in competition with each other.'"

Arguments in support of the above contention have been weighed and considered. It was clearly the intention of Congress by the enactment of the above Amendment to remove doubts and uncertainties as to the power of a sovereign state to enact "fair trade laws" when functioning under the police power of their respective constitutions. It is in the nature of a legislative interpretation of the Sherman Anti-Trust Act. See *Schill v. Remington Putnam Book Co.,* 179 Md. 83, 17 A. (2d) 175; *Pepsodent Co. v. Krauss and Ely Lilly & Co. v. Saunders, supra.*

The seventh question posed here by petitioners' counsel is viz: "Are the instruments attached to the bill of complaint and referred to as 'contracts' sufficient to support plaintiff's cause of action?" After hearing arguments on the motions to dismiss addressed to the bill of complaint, it was the view of the Chancellor that the contracts, by appropriate allegations made a part of the bill, were *prima facie* sufficient on the then state of the pleadings. Emphasis, during the course of the oral arguments here, was placed on the illegality of the contracts because of the lack of a sufficient showing on both (a) lawful consideration, and (b) mutuality. The door on these two points was not forever closed against the petitioners by the entry of the challenged order. It is generally recognized under our system of government that the use of property and contractual agreements are usually matters of private concern, but the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraints, and not immunity from reasonable regulation to safeguard the public interest by a sovereign state when legislating under its police power. *Miller v. Wilson,* 236 U. S. 373, 35 S. Ct. 242, 59 L. Ed. 628.

I would deny the petition for a writ of interlocutory certiorari.

[¶ 62,397] **Fred Martin and Max Lanier v. Albert B. Chandler, Individually and as Commissioner of Baseball, et al.**

In the United States District Court for the Southern District of New York. Civil Action No. 49-358. April 1, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Baseball and Interstate Commerce—Purpose of Injunctive Relief—Injunction Denied. —The application of two professional baseball players for an injunction which would prohibit the Commissioner of Baseball from keeping them on an ineligible list, until final disposition of their claim for treble damages, was denied. The issuance of an injunction is almost prohibitive where it is not designed to preserve the position of the parties but rather seeks preliminarily the ultimate relief to which the party may be entitled. An injunction may not issue where the issues of law are doubtful and especially where the jurisdiction of the Court to entertain the matter is unsettled. It was found that the plaintiff failed to show that irreparable damage would result if the relief was not allowed.

See the Sherman Act annotations, Vol. 1, ¶ 1650.275.

For plaintiffs: John L. Flynn, New York, New York; James A. McKaigney, William R. Ferris.

For defendants National League Baseball Club of Boston, Inc., et al.: Willkie, Owen, Farr, Gallagher & Walton, New York, New York.

For defendants Boston American League Baseball Company, et al.: Baker, Hostetler & Patterson, Boston, Mass.

For defendant National Exhibition Company: Edgar P. Feeley, New York,, New York.

[*Injunction Sought*]

CONGER, J.: This is an application by the Plaintiffs, professional baseball players, for a preliminary injunction enjoining the Defendants and their respective agents, servants, officers and employees (1) from continuing the Plaintiffs on a list of suspended and ineligible players of "organized baseball"; (2) from in any manner directly or indirectly interfering with the Plaintiff's practice of their profession; (3) from refusing in good faith to negotiate with the Plaintiffs for their services; and (4) from demanding that the Plaintiffs sign contracts containing either a reserve or termination clause as a condition of their employment.

[*Pleadings*]

The complaint, filed in this Court on March 8, 1949, sets forth causes of action for injunctive relief and treble damages amounting to $1,000,000. and $1,500,000. respectively under the Sherman and Clayton Anti-Trust Act (15 U. S. C. A. Sections 1, 2, 3, 13 and 14).

In substance, the complaint alleges that the Plaintiffs, Martin and Lanier, were gainfully employed as professional baseball players from 1935 and 1933 respectively until 1946, for which employment they had prepared themselves.

[*Nature of the Reserve Clause*]

Each was employed either directly or indirectly by the Defendant St. Louis National League Baseball Club under a uniform contract for each season of employment, such contract containing both a "reserve clause" (whereby a player agrees not to contract with nor play for any other baseball club in "organized baseball" at the expiration of his contract, excepting an assignee of the contracting baseball club) and a clause permitting the employer to terminate such contract on ten days' notice. During the course of employment the Plaintiffs were transferred from city to city in various States without opportunity to bargain in the open market for their services, being precluded therefrom by the terms of the uniform contract.

[*Violation of Reserve Clause*]

The complaint further alleges that in May, 1946, the Plaintiffs were declared ineligible by the Commissioner of Baseball to play in "organized baseball" for a period of five years by reason of their alleged disregard of the Major League Agreement and Major League Rules and particularly for violating the "reserve clause" of their contracts and for engaging in competition with ineligible players. Subsequent to the

Commissioner's declaration, the Plaintiffs sought to earn a livelihood by use of their professional ability but failed because the Commissioner, employing powers vested in him, persuaded, induced and coerced others to refrain from engaging in performances with them under threat of punitive measures.

[*Allegation that Agreement between Baseball Clubs Constitute Conspiracy*]

It is alleged that the Defendants, who are composed of the Commissioner of Baseball, the President of The National League of Professional Baseball Clubs, the President of the American League of Professional Baseball Clubs, the President of The National Association of Baseball Leagues, and sixteen corporate defendants who own and operate the baseball clubs comprising the Major Leagues, have by entering into the Major League Agreement, the Major-Minor League Agreement and the National Association Agreement and by their concert of action in adopting and enforcing said Agreements and the Rules concomitant therewith, engaged knowingly and continuously in an unlawful conspiracy to monopolize and restrain trade and commerce among the States in violation of the Sherman and Clayton Acts, and have by reason of such conspiracy and concerted action denied and continue to deny the Plaintiffs the opportunity to earn a livelihood in their profession.

According to the complaint, the so-called Major Leagues operate under the Major League Agreement, by the terms of which the office of the Commissioner of Baseball was created, and pursuant to which the Defendant Chandler was elected to such office.

[*Disciplinary Power of Commissioner*]

The complaint further avers that in addition to the Major Leagues, there are 59 Minor Leagues, so-called, comprised of more than 465 baseball clubs located in various cities in the United States, the District of Columbia, Puerto Rico, Canada and Cuba, operating under The National Association Agreement and Rules adopted. The Major Leagues and the Minor Leagues constitute so-called "organized baseball." By the terms of the Major-Minor League Agreement, to which the Major Leagues and the National Association are parties, the office of Commissioner of Baseball is recognized by the Minor Leagues. Under the terms of the Major League Agreement and the Major-Minor League Agreement, the Commissioner is given absolute disciplinary power over all players and officials in the Leagues. He may investigate any actions considered detrimental to the best interests of baseball, punish for infractions and settle disputes between the Leagues, Clubs and Individuals.

It is alleged that The Major League Agreement, the Major-Minor League Agreement and the Rules adopted prohibit any other than the standard or uniform contract between clubs and players.

[*Exclusive Aspects of Agreements*]

Moreover, the various Agreements provide for territorial rights within which the clubs may transact business exclusively, and in addition, the clubs are granted exclusive areas in the media of radio and television to broadcast and telecast their performances. Such broadcasts and telecasts are heard and viewed by millions of people throughout the United States, by transmission across State lines. The broadcasts and telecasts are sponsored by corporations engaged in interstate and international commerce.

Furthermore, in fulfilling their schedules of games in the regular season, and in the training period prior to the commencement thereof, the clubs transport equipment across and through the several States; they pay employees, so-called scouts, who travel among the several States in search of talent for their respective employers; the personnel of the clubs reside in various States and execute their contract of employment in various States.

[*Allege Interstate Character of Organized Baseball*]

In general, then, the complaint charges that "organized baseball," as it is presently conducted, is of an interstate character and that the agreements under which it operates create an unlawful monopoly of which the Plaintiffs are victims.

The Defendants have not answered the complaint, their time to do so having been extended until April 23, 1949, by order of this Court.

[*Supporting Affidavit Evidence*]

In support of the present application, the Plaintiffs have filed affidavits in which they recite the history of their careers on various baseball teams in the St. Louis National League organization, the compensation received, and the efficiency of their work. They assert that they served in the Armed Services of the United States in the late war, and that after their return to baseball, they accepted offers to play in the Mexican League at greater remuneration than they were receiving in St. Louis. Subsequent to their departure, they were notified by the Commissioner that they were suspended from "organized baseball" for five years, which suspension expires April 15, 1951. In the winter of 1946 and 1947, they played in the Cuban League, but they were prevented from being so employed in 1948 because the Cuban League had become affiliated with the Defendants. In the summer of 1948, they toured the United States with a group of other players, but the tour resulted in financial loss by reason of the conduct of Defendants' agents who threatened owners of baseball parks and players with dire penalties, including suspension for five years, if they permitted use of their parks or teams in competition with Plaintiffs. They assert that they are unable to support their families by working at their profession and have no future probabilities in baseball, the Commissioner having informed Lanier on February 26, 1949, that he has no present plans for reinstatement; and if the suspension is allowed to stand, it will terminate their careers.

[*Affidavit Evidence in Opposition*]

In opposition to the present application, affidavits have been submitted by officers or agents on behalf of all the corporate Defendants. In general these affidavits deny the allegations of the complaint, and deny making threats or sending letters and telegrams in the summer of 1948 to owners of baseball parks or players as charged in the moving affidavits. They assert that the rules and regulations for the conduct of baseball have as their purpose the promotion of competition between teams, the development of players, the preservation of the integrity of the game, and the maintenance of public confidence in the game, objectives which could not be accomplished without such rules and regulations. In addition, there are two affidavits of Eddie Dyer, manager of the St. Louis National League Club at the time of Plaintiffs' departure and at present, in which he states that the Plaintiffs, both of whom were under contract with the club for the 1946 season, refused to play for the team after May 26, 1946, because "* * * they were getting so much cash from the Mexicans that they would come out ahead if they were barred from American baseball for life." One of Mr. Dyer's affidavits and an affidavit of counsel on behalf of some of the corporate Defendants state that in recent polls taken of the players on the rosters of the St. Louis Club and the Pittsburgh Club, the players voted unanimously in favor of retaining the "reserve clause" in the baseball contract.

Finally, three affidavits purport to show the residences of Defendants Chandler, Harridge and Trautman to be outside the Southern District of New York, and another annexes telegrams and letters to and from the Commissioner in connection with the effect of the suspended players' participation with other players. The Commissioner's responses indicate that any "professional", i. e. a player under contract with a club in "organized baseball", will suffer suspension if he participates with the Plaintiffs. Amateurs and semi-professional players so participating will be unaffected presently, of course, or *in futuro* in case they desire to become professionals.

The Defendants urge the denial of Plaintiffs' application on four grounds: (1) that the Defendant Chandler, who has not been served with process within the jurisdiction of this Court, and is not a resident of this District for purposes of venue, is an indispensable party to the suit, and, therefore, the Court lacks jurisdiction of the subject matter; (2) that the preliminary injunction sought would change the *status quo* and would grant preliminarily the final relief sought; (3) that there are disputed questions of fact and law; and (4) that the Plaintiffs have failed to show that they will sustain irreparable damage *pendente lite*.

1. I deem it unwise and unnecessary to dispose of the Defendants' initial contention at this time.

It appears to be true that Commissioner Chandler has not been served with process

within the jurisdiction of this Court and that he is not a resident of this District.*

Whether he is an indispensable party, i. e. one who has "* * * an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience"*, depends upon a construction of the Major League Agreement, which step I feel should not be gratuitously undertaken on a proceeding in advance of trial where there are other and sufficient grounds for determining the Plaintiffs' application.

2. Injunction is one of the most drastic remedies in law, and its use depends upon the most compelling showing that it is indispensable to the final relief sought. And the issuance of an injunction is almost prohibitive where it is not designed for its common function—to preserve the *status quo* but, rather seeks preliminarily the ultimate relief to which a party may be entitled. *Warner Bros. Pictures, Inc. v. Gittone,* 110 F. (2d) 292, (C. C. A. 3, 1940); *U. S. v. Adler's Creamery,* 107 F. (2d) 987, (C. C. A. 2, 1939); *American Mercury v. Kiely,* 19 F. (2d) 295, (C. C. A. 2, 1927).

In the *Warner Bros.* case, *supra,* the Court stated at page 293:

> "In the present case the trial judge found that the exhibitor plaintiffs have suffered and will continue to suffer irreparable loss unless given injunctive relief. The defendants strongly urge that this finding is not supported by the record. We need not decide this question, however, for we are clear that the effect of the preliminary injunction which the court granted was not to preserve the *status quo* but rather to alter the prior status of the parties fundamentally. Such an alteration may be directed only after final hearing, the office of a preliminary injunction being, as we have pointed out, merely to preserve *pendente lite* the last actual noncontested status which preceded the pending controversy."

To grant the Plaintiffs' application would disturb the *status quo,* would restore them to positions they resigned voluntarily and would accord them preliminarily on papers alone the relief to which they might ultimately, after trial, be entitled.

3. The complaint and moving affidavits and answering affidavits in many instances do not disclose serious issues of fact. The charge of threats to club owners and players who might have dealings with the Plaintiffs is one issue of fact obviously in dispute. Moreover, both sides to this controversy should have full opportunity at a trial to develop the factual situation with respect to the entire case, and should not be burdened by any predisposition of what the facts are upon papers alone. The Defendants deny that they are engaged in any illegal restraint of trade or monopoly under the anti-trust laws and this issue will depend largely upon the factual situation which should be developed, as I have heretofore stated. In addition, these denials present a very serious question of law encompassing further grave questions in connection with the necessity of the method of operation to preserve the game, a factor mentioned in all of the answering affidavits, whether the laws embrace personal services, and whether the restraints are reasonable, for it is only unreasonable restraints which the law condemns.*

Apart from all of the foregoing is the serious question of whether the Court has jurisdiction of the suit in itself. Remember that in *Federal Baseball Club v. National League,* 259 U. S. 200. The Supreme Court held in 1922 that baseball was not trade nor commerce within the scope of the Federal anti-trust laws. And the recent opinion of the Court of Appeals in *Gardella v. Chandler, et al.,* decided February 9, 1949, was not decisive of the point. It merely held that a trial must be had to determine whether baseball as now conducted comes within the scope of those laws.

> "When the case goes back for trial * * * it will be necessary, as I view it, to determine whether all the interstate activities of the defendants—those, which were thought insufficient before in conjunction with broadcasting and television—together form a large enough part of the business to impress upon it an interstate character" (per L. Hand, C. J., in the *Gardella* case).

[*No Injunction Where Jurisdiction Unsettled*]

Even assuming that the facts are not greatly in dispute, the issues of law are too

* The situation with respect to Defendants Harridge and Trautman is similar.
* *Shields v. Barrow,* 17 How. 130, 139.

* *U. S. v. American Tobacco Co.,* 221 U. S. 106; *Chicago Board of Trade v. U. S.,* 246 U. S. 231.

doubtful for any sort of pre-judgment in the matter. Certainly, an injunction may not issue where the situation is so dubious in numerous respects, and especially where the jurisdiction of the Court to entertain the matter is unsettled. *Lowe v. Consolidated Edison Co.,* 67 F. Supp. 287 (S. D. N. Y., 1941); *Quigley Pub. Co., Inc. v. Showman's Round Table, Inc.,* 7 F. Supp. 410 (S. D. N. Y., 1934).

[*Meritorious Argument not Sufficient*]

4. The Plaintiffs assert in their moving papers that irreparable damage will result if the present relief is not allowed. Strictly, this does not appear to be so. The Plaintiffs have sued for treble damages, and if successful, they will recover all the loss they will have sustained up to the time of trial multiplied by three. Future harm will be precluded by final injunction against the Defendants. In legal contemplation they will receive all the relief to which they are entitled. However, one circumstance enters into the problem which renders the situation somewhat unique. The Plaintiffs, being skilled competitors, need similar competition to maintain the state of their skill prior to suspension. In this respect, it is asserted, final injunctive relief will find them incapable of following their profession on its previously high standard because of non-user, so to speak. There is some merit to the argument. It is not sufficient, though, to warrant the granting of such drastic relief here, especially in view of the compelling legal bases for denying it.

[*Motion Denied on All Grounds*]

I deny, therefore, the Plaintiffs' motion on all the grounds set forth above.

I think I should state here, to avoid misconception of the effect of this decision, that it in no way concerns the ultimate merits of the controversy. A trial of the matter must be had to determine the legal and factual issues involved.

Motion denied.

Settle order.

[¶ 62,398] The Winkler-Koch Engineering Company v. Universal Oil Products Company, et al.

In the United States District Court for the Southern District of New York. Civ. 30-165. November 7, 1947.

Sherman Antitrust Act

Patented Oil Cracking Processes—Allegations of Fraud and Bribery—Motions To Strike Out Pleadings.—In an action taken by a firm of engineers and designers of oil refining equipment, certain motions by the defendant oil companies to strike out pleadings were denied and others granted. The pleadings alleged that the named oil companies entered into a conspiracy to monopolize the trade in the licensing of patented cracking processes and the installation of oil cracking equipment by creating and controlling a patent pool, eliminating competition among themselves and using economic force acquired through the patent pool to exclude others. One of the methods employed was alleged bribery in litigation and the subsequent use of the decision to force the plaintiff to withdraw from the business. It was held that the pleading was sufficient to embrace the bribery charges. It may not be said as a matter of law that the prosecution of a case to a successful conclusion through bribery was not within the conspiracy pleaded or a foreseeable consequence of it.

See the Sherman Act annotations, Vol. 1, ¶ 1640.614.

For plaintiff: Paul Kolisch, New York, New York; Thiess, Olson & Mecklenburger, J. Bernard Thiess, Thorley von Holst, Sidney Neuman, Robert W. Poore, Chicago, Illinois.

For defendant Atlantic Refining Company: Chadbourne, Wallace, Parke & Whiteside, New York, New York.

For defendant Shell Union Oil Corporation: Cravath, Swaine & Moore, New York, New York.

For defendant Standard Oil Company (Indiana): Buell F. Jones, Pike H. Sullivan, Weymouth Kirkland, A. L. Hodson, Townley, Updike & Carter, New York, New York.

For defendant Universal Oil Products Company (Delaware): Dwight, Harris, Koegal & Caskey, New York, New York.

For defendant Standard Oil Company (New Jersey): Davis, Polk, Wardwell, Sutherland & Kiendl, New York, New York.

For defendant The Texas Company (also Gasoline Products Company, Inc.): George W. Ray, Jr., New York, New York.

For defendant The M. W. Kellog Company: E. F. Liebrecht, New York, New York.

For defendant Gulf Oil Corporation: M. S. Gibson, New York, New York.

[*Nature of Motion*]

CONGER, D. J.: The defendants move to strike certain portions of the complaint herein pursuant to Rule 12 (f), F. R. C. P., on the ground that they are redundant, immaterial, impertinent or scandalous, and also for a bill of particulars with respect to various facts.

[*Nature of Action*]

The complaint demands treble damages for injuries allegedly sustained as a result of a conspiracy among the defendants to monopolize and restrain trade in connection with patented oil cracking processes and apparatus in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. A. §§ 1, 2).

The complaint alleges that plaintiff, a Kansas corporation, had been engaged in designing and supervising the installation of refining equipment, particularly distillation equipment, and that it had developed and perfected, prior to 1928, plans for an oil cracking device to make gasoline, subsequently known as the Winkler-Koch still, utilizing a process which became known as the Winkler-Koch oil cracking process. The still and process were unpatented. Plaintiff offered to engineer, construct and install said still for refiners in consideration of payment for plaintiff's engineering services and without the requirement of continuing royalty payments. Between April, 1928 and the end of 1929, plaintiff entered into 16 contracts for the construction and installation in the United States of Winkler-Koch cracking stills for various independent refiners with substantial profits resulting, in competition with various of the defendants herein, some of which were engaged in seeking to grant licenses for the use of their respective cracking processes and to design and construct either themselves or through another defendant, the cracking equipment necessary thereto.

It is further alleged that the defendants, beginning in 1928 and continuing during all the times hereinafter referred to, have combined and conspired to monopolize and restrain, and have in fact monopolized and restrained, trade in the licensing of patented cracking processes and apparatus, and in the business of engineering, designing and supervising the purchase, sale and installation of cracking processes and equipment by various means including the creation of a patent pool, cross-licensing, elimination of competition previously existing among themselves, and the use of the economic force acquired through the patent pool.

Paragraph 64 of the complaint sets forth the objects of the conspiracy as follows:

"(a) To prevent any manufacturer from selling, and any engineering company from contracting for and installing, any cracking equipment to or for any refiner in the United States not licensed by one of the defendants under the aforesaid patent pool.

(b) To impose on every independent refiner in the United States the necessity of entering into a license agreement under the aforesaid patent pool in order to acquire cracking apparatus and a cracking process, if he previously had none, or in order to continue to operate a previously acquired cracking process without danger of bankruptcy.

(c) To impose on every independent refiner who acquired a license under the aforesaid pool of patents and unfair and onerous royalty which created a destructive competitive differential in costs between such licensees and those of the defendants who were and are engaged in the production of gasoline without any royalty obligation and who directly or indirectly share in the royalties paid by such licensees whereby said operating defendants are enabled to control and maintain the price of gasoline at a higher price than would have been possible if a cracking process were available royalty free to all independent refiners.

(d) To eliminate the plaintiff from the business of designing and installing unpatented, royalty free cracking equipment and processes in the United States."

And it is further alleged that these objects have been substantially accomplished by numerous acts, arrangements and contracts including the obtaining by Universal Oil Products Company [Delaware] of a corrupt affirmance of a judgment in the Third Circuit Court of Appeals through bribery of a judge, and certain settlements and dismissals of litigation as a result of the proceedings in the Third Circuit.

[*Grounds of Motion*]

The motion to strike is directed toward certain allegations of the complaint, as to which, these defendants assert, proof would not be admissible and which on their face are immaterial and irrelevant. In addition, the defendants object to the headings which precede certain paragraphs in the pleading.

I shall first take up the objections to Paragraph 137 of the complaint, which reads as follows:

> "In 1941 as a result of information brought to its attention, the Court of Appeals for the Third Circuit authorized an investigation into the question of possible fraud and corruption of the Court of Appeals in the *Root* case. Pursuant to proceedings had in this investigation, in which Universal participated and was fully heard, the Court on June 15, 1944, entered its order (reported in 62 U. S. P. Q. 114) adopting the findings and conclusions of a Special Master appointed by it and adjudged the *Root* judgments to be so tainted with fraud as to be wholly invalid and void. The *Root* judgments were vacated and the mandates to the lower court were recalled."

The defendants object to this paragraph on the grounds (1) that the order of the Third Circuit Court of Appeals, dated June 15, 1944, referred to therein, has no legal effect as an adjudication of the invalidity of the Root judgments; and (2) that, assuming its validity, it is still not admissible in the trial of this action.

The defendants' first objection is based upon an opinion of the Supreme Court in *Universal Oil Products v. Root Refining Co.*, 328 U. S. 575, in which the Court, in reversing an order of the Third Circuit Court of Appeals allowing counsel fees to the *amici curiae* assisting in the Root investigation, indicated quite strongly that the order of June 15, 1944, although not directly in issue, was of no effect as an adjudication of the rights of the parties because of the informality of the proceeding, the Court stating, among other things, that "a court cannot deprive a successful party of his judgment without a proper hearing." [page 580]

However, without deciding the effect and status of the proceedings in the Third Circuit, I pass to the second objection which is decisive.

[*Evidence on Previous Judgment Inadmissible*]

The allegations contained in paragraph 137 would be admissible upon the trial as evidence only upon the theory of *res judicata*. But it is a general rule that a judgment is evidence in a subsequent suit solely between the parties to the preceding suit, or their privies. *Rudd v. Cornell*, 171 N. Y. 114; *St. John v. Fowler*, 229 N. Y. 270, rearg. den. 229 N. Y. 608; *U. S. v. Pink*, 315 U. S. 203; *Restatement of the Law of Judgments*, Section 93. The plaintiff was neither party nor privy to the *Root* case, nor were the defendants, other than Universal.

Paragraph 137, and the parts of paragraphs 138, which allude to the matter contained therein should be stricken, as well as the expression "as later held by the Supreme Court of the United States" in paragraph 108.

[*Allegation of Bribery*]

Beginning with paragraph 132, the complaint sets forth allegations concerning the purported bribery of Judge Davis. I quote the pertinent paragraphs of the complaint.

> "132. With the object of assuring a successful outcome of the Root appeals, Universal, at some time pending the appeal or prior thereto, employed one Morgan S. Kaufman, an obscure referee in bankruptcy residing at Scranton, Pennsylvania, who was personally intimate with said Judge J. Warren Davis. The said Kaufman had a general understanding with Davis whereby Davis was to render Kaufman judicial favors in return for monetary rewards in cases in which Kaufman was interested. Following the argument of the Root appeal, Davis and Kaufman vacationed together at Miami Springs, Florida, and after Davis's return and on June 26, 1935, the purported opinion of the Circuit Court of Appeals was filed in favor of Universal in the *Root* case. Davis wrote the decision for the court. Subsequently Davis denied Root's petition for rehearing, and the

Supreme Court of the United States denied Root's petition for certiorari.

133. The order denying certiorari was entered on October 21, 1935. On October 22, 1935, Universal, through its president Hiram J. Halle, paid Morgan Kaufman the sum of $25,000.00 and entered into an agreement with Kaufman for the payment to him of an additional $25,000.00 to be paid to him during the following year. Morgan S. Kaufman rendered no legal services for Universal in the *Root* case and no legal services for Universal in any other case save as a local associate in one other case which did not involve a Winkler-Koch still. Universal, through its president Hiram J. Halle, agreed to pay, and did pay, Kaufman the said sum of $50,000. with the knowledge and purpose that the money or the prospect of receiving it would be used by Kaufman to insure a decision favorable to Universal on the Root appeal.

134. On October 24, 1935, said Morgan S. Kaufman, in Judge Davis's chambers, agreed with one Charles L. Stokley, a cousin of the said Davis, to loan Stokley the sum of $10,000.00 upon the security of certain properties of Stokley at Mt. Dora, Florida. Subsequently the $10,000.00 loan was actually made by Kaufman to Stokley. The said purported loan was, in fact, a mere disguise or cloak for the payment by Universal, through its agent Kaufman, to Davis of the sum of $10,000.00 as a reward for his decision favorable to Universal in the Root appeal, it being understood between Davis and Kaufman that the loan should be repaid by Stokley to Davis and not to Kaufman. Stokely in fact made payments of interest thereon to Davis up to the date when the Federal Bureau of Investigation in 1939 investigated this transaction.

135. The fraudulent and corrupt conduct of Universal improperly influenced Judge Davis in the *Root* case with the effect that the decision written for the Circuit Court of Appeals for the Third Circuit by Judge Davis and the judgments entered thereon were corrupt and void. The said fraudulent decision in the *Root* case remained in effect as an apparent adjudication and lawful determination that the operation of the Winkler-Koch still constituted an infringement of Universal's said Dubbs and Egloff patents throughout the life of said patents, thereby eliminating the Winkler-Koch still as a threat to defendants' licensing structure at least until May 12, 1942, when the said Egloff patent expired. Universal's said fraud in the *Root* case was a step taken by it in furtherance of the objects of the conspiracy among these defendants. Plaintiff alleges that but for the fraudulent intervention of Universal the erroneous decision of Judge Nields would have been reversed by the Circuit Court of Appeals for the Third Circuit as, in fact, it was ultimately overruled by the Supreme Court of the United States in the *Globe* case.

136. Universal publicized widely the decision of the Court of Appeals in the *Root* case which it had fraudulently obtained, through the medium of articles in trade papers, telegrams and letters to unlicensed refiners, and the distribution of printed copies of the opinion throughout the industry. All independent refiners not yet licensed by the defendants were advised by Universal that only by taking a license from it could they avoid costly litigation in the form of infringement suits which Universal intended to bring, based on the *Root* decision and under the patents involved therein. The telegram sent by Universal to unlicensed refiners gave prominence to the fact that a Winkler-Koch still had been held to infringe Universal's patents in the *Root* case. Universal's threats to unlicensed refiners, based on this fraudulent decision, caused many of them to enter into license agreements with Universal.

139. Thereafter [following the investigatory proceedings in the Court of Appeals for the Third Circuit] Universal entered into stipulations with defendants in all of its cases then pending against Winkler-Koch users, in which Universal had alleged the *Root* decree as either a precedent or a binding estoppel against the defendant under the doctrine of *res judicata,* dismissing each case with prejudice. Except for the fact of Universal's fraud and corruption in the *Root* case becoming known, Universal by these means would have continued to endeavor, as it had endeavored up to June 15, 1944, to compel the unlicensed users of Winkler-Koch stills to enter into agreements with Universal paying tribute to it under its patents."

The defendants urge that these allegations be stricken upon the ground that the alleged bribery by Universal was not within the scope of the conspiracy pleaded, nor was it a reasonably foreseeable consequence thereof.

The defendants refer to Paragraph 64 of the complaint to substantiate their contentions; and they argue that the scope of the conspiracy as set forth in those allegations or revealed in any other part of the

complaint fails to embrace the charges of bribery and corruption pleaded in Paragraphs 132 *et seq.*

Generally, the charge is that these defendants entered into a conspiracy to monopolize the trade and commerce in the licensing of patented cracking processes by creating and controlling a patent pool, eliminating competition among themselves, and using the economic force acquired through the patent pool to exclude others from the business of licensing patented cracking processes and of designing and installing cracking processes, whether or not patented.

Paragraph 64, quoted before, further particularizes the charge, and paragraph 65 then goes on to allege the specific means by which the defendants accomplished the objects sought to be obtained.

These means, called in the complaint "acts, arrangements, and contracts", consist among other things, of the institution by various defendants of a multiplicity of infringement suits against users of the Winkler-Koch still; the use of unfair, illegal, oppressive and unconscionable methods of competition against the plaintiff; concentration of licensing rights; and settlements of suits among the defendants, all in addition to the alleged bribery in the *Root* case and the subsequent use of that case as an instrument to force the plaintiff to withdraw from the business.

Actually, the complaint does not charge that the bribery was committed pursuant to the conspiracy among the defendants. The allegation found in Paragraph 135 that "Universal's said fraud in the *Root* case was a step taken by *it* in furtherance of the objects of the conspiracy among the defendants" seeks to connect the others to the deed. There is no charge that the defendants, other than Universal, had knowledge of, participated in, or ratified, the act. It is a general rule, however, that co-conspirators are vicariously responsible for acts committed in furtherance of the joint venture, subject to the limitation that "* * * the acts so imputed must be in execution of the venture as all understand it * * *." *U. S. v. Crimmins*, 123 F. (2d) 271, 273, (C. C. A. 2nd, 1941); *U. S. v. Peoni*, 100 F. (2d) 401, (C. C. A. 2nd, 1938); *Pinkerton v. U. S.*, 328 U. S. 640.

It is this limitation of the general rule which the defendants assert at this time.

[*Pleading Embraces Bribery Charges*]

However, I have come to the conclusion that the pleading is sufficient to embrace the bribery charges.

The complaint alleges a conspiracy to create and control a patent pool. The methods by which the patent pool was to be controlled are found in the various "acts, arrangements and contracts" described in the complaint. One of the methods charged was the institution of a multiplicity of infringement suits designed to pressure those who had refused to take a license under the patent pool. One of these suits was the *Root* case. If it may be taken as true that the defendants were part of the conspiracy to create and control the patent pool by the methods charged, it may not be said as a matter of law that the prosecution of the *Root* case to a successful conclusion through bribery was not within the conspiracy pleaded or a foreseeable consequence of it.

The motion to strike Paragraphs 132-136 and the last sentence of Paragraph 139, is denied.

[*Settlement of Suits*]

Paragraphs 138, 139, 111 and portions of Paragraphs 114, 116 and 118 of the complaint refer to various matters to which the defendants object, including a settlement between Universal and Root Refining Company following the proceedings in the Court of Appeals for the Third Circuit, as well as dismissals of suits begun by certain defendants against strangers to the instant case.

It appears that these allegations have been inserted in the complaint as admissions of the truth of the findings of the Circuit Court for the Third Circuit in the *Root* proceedings; and, with respect to the dismissals, as evidence of the bad faith character of a multiplicity of suits allegedly brought by certain defendants pursuant to the conspiracy.

It is a generally accepted rule that a settlement or compromise and particularly with a stranger of a dispute arising out of the same facts involved in a subsequent suit is not evidence as an admission of liability or of any other fact involved in the prior suit. *Hawthorne v. Eckerson Co.*, 77 F. (2d) 844, (C. C. A. 2nd, 1935); *National Battery Co. v. Levy*, 126 F. (2d)

33, (C. C. A. 8th, 1942), cert. den. 316 U. S. 697; *Wigmore on Evidence.* § 1061; *Wigmore,* Supp., 1934, p. 460; 31 C. J. S. *Evidence,* § 292, p. 1055.

The settlement alleged in Paragraph 138 between Universal and the Root Refining Co., a stranger to the instant case, offends this rule, is therefore impertinent, and should be stricken.

[*Dismissal of Suits*]

The dismissals alleged present a different problem.

The plaintiff, although submitting no authority in support of their inclusion, nevertheless insists that the allegations are proper as evidence of the bad faith of the defendants in instituting the many suits.

Ordinarily, the only penalty for instituting unsuccessful litigation is the imposition of costs, except in certain types of cases such as malicious prosecution where a prior favorable verdict is an essential element of the cause of action, or an attachment proceeding where damages for wrongful seizure are allowed.

[*Allegation of Mala Fides Struck Out*]

To permit the assertion of these dismissals here as evidence of *mala fides* in commencing the suits would, it seems to me, give unprecedented significance to them, and serve as a novel *caveat* to potential good faith litigants who might contemplate withdrawals for one reason or another.

Further, assuming, *arguendo,* that evidence of the institution of a multiplicity of suits is admissible to prove a conspiracy, I fail to see how the good or bad faith of the parties gives force to the charge.

It is well established that acts committed in effectuation of a conspiracy need not be illegal in themselves; indeed, the acts may be wholly innocent, yet be part of, and tend to accomplish, an illegal conspiracy. *U. S. New York Great A. & P. Tea Co., Inc.,* 137 F. (2d) 459, (C. C. A. 5th, 1943), cert. den. 320 U. S. 783; *Lynch v. Magnavox Co.,* 94 F. (2d) 883, (C. C. A. 9th, 1938); *U. S. v. Reading Co.,* 226 U. S. 324; *U. S. v. Patten,* 226 U. S. 525.

The assertion of bad faith here stands in the same light. It adds nothing to the acts alleged, and evidence of it would be highly prejudicial to the defendants, in addition to being impertinent.

The first sentence of Paragraph 139, Paragraph 111, and the offensive portions of 114, 116 and 118 should be stricken.

[*Headlines Helpful to Court*]

Finally, the defendants move to strike the headings in the complaint of which there are fifteen. For example, Paragraph 1 is headed by the caption, "THE PARTIES", and Paragraph 13 by "PURPOSE OF ACTION, JURISDICTION AND VENUE."

Technically, these "headlines" violate Rule 10 (b), F. R. C. P., but they are commonly used in bulky pleadings, and are helpful to the Court in directing its attention to their content. They can in no way prejudice the defendants here, pleadings not being in evidence, and may remain in the complaint.

The defendants move for a bill of particulars pursuant to Rule 12 (e), F. R. C. P. in order that they might prepare their answer. Specifically, they seek facts allegedly essential for pleading applicable statutes of limitations. Their request is composed of five items which seek: (1) Identification of prospective customers claimed to have been dissuaded from doing business with plaintiff; (2) the times when such business was solicited and refused; (3) the specific means by which each such prospective customer was dissuaded from doing business with plaintiff; (4 the alleged damages by years; and (5) the alleged damages with respect to each of the divisions of plaintiff's business.

The plaintiff resists the application upon the ground that the defendants may properly plead the statutes of limitations upon the allegations of the complaint without further particularization. It contends that the complaint sets forth a single cause of action, arising in Kansas where plaintiff at all times had its property and place of business and where it suffered the losses, and that the conspiracy has continued and cannot, therefore, be barred.

This argument misconceives the nature of the action.

As indicated before, the complaint alleges numerous and diverse methods and means by which the defendants carried out the conspiracy. Each alleged act, if true, constitutes a separate effectuation of the conspiracy and is actionable. *Foster v. Kleiser Co. v. Special Site Sign Co.,* 85 F. (2d) 742, (C. C. A. 9th, 1936), cert. den. 299 U. S.

613; *Momand v. Universal Film Exchange*, 43 F. Supp. 996, (D. Mass., 1942). And the statute of limitations runs from the dates of these alleged acts, when each invasion of right and resulting damage occurred. *Foster v. Kleiser v. Special Site Sign Co., supra; Momand v. Universal Film Exchange, supra; Momand v. Paramount Pictures Distributing Corp.*, 36 F. Supp. 568, (D. Mass. 1941); *Bluefield's S. S. Co., v. United Fruit Co.*, 243 Fed. 1, (C. C. A. 3rd, 1917), error dismissed per stipulation 248 U. S. 595; cf. *Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co.*, 73 F. (2d) 333, (C. C. A. 6th, 1934), cert. den. 294 U. S. 719.

Initially, the applicable statute of limitations would be the one of the State wherein the action is pending, no Federal statute of limitations having been enacted for suits under the Sherman Act. 28 U. S. C. A. 725; *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; *Seaboard Terminal Corp. v. Standard Oil Co. of New Jersey*, 24 F. Supp. 1018, (S. D. N. Y. 1938), aff'd on opinion below, 104 F. (2d) 659, (C. C. A. 2nd, 1939). But Section 13 of the New York Civil Practice Act provides as follows:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon such cause of action, except that where the cause of action originally accrued in favor of a resident of this state the time limited by the laws of this state shall apply."

The plaintiff herein is a foreign, not a domestic corporation and would, therefore, not be a resident of the State, and the statute of limitations of the jurisdiction where the cause of action arose would be applicable, if such statute be shorter than that of New York.

The allegations of the complaint in some respects are rather general. As to these, defendants are entitled to some particulars so that they may plead the applicable statutes of limitations.

I am mindful of the fact that bills of particulars have lost favor in Federal procedure.* See Moore's *Federal Practice*, Cumulative Supplement to Vol. 1, pages 295-314. But I believe that the present situation is a proper case calling for them under the Rule as now interpreted. *Mendola v. Carborundum Company*, 26 F. Supp. 359 (W. D. N. Y. 1938); *Alden-Rochelle, Inc. v. A. S. C. A. P.*, 3 F. R. D. 157 (S. D. N. Y. 1942); *Frederick O. Muller, Inc. v. Dun Bradstreet, Inc.*, 4 Fed. Rules Serv., 12 e.21, Case 1 (S. D. N. Y. 1940); *Klein v. Debway Hats, Inc.*, 2 F. R. D. 356 (S. D. N. Y. 1942).

Accordingly, the motion with respect to items 1 and 2 is granted. The answers to these items should be sufficient to defendants so that any applicable limitations statutes might be pleaded. The other items do not appear to be necessary for this plea, and are denied.

The defendants' application for an extension of 60 days to answer is denied. If enlargement of time becomes necessary later, the defendants may apply for such relief upon proper showing.

All the rest of defendants' motions are denied.

Settle order in accordance herewith.

[¶ 62,399] W. A. Shaeffer Pen Company v. Ray Barrett, et al.

In the Chancery Court of the First Judicial District of Hinds County, Mississippi. No. 38,643. March 12, 1949.

Mississippi Fair Trade Act

Injunctive Relief to Enjoin Price Cutting Denied—Constitutionality of Fair Trade Act—Conflict With Antitrust Laws.—In denying an injunction to restrain retailers from selling commodities below the price fixed by the manufacturer as provided for by the Fair Trade Act on the grounds that the Act, by its own terms, precluded this type of relief the Court also passed on the Act's constitutionality. It was held not only unconstitutional and inimicable to the public welfare and violative of the public policy and fundamental rights of the people but also repugnant and hostile to the public interest in the

* The new Federal Rules of Civil Procedure to become effective sometime after September 1, 1947, abolishes them.

right of free trade and legitimate competition in business. It was declared to be in such direct conflict with the state Antitrust laws that both could not be enforced.

See the Mississippi Fair Trade Act, Vol. 2, ¶ 8444.

STRICKER, V. J.: Coming on this day to be heard an application by the Complainant for a temporary injunction restraining the Defendants from selling certain commodities below the price fixed by the manufacturer on the alleged authority of what is designated as the Fair Trade Act of this State, and on defendants right reserved, with permission, to file such pleadings as might be proper later in the hearing to bring all pertinent questions in issue before the Court, and the Court desiring and directing argument on the questions,

1. As to the validity of said Act, in view of the Constitution and the public policy of this State, and

2. As to, at all events, the propriety and legality of an injunction in such case, and within the express terms of the Act itself,

And the Court having heard argument of Counsel on both sides, and having considered said matter, with reference to the two basic propositions above set forth, is of the opinion,

1. That said Act is not only unconstitutional and inimical to the public welfare and violative of the public policy and fundamental rights of the people, but that it is repugnant and hostile to the public interest in the right of free trade, and legitimate competition in business, and

2. That it is in direct conflict, and repugnant, to the Anti-Trust laws previously existing in this State, and in such conflict therewith that both cannot consistently be enforced, and

3. That said Act, by its own terms, prescribes the procedure for its violation, and limits such complaints to actions at law for damages, thereby precluding the injunctive process from applying under any circumstances.

Wherefore, it is ordered that the application for said injunction or restraining order be, and is, hereby denied.

ORDERED, ADJUDGED AND DECREED, this the 12th day of March, 1949.

[¶ 62,400] Westinghouse Electric Corporation v. Bulldog Electric Products Company.

In the United States District Court for the Northern District of West Virginia. Civil Action No. 229-W. January 31, 1949.

Sherman Antitrust Act

Patent Monopoly—Price Control of Patented Article—Misuse of Patents as a Defense. —A complaint filed by an electrical manufacturing company alleged that its licensee was infringing certain patents that it owned for the manufacture of circuit breakers. A motion for summary judgment of dismissal was allowed when it was found that the licensor had misused its patents. The Court refused to uphold schedules of prices and terms in the license agreement prohibiting the licensee from selling the patented product any cheaper than the licensor because it appeared that the plaintiff had granted a license for the manufacture of its patented circuit breaker to another company holding a patent for an improvement in the commercial application of the plaintiff's product in exchange for a similar grant. Through such an exchange of patents an improved circuit breaker known by a different name was manufactured. The license agreement sued upon covered the new product which was the result of this exchange of patents. In declaring that two or more patent owners can not combine their patents and issue licenses under the combination and restrict the terms at which the resulting article can be sold, the Court held the patent license sued upon to be in restraint of trade and dismissed the action.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201.

For plaintiff: James M. Guiher, Steptoe & Johnson, Clarksburg, West Virginia; Victor S. Beam, Thomas J. Byrne, New York, New York; Ralph H. Swingle, O. H. Eshholz, Pittsburgh, Pa.

For defendant: Charles P. Mead, Goodwin, Nesbitt, Spillers & Mead, Wheeling, West Virginia; Daniel G. Cullen, Butzel, Levin, Winston, Youngjohn & Quint (Jacob L. Keidan) Detroit, Michigan.

[*Review of Proceedings*]

BAKER, District Judge: On November 10, 1943, the plaintiff, then known as Westinghouse Electric & Manufacturing Company, filed its complaint against Bulldog Electric Products Company, alleging that the defendant was infringing certain patents owned by the plaintiff for the manufacture of circuit breakers. A circuit breaker is a device for cutting electric current out of a circuit when the power load becomes dangerously high. The basic principle of the device had been known and used for years.

In the early 1930s, the Westinghouse Company decided that it would be advantageous to manufacture a small circuit breaker which would retail at a low enough price to be used in private homes and small commercial buildings in place of fuses then and still commonly in use. The circuit breaker is more convenient to use than a fuse, and does not require the user to keep on hand a supply of replacement fuses. The Westinghouse Company was issued certain patents under which the device, known as the AB circuit breaker, could be manufactured.

At about the same time, the Square D Company had pending applications for patents of a similar nature. Interferences arose in the patent office between Westinghouse and Square D in connection with the latter's applications. These were resolved by Square D's conceding priority to Westinghouse. At the same time, Westinghouse gave Square D a license under its patents, and received from Square D a license under Square D's patents. The Square D patents covered an improvement in the commercial application of the Westinghouse patents and, by use of both patents, a circuit breaker, known as the Multibreaker, could be manufactured.

It was agreed that Westinghouse would issue Multibreaker licenses under its patents, and the royalties derived therefrom would be split between Westinghouse and Square D in the proportion of sixty to forty, if Square D issued non-assertion agreements to the Westinghouse licensees. For the purposes of this case, I can see no distinction whatever between a non-assertion agreement and a license. Westinghouse issued several licenses under this contract, and Square D issued non-assertion agreements to the licensees involved. In most instances, the non-assertion agreement was issued practically simultaneously with the Westinghouse license. The license agreements provided, among other matters, that the licensee could not sell the patented product for a cheaper price than that charged by Westinghouse, and Westinghouse, from time to time, issued a schedule of prices and terms, which the licensees were required to observe.

On January 10, 1944, the defendant filed a motion for summary judgment of dismissal upon the grounds that the patents in suit were being illegally used as a part of a combination in restraint of trade. This motion was overruled May 23, 1944, because I felt that the doctrine of *United States v. General Electric Co.*, 272 U. S. 476, permitted the type of price control complained of in this case. On July 1, 1944, the defendant's answer was filed.

After several other steps and hearings, it came to the attention of the court that there was a suit pending in the Eastern District of New York between these same parties, which involved these same patents. The New York suit had proceeded much further than the one in this court. There was an indication that the New York litigation would settle many, if not all, of the issues before me and, since it had started before the case here, I stayed the proceedings in this District on March 2, 1945. There was no objection by either party to this suit to the stay. On May 17, 1948, after the proceeding in the Eastern District of New York had terminated, both in the district and appellate courts, this stay lifted, and the case here resumed.

The defendant again filed a motion for summary judgment of dismissal, alleging generally the same grounds it had urged in its prior motion. However, in the meantime, two decisions had been handed down by the United States Supreme Court, clarifying that Court's ruling in the *General Electric* case and, in my opinion, materially modifying what I had thought was the rule of that decision. These cases were *United States v. Line Material Co.*, 333 U. S. 287, 92 L. Ed. 510, and *United States v. United States Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 552. It might be noted here parenthetically that the lower courts apparently agreed with my interpretation of the *General Electric* decision. The basic ruling in these cases, reduced to its simplest terms, is, in effect, that while under the

General Electric decision one patent owner may issue a license to one licensee and, as a condition of that license, restrict the price which the licensee must charge for the finished product, two or more patent owners can not combine their patents and issue licenses under the combination and restrict the terms at which the resulting article can be sold. It is the contention of the defendant that, in the instant case, we have a combining of patents by different owners, and the use of the combined patents in a manner that fixed prices, in violation of the Sherman Anti-Trust law. The plaintiff contends that it has not used its patents illegally or that if there has been a misuse in some instances, that misuse has been purged.

I do not deem it necessary in this memorandum to go into all the arguments and authorities advanced by the respective parties. Each party knows the positions taken and authorities cited in support therefor. I deem it sufficient here to say that it is my opinion the plaintiff has been guilty of a misuse of its patents; that it is, therefore, without clean hands in this court; that this situation has not been purged; and that the instant proceeding must be dismissed. In accordance therewith, I make the following findings of fact and conclusions of law:

[*Findings of Fact*]

1. On July 1, 1934, plaintiff entered into certain agreements with Square D Company of Detroit, Michigan, and Cutler-Hammer, Inc., of Milwaukee, Wisconsin, wherein plaintiff granted non-exclusive and non-divisible licenses, involving patents in suit, to said companies under patents of plaintiff to make and sell the AB type of circuit breaker. Each of said licensees was obliged to pay a 5% royalty to plaintiff. The license grants were conditioned on the said licensees selling the AB type circuit breakers at prices no more favorable to customers than those established and followed by plaintiff in making its sales.

Said sales price condition of the grant has continued to be and now is in effect.

In such license agreements, Square D Company and Cutler-Hammer, Inc., agreed not to assert against plaintiff any of their patents; and Westinghouse agreed to be bound to the price schedules published by it for minimum thirty-day periods.

2. After the development of the Multibreaker type circuit breaker, plaintiff, by agreement with Square D Company dated July 1, 1936, and by agreement with Cutler-Hammer, Inc., dated October 1, 1936, amended its said agreements dated July 1, 1934, with said Square D Company and Cutler-Hammer, Inc., to include the said Multibreaker in the license grant. Said agreements were further amended to include a new Schedule C of patents, including patents in suit, which were not listed in said original agreements for said AB breakers.

The said amending agreements of July 1, 1936, and October 1, 1936, respectively, inserted an additional price control provision making the grant for the Multibreakers conditional on the licensees selling Multibreakers at prices no more favorable to the customers than those followed by plaintiff.

By letter dated April 9, 1949, plaintiff irrevocably waived said selling price control provision of the licensees applying to Multibreakers and withdrew and cancelled every price schedule applying to Multibreakers.

No such letters were sent out as to the price control provisions of the AB agreements, these remaining in effect, nor has plaintiff cancelled its right to fix prices charged by Frank Adam Electric Co., in its sale of its breakers.

The said 1936 amendments did not change the above 1934 agreements in any way as to the AB devices, but merely expanded the agreements to cover the Multibreakers and additional patents of Westinghouse. These price control provisions provided that plaintiff would not change its prices for Multibreakers without first giving the licensees thirty-days notice.

The non-assertion clauses from Square D Company and Cutler-Hammer, Inc., in favor of plaintiff apply to the Multibreakers as well as to the AB breakers.

As to Multibreakers, the royalty rate to Square D Company was only 2½%, but as to AB breakers, the royalty rate to Square D Company remained 5%. The Cutler-Hammer, Inc., royalty, as to AB breakers, and Multibreakers as well, was 5%.

3. That on July 1, 1936, a license agreement was entered into between said Square D Company and plaintiff, whereby plaintiff was granted a non-exclusive and non-divisi-

ble license to manufacture, use and sell Multibreakers under inventions of certain applications for patents of licensor, Square D Company, which were later filed and subservient to the dominant patents of plaintiff covering Multibreakers. Said license is still in effect. Under said license plaintiff was obligated to pay to the licensor, Square D Company a 2½% royalty for devices made and sold by plaintiff embodying inventions, the subject of applications for patents identified in said license.

It was also agreed that if licensor, Square D Company, should in the future grant a non-assertion under certain of its patents to any licensee of plaintiff for the manufacture, use and sale of Multibreakers, plaintiff would pay to Square D Company 40% of the royalty received by plaintiff from such Multibreaker licensees as have been granted the non-assertion.

4. Plaintiff issued Multibreaker licenses to Cutler-Hammer, Inc.; to Trumbull Electric Mfg. Co.; to Colt's Patent Fire Arms Mfg. Company (now Federal Electric Company); and Arrow-Hart & Hegeman Electric Co.

Substantially simultaneously, Square D Company issued non-assertions to these same companies, and in accordance with said Agreement of July 1, 1936, a copy of each non-assertion from Square D Company to each of plaintiff's Multibreaker licensees was sent by Square D Company to plaintiff.

Royalties received by plaintiff for Multibreakers have been divided with Square D Company in accordance with the provisions of said agreement of July 1, 1936.

Multibreaker licenses have been issued by plaintiff only to those having such non-assertion agreements from Square D Company, and non-assertions have been issued by Square D Company only to those having Multibreaker licenses from plaintiff. Each such non-assertion from Square D Company to a Multibreaker licensee of plaintiff referred to the corresponding Multibreaker license from plaintiff and was limited to the period during which the corresponding Multibreaker license from plaintiff was effective.

The Colt's Patent Fire Arms Mfg. Company license from plaintiff for Multibreakers further provided that Colt's Patent Fire Arms Mfg. Company would not assert its patents against plaintiff or the plaintiff's licensees for Multibreakers. The Colt's license from plaintiff was transferred to Federal on July 1, 1944, and the Square D Company non-assertion to Federal of March 21, 1946, in recognition of that fact, was retroactive to the date of that transfer, July 1, 1944.

The plaintiff's licenses for Multibreakers were limited to designs manufactured by plaintiff or Square D Company, a limitation abandoned October 1, 1942.

Patents in suit are included in each of plaintiff's Multibreaker licenses.

From time to time after the grant of the said licenses plaintiff furnished schedules of its prices to its licensees, as provided for in the price control provision in each of plaintiff's licenses. These schedules of prices were followed by all of the licensees.

The aforesaid Multibreaker licenses issued by plaintiff and the non-assertion letters given by Square D Company remain in effect, except as herein otherwise indicated.

5. Such licenses of paragraph 4 above were on the same terms as those contained in the license as to Multibreakers given to Cutler-Hammer, Inc., as set forth in the foregoing finding numbered "2."

The Multibreaker is manufactured and sold by plaintiff and by Square D Company and by the four licensees under the subservient patents of Square D Company and patents of plaintiff, and are referred to in the Multibreaker licenses of plaintiff as "Latching Contact Bar Type Circuit Breakers." The various dominant patent claims of plaintiff relating to Multibreakers were involved in Patent Office priority interference contests resulting in the dominant patents issuing to plaintiff as a result of concessions of priority from Square D Company to plaintiff.

6. Plaintiff granted a license, dated January 2, 1947, under certain of its patents involved in this suit, to the Frank Adam Electric Co., for the manufacture and sale of the commercial Frank Adam "Type AC" and "Thermag" circuit breakers, but plaintiff did not issue any price schedules for such breakers.

7. In May, 1944, plaintiff demanded price maintenance by Bulldog as a condition of any license from plaintiff to Bulldog, and no indication of a withdrawal of such demand was given by plaintiff to Bulldog until July 1, 1948, at a hearing before the

Court, upon question addressed to plaintiff by the Court.

[*Conclusions of Law*]

1. Plaintiff's price control program, as to AB and Multibreaker circuit breakers, constitutes combination in restraint of trade.

2. The aforesaid combination in restraint of trade involves the patents in suit.

3. The aforesaid combination in restraint of trade constitutes a misuse of the patents in suit.

4. Plaintiff has made no showing of the termination or any modification of that part of the combination which relates to the control of the prices of AB circuit breakers.

5. Plaintiff has not shown the abandonment and full dissipation of that part of the combination which relates to the control of the prices of Multibreakers.

6. Plaintiff has not shown complete abandonment of misuse of the patents in suit or full dissipation of the consequences of that misuse.

7. Defendant's Motion for Summary Judgment dismissing the complaint shall be granted by suitable order of this Court.

Counsel are requested to attempt to agree upon such order. If such agreement can not be reached, each side is directed to submit a proposed order.

[¶ 62,401] United States of America v. E. I. du Pont de Nemours and Company.

In the United States District Court for the District of Columbia. Civil Action No. 5017-47. April 1, 1949.

Action for an injunction against alleged violations of the antitrust laws. On defendant's motion for a change of venue to the District of Delaware. Motion granted.

Sherman Antitrust Act

Motion for Change of Venue Granted—Discretion in Court To Change Place of Trial. —In a civil action brought by the government for an injunction to restrain alleged attempts to monopolize trade and commerce in cellophane, the defendant's motion made under Section 1404 (a) of Title 28, United States Code, was granted since a transfer of the place of trial would be both in the interest of the convenience of witnesses and in the interest of justice. The statute assumes that the action has been instituted in a proper district, and grants to the court discretion to change the place of trial to some other district in which the action might have been originally commenced.

See the Sherman Act annotations, Vol. 1, ¶ 1610.275.

For plaintiff: James L. Minicus, Washington, D. C.

For defendant: John Lord O'Brian, Gerhard A. Gesell, Washington, D. C.

Opinion

HOLTZOFF, A., District Judge: This is a civil action brought by the United States for an injunction against E. I. du Pont de Nemours and Company, to restrain the defendant from continuing certain alleged violations of the antitrust laws. The activities of which the Government complains are claimed to consist of attempts to monopolize trade and commerce in cellophane. The defendant moves for a change of venue to the District of Delaware.

[*Change of Venue Section*]

The motion is made under Section 1404 (a) of Title 28, United States Code, which became effective on September 1, 1948, and reads as follows.

> § 1404. Change of venue.
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

This provision introduced a new principle into Federal judicial procedure. It is a comprehensive, general statute applicable to all civil actions without exception. The innovation is salutary, as it enables the courts to make desirable adjustments as to places of trial, and puts plaintiffs and defendants more nearly on a plane of equality

in those situations in which an action may be brought in any one of several districts. Previously, the final choice of the jurisdiction lay entirely with the plaintiff. This result obviously involved an element of unfairness, which the new statute endeavors to meet.

[*Proper District Assumed*]

Manifestly, the general provision relating to change of place of trial, does not affect, and in turn is not restricted or limited by, and statutes relating to venue, — either general venue statutes or special statutory provisions relating to venue in actions of specified types. The new provision assumes that the action has been filed in a jurisdiction where venue may be properly laid, for if it has not been so brought, it is subject to dismissal. The new statute assumes that the action has been instituted in a proper district, and grants to the court discretion to change the place of trial to some other district in which the action might have been originally commenced. In other words the statute assumes that venue exists where suit is filed. The new provision begins where the venue statutes leave off, and empowers the court to change the venue. It seems clear that there is no basis for excepting Government antitrust actions from the purview of the new statute, as obviously the Congress intended that it should be comprehensive and all inclusive in its scope. *United States v. National City Lines,* 80 F. Supp. 734.

[*Corporation Organized Under Laws of Delaware*]

There is only one defendant in this action. It is a corporation organized under the laws of the State of Delaware. Its principal executive and business offices are located in Wilmington, Delaware. The activities challenged by the Government are within the purview of the so-called "rayon department" of the defendant. The administrative and executive offices of this department are likewise located at Wilmington, as are the defendant's main offices. The defendant's plants are maintained in Delaware as well as in several other States, but none is located in the District of Columbia. The defendant does not manufacture any cellophane in Washington. The defendant does transact some business in the District of Columbia, and is subject to service of process in this jurisdiction.

[*Witnesses and Records Located in Delaware*]

The officers and employees of the defendant, who will be called as witnesses, reside in or near Wilmington. None of them resides in the District of Columbia. Voluminous files and records will be necessary at the trial and all of them are located at Wilmington, Delaware. Counsel for the plaintiff claims that the Government will have several witnesses who are Government officers residing in the District of Columbia, but there is no contention that the number of these witnesses exceed, or even equal, the number of witnesses located in Wilmington. The Government's principal argument seems to be that Washington is within easy reach of Wilmington, insofar as Wilmington witnesses are concerned, and that as concerns other witnesses, it is at least as easy for them to travel to Washington, as Wilmington.

[*No Reason for Trial in D. C.*]

No reason is perceived why this action should be brought and tried in the District of Columbia. Manifestly, it does not properly belong here. Delaware is the proper jurisdiction, even though technically venue may also be laid in the District of Columbia, as well as in a number of other districts. The convenience of witnesses clearly predominates in favor of the District of Delaware, as appears from the foregoing summary of facts.

[*Preferential Position of Government Modified*]

Until recently, in civil and criminal proceedings under the antitrust laws, as well as in criminal conspiracy cases, the Government had the final choice of forum, since in most cases of these types it is possible to justify venue in any one of several districts. Government counsel are not to be criticized for exercising the right of selection that the law gave them. Nevertheless, it has been recognized by many that the existence of this preferential position of the Government was inherently unfair and needed modification in order that the Government and defendants might approach some degree of equality in this respect and that the defendants would have some rights in this matter.

This undesirable situation was rectified in respect to criminal cases by Rule 21(b)

of the Federal Rules of Criminal Procedure, which authorizes the court on defendant's motion to transfer a proceeding to another district in the interest of justice, if the prosecution might originally have been instituted in that other district. The notes of the Advisory Committee concerning this Rule contain the following comment:

> "The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court."

Section 1404(a), Title 28, United States Code, which became effective on September 1, 1948, among other things, effected a similar change in respect to Government civil cases. As stated above, it is comprehensive in its nature and covers all civil actions, irrespective of the nature of the parties, or of the subject matter.

There is another vital consideration that weighs heavily with this court in determining whether the requested transfer would be in the interest of justice. In *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, Mr. Justice Jackson observed:

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin."

True, he made this observation in discussing the doctrine of *forum non conveniens*. These comments are, however, equally applicable in determining whether a change of venue would be in the interest of justice. This Court has an exceedingly heavy docket. While its criminal calendar is current, its civil docket is about 12 or 13 months in arrears, that is, the time between the date a case is placed on the calendar and the date on which it is reached for trial in regular course, is about 12 or 13 months. This situation is caused by the peculiar and unique jurisdiction of the United States District Court for the District of Columbia. Due to the presence of Government agencies in Washington, there is an unusually heavy volume of Federal litigation. Due to the fact that the District of Columbia is a Federal area, this Court has jurisdiction of cases that elsewhere would be tried in State courts. Thus, all felonies and all civil cases involving more than $3,000, as well as matrimonial actions, probate of wills, administration of decedents' estates, and lunacy proceedings come before this court. Every judge in this district sits continuously from the opening of the court term in the fall until the last day of June, with the exception of a few days' recess at Christmas and Easter. Even during the summer, the court continues in session without interruption but on a curtailed schedule, the judges rotating for summer assignments.

[*Prejudice to Local Litigants*]

It is stated by counsel that the trial of this case would take six to eight weeks, and possibly longer. In the light of the above mentioned circumstances, to immobilize a judge for one case for this long period would be highly detrimental to the remaining business of this court. It would cause the docket to fall further in arrears. Naturally, if this litigation legitimately belonged in this jurisdiction, it would have to be kept here in spite of this consideration. Manifestly, however, bringing the action in the District of Columbia is a pure artificiality. To try this law suit here would be unfair to local litigants, who are waiting to secure a trial of their cases, and who would be further delayed if this antitrust case were to be tried in the District of Columbia.

[*Trial Ordered to Be Transferred*]

In view of the foregoing circumstances, the court is of the opinion that a transfer of the place of trial of this case to the District of Delaware would be both in the interest of the convenience of witnesses and in the interest of justice. No reason is discernible, on the other hand, why it should be tried here.

Motion of defendant for a change of venue from the District of Columbia to the District of Delaware, is granted.

[¶ 62,402] United States of America *v.* The Borden Company et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 CR 360. April 6, 1949.

Sherman Antitrust Act

Dairy Business—Motion To Dismiss Indictment Denied.—In a criminal action charging eight dairy companies with conspiracy in violation of the Sherman Act, motions to dismiss the indictment on grounds that (1) the restraints alleged were in intrastate commerce and that (2) no substantial effect upon interstate commerce is directly alleged, are denied. The transactions complained of, namely, refraining from offering inducements to persuade customers to change from one defendant to another and refraining from soliciting other defendants' customers were held to have occurred "in commerce among the several states."

See the Sherman Act annotations, Vol. 1, ¶ 1630.210.

For plaintiff: Otto Kerner, Jr., Melville C. Williams, Chicago, Illinois.

For defendant Meadowmoor Dairies, Inc.: Charles M. Schaub, Chicago, Illinois.

For defendants Hunding Dairy Company, Western United Dairy Co., William R. Baruszak: Packard, Barnes, Schumacher, Gilmore & Van Ness, Chicago, Illinois.

For defendants Capitol Dairy Company & Hyman L. Freed: Isidore & Herbert B. Fried, Chicago, Illinois.

For defendants D. Cameron Peck, Bowman Dairy Co., Francis H. Kullman, Jr., & Walter F. Kettell: Leo F. Tierney & Donald M. Graham, Louis E. Hart & L. Edward Hart, Jr., Chicago, Illinois.

For defendants The Borden Company, O. O. Smaha, O. N. Koenig, H. H. Inglehart: Howard Neitzert & Lloyd S. McClelland, Sidley, Austin, Burgess & Harper, Edwin Clark Davis & Joseph A. Greaves, Chicago, Illinois.

For defendant American Processing & Sales Company: Campbell, Clithero & Fischer, Chicago, Illinois.

For defendants S. D. McGuire & Beloit Dairy Company: Leo F. Tierney & Donald M. Graham & Charles L. Stewart, Jr., Mayer, Meyer, Austrian & Platt, Chicago, Illinois.

Memorandum

BARNES, J. P.: This case came on to be heard on the motions of the defendants to dismiss the indictment.

Eight of the dairy companies doing business in the so-called Chicago area are charged by the indictment in this case with a conspiracy in violation of Section 1 of the Sherman Act. The conspiracy charged related to sales made by defendants to certain of their wholesale customers and certain named institutions. The conspiracy is alleged to have existed for approximately seven years. It is described as a conspiracy to allocate wholesale customers by (1) refraining from offering inducements to persuade customers to change from one defendant to another, (2) refraining from soliciting other defendants' customers unless such customers were dissatisfied, (3) refraining from soliciting other defendants' customers who had temporarily discontinued business or sold their business without the removal of the store fixtures, and (4) either not to bid or to bid more than the bid of the possible supplier of the thirteen named institutions.

[*Grounds of Motion*]

The grounds for the various motions are, generally, the same, and are as follows. (a) The restraints alleged were in intrastate commerce; (b) no substantial effect upon interstate commerce is directly alleged or demonstrated by facts alleged in the indictment; and (c) the indictment does not allege an unreasonable restraint of trade or allege facts which demonstrate such a restraint.

[*Motion Overruled*]

The court was inclined to think that the defendants' points "a" and "b" were well founded and was about to file a memorandum indicating that the indictment might be dismissed for those reasons when

the United States Court of Appeals for the Seventh Circuit announced its opinion in the case of *Standard Oil Company v. Federal Trade Commission* on March 11, 1949. In the court's opinion, the rationale of the decision of the court in that case requires the holding that the transactions complained of in the case at bar occurred "in commerce among the several states."

The motions to dismiss may be overruled and denied. Appropriate orders may be made, on notice.

[¶ 62,403] United States v. Bowman Dairy Company et al; United States v. The Borden Company et al.

In the United States District Court for the Northern District of the Eastern Division of Illinois. Nos. 48CR361, 48CR362. April 6, 1949.

Robinson-Patman Act

Secret Rebates—Attack on Constitutionality—Motion To Dismiss Denied.—Motions to dismiss indictments charging two milk companies with paying exclusive rebates to favored customers in violation of Section 3 of the Robinson-Patman Act were denied. The Court held that the transactions complained of occurred "in the course of commerce". While expressing doubt as to the constitutionality of the Statute, the Court resisted arguments as to the vague and indefinite nature of both Section 3 and the indictment and as to the unreasonable interference with freedom of contract resulting from enforcement of this Section and declared it inexpedient to determine constitutional questions upon a motion if there was likelihood that the production of evidence would make the answer clearer.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2219.

For plaintiff: Otto Kerner, Jr., Melville C. Williams, Chicago, Illinois.

For defendants Bowman Dairy Company et al.: Leo F. Tierney & Donald M. Graham, Louis E. Hart & L. Edward Hart, Jr., Chicago, Illinois.

For defendants Borden Company et al.: Howard Neitzert, Lloyd S. McClelland, Sidley, Austin, Burgess & Harper, Edwin Clark Davis, Joseph A. Greaves, Chicago, Illinois.

Memorandum

BARNES, J. P.: These cases are before the court on motions of the defendants to dismiss the indictments.

[*Violation Charged*]

Both indictments charge violations of that portion of Section 3 of the Robinson Patman Act, next hereinafter set forth:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity;"

[*Allegations*]

In No. 48CR361 it is alleged that Bowman Dairy Company by contract agreed to pay The Great Atlantic & Pacific Tea Company a certain lump sum rebate, discount and allowance and a continuing secret percentage rebate, discount and allowance on all its purchases of milk and cream subsequent to May 30, 1942, in consideration of the agreement of The Great Atlantic & Pacific Tea Company to continue to purchase milk and cream from the Bowman Dairy Company, that such rebates, discounts and allowances continued until March, 1948, and were not made available to competitors of The Great Atlantic & Pacific Tea Company.

In No. 48CR362 it is alleged that The Borden Company, by two separate contracts, agreed to pay The Great Atlantic & Pacific Tea Company and the Jewel Tea Company, Inc., respectively, secret percent-

age rebates, discounts and allowances in consideration of their agreement to continue to purchase milk and cream from The Borden Company, that these contracts were performed by the parties from about July 1, 1942, until March, 1948, and that such rebates, discounts and allowances were not made available to the competitors of The Great Atlantic & Pacific Tea Company or of the Jewel Tea Company, Inc.

[*Grounds of Motions*]

The motions of the defendants to dismiss are substantially alike. The grounds of the motion in No. 48CR362 are stated as follows:

"1. Section 3 of the Robinson-Patman Act (15 U. S. C. 13a) is so vague and indefinite that it violates the Fifth and Sixth Amendments to the Constitution of the United States.

"2. The enforcement of Section 3 of the Robinson-Patman Act (15 U. S. C. 13a) would constitute an unreasonable interference with freedom of contract in that the prohibitions of that section have no reasonable relation to any supposed evil to which such prohibitions may properly have been directed, all in violation of the Fifth Amendment to the Constitution of the United States.

"3. The indictment fails to charge an offense against the United States in that the alleged transactions complained of in the indictment were not in commerce or in the course of commerce as provided by Section 3 of the Robinson-Patman Act (15 U. S. C. 13a).

"4. The indictment is so vague, indefinite and uncertain that it fails to inform the defendants of the nature or cause of the accusation, in violation of the Sixth Amendment to the Constitution of the United States."

[*Constitutional Issue Raised On Motion*]

After studying the carefully prepared briefs of counsel for the parties and after listening to the oral arguments of counsel and reading the transcripts of such oral arguments, the court has finally concluded that, though it be beset with doubts as to the constitutionality of the statute in question and doubts as to whether or not the transactions complained of occurred "in commerce" or "in the course of commerce", the court should, nevertheless, heed the admonition of the Supreme Court of the United States as set forth in such cases as *Borden's Co. v. Baldwin,* 293 U. S. 194 to the effect that "It is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." It may appropriately be added that, in the court's opinion, the rationale of the decision of the United States Court of Appeals for the Seventh Circuit in *Standard Oil Company v. Federal Trade Commission,* rendered March 11, 1949, requires the holding that the transactions complained of in the cases at bar occurred "in commerce" or "in the course of commerce."

The motions to dismiss may be overruled and denied. Appropriate orders may be made on notice.

[¶ 62,404] Opinion of the Comptroller General of the United States.

Addressed to Mr. Gray, Administrator of Veterans' Affairs, Veterans' Administration, by Lindsay C. Warren, Comptroller General of the United States, B-84111, March 17, 1949.

Miller-Tydings Act

Contract Tender Below Established Prices—Acceptance by Government—Binding Contract Formed.—A retailer who offered to fill a government contract for bedspreads at a price below that established by fair trade agreements can not withdraw his bid after acceptance. A binding contract has been formed. There is no duty upon contracting officers of the Government to determine whether prices quoted by bidders conform to fair trade agreements.

See the Resale Price Maintenance Commentary, Vol. 2, ¶ 7288.

[*Issue*]

This Office is in receipt of a letter dated February 28, 1949, with enclosures, from the contracting officer, Veterans' Administration Hospital, Framingham, Massachusetts, wherein a decision is requested as to

whether the Abbott & Litchfield Company may be permitted to withdraw its accepted bid for the stated reason that the price specified therein is below that prescribed by the "Fair Trade Law" apparently the Fair Trade Act of August 17, 1937, 50 Stat. 693, 15 U. S. Code, section 1.

[*Facts*]

The Veterans' Administration Hospital, Framingham, Massachusetts, by invitation No. 49-336, requested bids—to be opened January 31, 1949—for furnishing 100 bedspreads to be Bates Fabrics No. 8670-8672, or equal. In response to the invitation, the Abbott & Litchfield Company submitted a bid dated January 28, 1949, wherein it offered to furnish Bates No. 8672 bedspreads for $4.68 each. The bid of the company being the lowest received—the only other bid having been submitted by Bates Fabrics, Inc., in the amount of $4.80 each—was accepted on January 31, 1949.

In a letter dated February 17, 1949, addressed to the Veterans' Administration Hospital, Framingham, Massachusetts, the company requested permission to withdraw its bid for the reason that "At the time we submitted the bid, we did not know anything about a Fair Trade Law which would prevent a dealer or jobber from selling these spreads below the established price of $5.17 each."

[*Law Applicable*]

Section 1 of the act of August 17, 1937, *supra,* relating to the illegality of contracts in restraint of trade provides, in substance, that nothing therein shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears the trade mark, brand, or name of the producer or distributor, when contracts or agreements of that description are lawful as applied to intra-state transactions under any statute, law, or other policy now or thereafter in effect in any State, Territory, or the District of Columbia in which such resale is made.

[*Duty on Party Who Bids*]

The bid of the Abbott & Litchfield Company appears to have been as intended at the time it was submitted. After acceptance of its bid by the Government, the company apparently concluded that its bid price was less than the price for which it had agreed with the manufacturer to sell the bedspreads. The matter of determining the price at which the bedspreads were to be offered to the Government was upon the bidder. The act of August 17, 1937, *supra,* does not impose any duty upon contracting officers of the Government to determine whether prices quoted by bidders are in conformity with the requirements of any agreements which the manufacturers and suppliers of the products may have entered into pursuant to said act. The matter of bidding is not the responsibility of the contracting officer of the Government, the duty of the contracting officer being to accept the lowest responsible bid meeting the requirements of the specifications.

[*Acceptance Consummates Valid Contract*]

The present record indicates that the acceptance of the bid of the Abbott & Litchfield Company was made in good faith, there being nothing on the face of the bid to indicate the existence of mistake and no error having been alleged by the company until after award. Consequently, there would appear to be no basis on which it could be held that the acceptance of the bid did not consummate a valid and binding contract.

[*Duty To Deliver at Price Specified*]

Accordingly, if Abbott & Litchfield Company fails to deliver the bedspreads at the price specified therefor in its bid and the bedspreads are procured from other sources, the excess cost, if any, should be charged to the company.

The contracting officer is not entitled to a decision—the contract having been awarded (Cf. 16 Comp. Gen. 565)—but since a decision in the matter appears necessary, it is being rendered to you.

The papers which accompanied the letter of February 28, 1949, are transmitted herewith.

[¶ 62,405] United States v. The Sherwin-Williams Company et al.; U. S. v. The E. I. du Pont de Nemours & Company et al.

In the United States District Court for the Western District of Pennsylvania. No. 12789 Criminal, No. 12790 Criminal. April 15, 1949.

Sherman Antitrust Act

Alleged Conspiracy in Paint and Varnish Industry—Motion To Dismiss Indictment Denied—Motion for Bill of Particulars Denied.—In criminal prosecutions charging corporations and individuals engaged in various phases of the paint and varnish industry with conspiracy to violate the Sherman Act, motions to dismiss the indictments and in the alternative for a Bill of Particulars made by certain of the defendants were denied. It was held that the indictments were drawn in compliance with Rule 7 (c) of the Federal Rules of Criminal Procedure and satisfy the Constitutional requirements by charging the offense with such definiteness and certainty as to inform the defendants of the nature and the cause of the accusations, enabling them to prepare their defenses. From the nature of the offense charged it is apparent that the negotiations, transactions, and dealings between the defendants and others are complicated, involved and voluminous, and to restrict the Government in presenting its case seems to be unwarranted. The defendants' motion seek, in great detail, matters relating to overt acts and evidence. These are not proper demands of a bill of particulars in this conspiracy charge under the Sherman Act.

See the Sherman Act annotations, Vol. 1, ¶ 1630.225, 1630.355.

For plaintiff: Edward R. Kenney, Special Assistant to the Attorney General.

For defendants E. I. du Pont de Nemours & Company and Henry Lackey: Earl F. Reed, Pittsburgh, Pa.; William C. O'Neill, Pittsburgh, Pa.; Charles A. Horsky, Washington, D. C.; Orm W. Ketcham, Washington, D. C.

For defendant Columbus Varnish Company and Walter S. Hanna: Obed K. Price, Pittsburgh, Pa.

For defendant The Glidden Company and E. C. Shurtleff: John A. Duncan, Clifton M. Kolb, Cleveland, Ohio.

Opinion

[*Parties*]

McVicar, N. J.: Indictments at numbers 12789 and 12790 charge seventeen corporate defendants and twenty-one individual defendants engaged in various phases of the paint and varnish industry with conspiracy to violate the Sherman Anti-Trust Act, Title 15 U. S. C. A. 1.

E. I. Dupont De Nemours & Co., Columbus Varnish Co., and The Glidden Co., corporate defendants, and individuals, Henry Lackey, Walter S. Hanna and E. C. Shurtleff have moved to dismiss the indictments or in the alternative for a Bill of Particulars. The other defendants have pleaded *nolo contendere* and paid fines pursuant to sentences of this court.

[*Nature of Charges*]

Indictment No. 12789 charges certain defendants with conspiracy to fix and control prices of paints, varnishes, enamels and lacquers in restraint of interstate commerce, and indictment No. 12790 charges certain defendants with conspiracy to fix and control prices of wood finishes, the charges are essentially the same in the two indictments. Since the grounds urged in support of the motions are the same, both cases will be disposed of by this opinion.

The indictments charge that beginning in or about the year 1937 (the date in number 12790 is 1940) and continuing thereafter to the date of the return of this indictment, the defendants have engaged in a combination and conspiracy to fix, stabilize, maintain and control the prices, discounts, allowances, and terms of sale of paints, varnishes, enamels and lacquers in restraint of interstate trade and commerce; and that the combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants. The indictments set forth the substantial terms of the alleged agreement and concert of action.

[*Grounds of Motions To Dismiss*]

The defendants' motions to dismiss allege that the indictments are in violation of the Fifth and Sixth Amendments to the Constitution of the United States and do not meet the requirements of Rule 7 (c) of the Federal Rules of Criminal Procedure.

The Fifth Amendment provides:

> ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

Rule 7 (c) of F. R. Criminal P. provides:

> "The indictment . . . shall be a plain, concise and definite statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. It may be alleged in a single count that the means by which the defendant committed the offense are unknown. . . ."

Although Rule 7 (c) has made it unnecessary to charge an offense with the precision and detail as was formerly required, it has long been well settled that in charging a conspiracy under the Sherman Act, overt acts, other than the conspiracy itself, need not be pleaded or proved. *Nash v. United States,* 229 U. S. 373, (1913); *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 252, (1940). In addition, it is not necessary to describe a conspiracy with the same degree of particularity as required in describing a substantive offense. *Mercer v. United States,* 61 F. (2d) 97, (CCA3, 1932).

The indictments here in question not only charge the defendants with the offense substantially in the words of the Sherman Act, but also set forth the details of the crime by listing the terms of the "agreement and concert of action".

[*Indictment Held To Comply With Requirements*]

It is the opinion of the court that these indictments are drawn in compliance with Rule 7 (c) of the Federal Rules of Criminal Procedure and satisfy the Constitutional requirements by charging the offense with sufficient definiteness and certainly to inform the defendants of the nature and cause of the accusations against them to enable them to adequately prepare their defenses, and, to plead an acquittal or conviction thereunder in bar of any other proceeding against them based on the same subject matter.

The defendants' motions to dismiss must be denied.

[*Bill of Particulars Denied*]

Although an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on a motion to dismiss, a defendant is entitled to a bill of particulars where the charge in the indictment is couched in such language that the defendant may be prejudicially surprised at the trial. However, these indictments set forth the conspiracy in sufficient detail to enable the defendants to adequately prepare their defenses without the threat of being surprised at the trial.

From the nature of the offense charged it is apparent that the negotiations, transactions, and dealings between the defendants and others are complicated, involved and voluminous, and to restrict the government in presenting its case seems to be unwarranted. The defendants' motions seek, in great detail, matters relating to overt acts and evidence. These are not proper demands of a bill of particulars in this conspiracy charge under the Sherman Act. See: *Swift & Co., v. United States,* 196 U. S. 375, (1905); *Nash v. United States,* 229 U. S. 373, (1913); and *United States v. General Electric Co.,* 40 Fed. Supp. 627, (S. D. N. Y., 1941).

The defendants Motions for Bill of Particulars must be denied.

[¶ 62,406] Opinion of the Attorney General of Minnesota.

417-E, Addressed to George E. Frogner, Fillmore County Attorney, Harmony, Minnesota, by J. A. A. Burnquist, Attorney General, by Charles E. Houston, Assistant Attorney General. March 23, 1949.

Minnesota Unfair Trade Practices Act

Rule of Evidence—Elements of the Offense of Unfair Discrimination.—The crime of unfair discrimination consists of selling below cost for the purpose or with the effect of injuring competitors. Section 325.52 is an evidentiary rule to assist in establishing the violation. If the rule is overcome by evidence showing no intent to injure competitors and that the conduct did not have that effect, then there is no evidence of crime.

See the Minnesota Unfair Trade Practices Act annotations, Vol. 2, ¶ 8428.17.

[*Review of Sections*]

Your letter of March 19 calls for consideration of M. S. A. 325.52. This section of the statutes creates a rule of evidence. When the facts therein enumerated exist, the rule applies. The only effect of Sec. 325.52 is that when a retailer sells at less than the price specified, it is *prima facie* evidence of the violation of Secs. 325.02 to 325.07. This includes Sec. 325.04. That section defines conduct which constitutes the crime of unfair discrimination. The elements of that crime are (1) selling, offering for sale, or advertising for sale a commodity or goods at less than cost to the vendor, or giving or advertising the intent to give such goods, (2) for the purpose, or with the effect, of injuring competitors and destroying competition. If the conduct involved is not for the purpose or with the effect of injuring competitors and destroying competition, it makes no difference whether or not the sale is below cost. That is as much an essential element of the crime as the selling below cost. And Sec. 325.52 establishes only a rule of evidence. If the rule is overcome by other competent evidence showing that the vendor had no intent to injure competitors, had no intent to destroy competition, and that the conduct complained of did not have that effect, then there is no evidence of crime.

[*No Intent or Effect, No Crime*]

Standing alone, the facts which you relate in your letter, without showing any intent on the part of the merchant and without showing the effect named in the statute, do not constitute a crime.

Too much attention is usually given to the *prima facie* evidence rule without consideration of Sec. 325.04.

[¶ 62,407] W. B. Griffin v. R. M. Vandegriff.

In the Supreme Court of Georgia. No. 16524. April 11, 1949.

Georgia Constitution

Restrictive Covenant in Employment Contract Upheld—Reasonable Restraint—Constitutional Prohibition.—In an action taken by a proprietor of a laundry business against a former employee on a covenant in which the latter agreed not to enter into a similar business within a given area for one year after the termination of his services, the contract sued upon was upheld and declared not to offend a state provision voiding contracts whose purpose or effect was to lessen competition or encourage monopoly. Since the restrictions were effective for one year they were found to be reasonable as to time and since they applied only to those portions of the three counties where the employer's business was operated they were reasonable as to area.

See the Georgia Constitutional Provisions, Vol. 2, ¶ 8181.

For appellant: H. O. Hubert, Jr., Decatur, Georgia.

For appellee: E. A. Wright, Atlanta, Georgia.

For parties at interest: Herbert J. and Joseph F. Haas, J. Kurt Holland, Hugh Howell, Jr., Morris B. Abram, Heyman, Howell & Heyman, Poole, Pearce & Hall, Gilmer A. MacDongald, MacDongald, Troutman Sams & Branch all of Atlanta Georgia.

See earlier opinion reported at ¶ 62,385.

[*Syllabus*]

By the Court: 1. Article 4, section 4, paragraph 1 of the Constitution of 1945 is in substance the same as article 4, section 2, paragraph 4 of the Constitution of 1877, and its meaning is that fixed by construction by this court in *State v. Central Railway Co.*, 109 Ga. 716 (35 S. E. 37), while it was a part of the previous constitution, and it does not declare any new principle of law and has the same meaning as the Code, § 20-504.

2. The restrictive clause in the contract of employment in the present case is supported by a sufficient consideration in the form of mutual promises and has been rendered definite by performance of the main contract, and being reasonable as to time and area is not void under the above stated clause of the constitution or section of the Code.

[*Review of Facts*]

The petition of R. M. Vandegriff, doing business as Superior Laundry, against W. B. Griffin and Lee Kennedy, individually, and doing business as Hendricks Laundry, alleged that the petitioner had been injured in the sum of $5000 as a result of the employment of the defendant Griffin by the defendant Kennedy in violation of a contract between the petitioner and the defendant Griffin. The contract relied upon and attached to the petition as exhibit shows that it was executed on December 17, 1946, by the terms of which the petitioner employed the defendant Griffin to call for and deliver laundered and unlaundered goods and to perform such other duties as may be required of him for a compensation of "a percentage of all monies collected in his territory, the amount to be agreed upon," for all laundry and dry cleaning brought in, delivered, and collected for and such additional wages, if any, as may from time to time be agreed upon. The contract recited that such employment enabled the employee to discover and acquire the method of doing business and to become skilled in that business and contained a clause whereby the employee agreed that he would not at any time, while in such employ, or within one year after leaving the same, "call for, deliver, or solicit laundered or unlaundered goods for himself or any other person, persons or company, nor will he directly or indirectly solicit, divert, take away, or attempt to solicit, divert, or take away any of the customers, business or patronage of such customers, within such one year after leaving the services of said party of the first part, in the portion of section which he had served while in the service of the party of the first part. Fulton, DeKalb and Gwinnett Counties of Georgia." The petition alleged that Griffin entered the employment of the petitioner immediately after the date of the contract and continued in his employ until November 6, 1948, at which time he resigned after having given two weeks notice, and that a partial list of customers furnished to the defendant Griffin upon his entering the employment of the petitioner is attached to the petition as an exhibit. Griffin solicited the business of the customers on behalf of the petitioner from the date of his employment to the date of his resignation. The petitioner has been advised and believes it to be true that on November 8, 1948, the defendant entered into an agreement with the defendant Kennedy and Hendricks Laundry whereby Griffin agreed to call for and solicit unlaundered goods and deliver them to Kennedy individually and as Hendricks Laundry. The goods were to be laundered for and on behalf of the defendant Griffin. On November 8, 1948, Griffin contacted the customers of the petitioner listed in Exhibit "B" attached to the petition and secured from them unlaundered goods which he took and turned over to the defendant Kennedy and Hendricks Laundry to be laundered. Kennedy and Hendricks Laundry have been advised that Griffin had been employed by the petitioner, and Kennedy advised the petitioner that he would not stop taking unlaundered goods from Griffin but would continue to do so. By such conduct Kennedy and Hendricks Laundry are aiding the defendant Griffin to violate his contract with the petitioner, which contract remains in force until November 6, 1948. The petitioner has no adequate remedy at law.

The prayers were for an injunction against Griffin during the period of one year from November 6, 1948, from soliciting, serving, or catering to any of the customers of the petitioner whom Griffin served during his employment with the petitioner, that Griffin be enjoined from being interested in or connected with any other person soliciting, serving, and catering to any of the petitioner's customers, and that the defendant

Kennedy be enjoined from aiding the defendant Griffin in violating his contract with the petitioner, and that the petitioner recover a judgment in the sum of $5000 and costs of this proceeding.

The exception here is to the judgment overruling the general demurrer filed by the defendant Griffin to the petition.

[*Authorities Cited*]

DUCKWORTH, Chief Justice: (after stating the foregoing facts.)

1. Article 4, section 4, paragraph 1 of the Constitution of 1945 is as follows:

> "All contracts and agreements which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement."

With minor changes in sentence structure the quoted clause was taken from article 4, section 2, paragraph 4, of the Constitution of 1877, which was as follows:

> "The General Assembly of this State shall have no power to authorize any corporation to buy shares, or stock, in any other corporation in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

If this clause of the constitution is ambiguous, the construction placed thereon, while it was a part of the provisions of the Constitution of 1877, in *State v. Central Railway Co.,* 109 Ga. 716 (35 S. E. 37), would be controlling as to its meaning in the present Constitution. *Thompson, Lieutenant Governor, v. Talmadge,* 201 Ga. 867 (41 S. E. 2d, 883). But if it be unambiguous we would not be authorized to look beyond its actual verbiage to find its meaning, but would be required to give it that meaning which is expressed. It would neither require nor permit a construction which would cause it to mean anything other than that clearly revealed by its own terms. *Neal v. Moultrie,* 12 Ga. 104, 110; *Standard Steel Works v. Williams,* 155 Ga. 177 (2d) (116 S. E. 636); *State v. Camp,* 189 Ga. 209 (6 S. E. 2d, 299); *New Amsterdam Casualty Co. v. McFarley,* 191 Ga. 334, 337 (12 S. E. 2d, 355); 11 AM. Jur. 678, § 64; 16 C. J. S. 67, § 29. Were it permissible under controlling rules of construction to lift from the context the words thereof one at a time, and while thus isolated, attach the full meaning of each word, then it would appear that the verbiage of this clause would render void any contract or agreement which had the effect of defeating or lessening competition of every kind whatsoever, irrespective of the nature of the enterprise or the public welfare or the legitimate interest of the parties or the degree to which such competition is either defeated or lessened. Such an interpretation would manifestly apply to all contests in athletics, in schools, in politics, and even in the church, and indeed would practically paralyze the whole scope of human relationships. But the law has wisely decreed a rule of construction which does not permit such procedure. The words of this clause under the established rule must be construed in connection with the context with which they are used. *Thompson, Lieutenant Governor, v. Talmadge, supra.* In the light of the applicable rules of construction is it not thus demonstrated that the clause here considered is obviously ambiguous? Since the verbiage does not limit in any respect the application of the prohibition against defeating competition, it is only by judicial construction in harmony with the established rules of law that proper limitation as to such application can be made. It is unsafe to apply to the constitution or to statutes a literal construction in every instance. In Vol. 2 Sutherland, *Statutory Construction,* 3rd ed., p. 316, § 4502, it is said:

> "A word is but a sumbol which may stand for one of an innumerable number of objects. It is only as custom and usage and agreement attach a particular meaning to a particular word that it has any significance in relation to either a tangible or an intangible object."

So it is with the word "competition" when used as here in the constitution. But, as pointed out in *State v. Central Railway Co., supra,* the custom and usage of this word in the common law has attached to it a particular meaning. In 12 *Harvard Law Review,* p. 417, Mr. Justice Holmes says:

> "It is not true that in practice . . . a given word or even a given collocation

of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book."

We think the disastrous result of a literal construction in all cases is demonstrated by Maxwell on the *Interpretation of Statutes,* p. 36, as follows:

> "If a literal meaning had been given to the laws which forbade a layman to 'lay hands' on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life, would have been liable to punishment."

We believe the foregoing quotations are quite sufficient to underline the vital necessity for judicial interpretation in order to effectuate and not defeat the intent of the constitution. That there is need for judicial interpretation is enough within itself to render the law ambiguous. It necessarily follows that the clause here involved requires construction to prevent it from having effect beyond the scope ever intended. Consequently, we revert to the rule of construction first above mentioned and apply the same as being controlling here. The clause, while a part of the previous constitution, was construed as stated in *State v. Central Railway Co., supra.* It was there ruled that it was not intended to declare a new principle of law, but that the sole purpose of the clause was to declare the common law against restraint of trade and monopoly. The opinion cited in what is now Code, § 20-504, which renders contracts in general restraint of trade void, and quotes from a number of decisions of this court construing that section and holding that it prohibits only general restraints, and that partial restraints are not thereby rendered void. It is apparent that this court considered the constitutional provision to mean precisely the same thing which the Code section has been construed to mean. It simply held that preventing competition and restraining trade were synonymous terms. In so holding, this court was in harmony with numerous decisions of other jurisdictions and the statement of this principle in 19 R. C. L., p. 36, § 20, which is as follows:

> "The distinction, however, is scarcely practical, because whatever restrains trade prevents competition, and whatever prevents competition in trade necessarily restrains trade."

We have good authority for holding that in lifting this clause from the constitution of 1877 there was no intention to cure some defect, remedy some evil or in any manner change the existing law. See Minutes of Constitutional Commission, Vol. 1, p. 185. As ruled in *State v. Central Railway Co., supra,* where the language does not indicate an intention to declare some new principle, sound construction requires that it be construed to have intended no more than merely to state the law as it existed at the time.

What, then, is the meaning which we are required by law to give this clause of the constitution by construction? Obviously, it was intended to be in harmony with the existing right to contract which is guaranteed by the 14th amendment to the Federal Constitution. In *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 (1), it was held:

> "Deprivation of liberty to contract is forbidden by the constitution if without due process of law; but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process."

To the same effect, see *Allgeyer v. Louisiana,* 165 U. S. 578; *Chicago & C. R. Co. v. McGuire,* 219 U. S. 549 (31 Sup. Ct. 259, 55 L. ed. 328); *Bayside Fish Co. v. Gentry,* 297 U. S. 422, 427; *Morehead v. N. Y. ex rel. Tipaldo,* 298 U. S. 587; *City of Newman v. Atlanta Laundries Inc.,* 174 Ga. 99 (162 S. E. 497). The extent to and the purpose for which this right of contract may be abridged in order to prevent monopoly is indicated in *Fowle v. Park,* 131 U. S. 88, 97, where it is said:

> "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained."

It would appear that so long as the contract does not adversely affect the interest

of the public or injure the obligor beyond what is necessary to protect the legitimate rights of the obligee, it is valid under the laws of this State as they now exist. To apply this rule to individual cases it is necessary, therefore, to discover if the contract involved is reasonable in these respects. Numerous decisions of this court, applying the provisions of the Code, § 20-504, have held that such contracts when reasonable as to time and area of restrictions are not void under that section, the latest of which are *Black v. Horowitz,* 203 Ga. 294; *Orkin Exterminating Co. v. Dewberry,* — Ga. — (51 S. E. 2d 669).

[*Reasonable Exercise of Right to Contract*]

2. Having ruled in the preceding division of this opinion that the new constitution in no wise changed the law with respect to contracts in restraint of trade or which defeat or lessen competition, it remains only to test the contract here involved by the applicable rules of law long followed. Mutual obligations in a contract are sufficient consideration to sustain it. Code, § 20-304. Where as here there has been performance of a contract of employment, its performance is sufficient to make definite the compensation payable for the service rendered, although the contract itself was indefinite in this respect, and such performance is likewise a sufficient consideration to support the ancillary restrictive agreement here sued upon. Therefore, the contract is not subject to the attack made, that it was without consideration. While the recitals in the contract as to the nature of the employer's business and the necessity for protection against use by the employee, after the employment terminated, of knowledge gains of the said business must be supported by evidence upon the trial, yet when and if so supported, it will show a case which would justify the restrictions provided in the contract. Then since the restrictions are effective for a period of only one year, they are clearly reasonable as to time, and since they apply only to those portions of the three counties where the employer's business is operated, they are reasonable as to area, and, consequently, the contract in question is but an exercise of the right to contract and does not offend any law of this State. It follows that the petition alleged a cause of action, and the court did not err in overruling the defendant's general demurrer.

Judgment affirmed. All the Justices concur, except WYATT, J., who concurs in the judgment only.

[¶ 62,408] A. B. Dick v. James Marr, doing business as Marr Duplicator Company.

In the United States District Court for the Southern District of New York. E 50-59. April 13, 1949.

Sherman Antitrust Act

Motion To Strike Allegations Denied—When Evidence of Previous Decisions Admissible—Rule as to Admissibility.—A motion to strike parts of a petition reciting the history of the criminal and civil actions instituted against the plaintiff and disposed of by a plea of *nolo contendere* and a consent decree is denied. Those actions might play an important role in the history of the issue to be tried and there was no apparent reason why the trial judge should not be aware of them. It was held to be for the trial judge to decide whether evidence as to the previous actions was properly admissible. The Court may take for its own use evidence no party would have a right to force upon it.

See the Sherman Act annotations, Vol. 1, ¶ 1640.614.

For plaintiff: Robert W. Byerly and Archibald Cox, New York, N. Y.

For defendant: Edward D. Bolton, New York, N. Y.

KNOX, D. J., District Judge: Plaintiff's motion to strike portions of defendant's petition of December 17, 1948 is denied.

Plaintiff, it appears, is particularly concerned with allegations contained in paragraphs 3 and 33 to 36.

These latter portions of Marr's petition recite the history of the criminal and civil actions which were disposed of by a plea of *nolo contendere,* and a consent decree, respectively. Dick objects that neither the plea nor the decree is evidence in this proceeding, and are therefore improperly averred.

Ordinarily, the rule announced in *Alden-Rochelle v. Ascap,* 3 F. R. D. 157, D. C. N. Y., 1942, with respect to the Ohio transactions, would be followed, but in this proceeding, I am of opinion that the rule is inapplicable. The above mentioned actions may possibly play an important role in the history of the issue about to be tried, and there is no reason apparent why the trial judge should not be aware of them. In *Root Refining Co. v. Universal Oil Products Co.,* 168 F. 2d 514, C. C. A. 3rd, 1948, the Court did not blind itself to the fact that Judge Davis had been indicted.

Thus, for the moment, the allegations to which Dick objects should stand until the trial judge decides whether or not evidence in connection therewith is properly admissible on the theory that, as was said in a recent reorganization case, the court "may take for its own use evidence no party would have a right to force upon it." *Comstock v. Group of Investors,* 335 U. S. 211, 227, 1948.

Paragraph 3 alleges that plaintiff conspired to restrain trade and to monopolize, and did restrain trade and monopolize, and that, pursuant to such purpose, it conducted oppressive patent litigation by predatory means and forced competitors to enter into consent decrees and other restrictive arrangements, by concealing and fraudulently suppressing evidence. It is here contended that this paragraph is "impertinent and immaterial." Rule 12, F. R. C. P. While the conclusory form of the paragraph may not represent the best form of pleading, the allegations do contain an offer of proof of which the trial judge may wish to avail himself, especially so in a proceeding such as this. 2 Moore's *Federal Practice* (2d ed.), 2317.

Paragraph 30 alleges that Dick surreptitiously induced one Hugo Schlatter, a chemical expert hired by Marr, to assist in the defense of this litigation, to leave the employ of Marr and enter the employ of Dick. Dick charges that this allegation is irrelevant, and was put at rest by Judge Patterson's original decision in this suit. At this juncture, it can not be determined that the allegations are impertinent and irrelevant. It must be remembered that respondent's prosecution of the instant case may have been a fraud upon the courts. For this reason, I think a "law of the case" argument can not be entertained.

Other paragraphs are objected to on the ground that they are repetitious of the Government's "Notice of Issue and Facts Bearing Thereon To Be Presented By United States, Amicus Curiae," and because they are said to be immaterial, lengthy, and argumentative. On all these points I hold against the movant.

Motion denied.

[¶ 62,409] **Clayton Mark & Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., et al., v. Federal Trade Commission.**

In the Supreme Court of the United States. October Term, 1948. April 25, 1949. No. 464.

On writ of certiorari to the Court of Appeals for the Seventh Circuit.

Federal Trade Commission Act

Conspiracy To Restrain Trade—Concurrent Use of Delivered Price System—Violation of Section 5 of Act.—An evenly divided Court affirmed a judgment upholding an order of the Federal Trade Commission which found that the petitioners conspired to restrict and suppress actual and potential competition in the distribution and sale of rigid steel conduit, and that the individual use of a basing point method of quoting prices, knowing that competitors were using the basing point formula, was an unfair method of competition in violation of Section 3 of the Federal Trade Commission Act.

See the Federal Trade Commission annotations, Vol. 2, ¶ 6380, 6380.63.

Affirming the decision of the United States Court of Appeals for the Seventh Circuit. Nos. 8639, 8640, 8642, 8644, 8649, reported at ¶ 62,254, affirming the order of the Federal Trade Commission in Dkt. 4452.

PER CURIAM: The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[¶ 62,410] Kold Kist, Incorporated et al. v. Amalgamated Meat Cutters and Butchers Workmen of North America Local No. 421.

In the California Superior Court, Los Angeles County. No. 557,931. April, 1949.

California Cartwright Act

Agreement Not To Sell a Commodity—Union Objectives Restrain Trade—Injunction Granted.—A contract between retailers and a union which provided that frozen meat would not be sold during the hours that meat cutters were not employed by a retailer was held to be a combination in restraint of trade even though its primary purpose was to achieve labor benefits. Since the Act did not expressly prevent this type of relief, an injunction to restrain performance of the proposed contract was granted at the instance of manufacturers of frozen meat.

See the California Cartwright Act annotations, Vol. 2, ¶ 8075.

For plaintiffs: Ben Gould, Los Angeles, California.

For defendants: McLaughlin, McGinley & Hanson, David Sokol, Los Angeles, California.

[*Issue Defined*]

HANSON, J.: The primary question presented is whether a provision in a contract, about to be entered into by and between the defendant retailers and the defendant meat cutters union, which will prohibit the retailers from selling packaged frozen meats during the hours the meat cutters are not employed by a retailer, is violative of our laws against restraints in trade and, if so, whether the plaintiffs who are engaged in freezing, packaging and selling meats to the defendant retailers are entitled not only to damages but an injunction as well. Other provisions of the contract such as those that limit the hours the members of the union are to be employed and which prohibit their employment on Sundays and holidays are not here involved.

At the hearing of this cause I expressed the view that the provision of the contract above referred to was a proper labor objective. Since then, upon a review of the cases I have concluded that I was in error.

[*Purpose of Contract*]

The plain purpose of the contract in the aspect mentioned is to place an embargo upon the sale by the retailers of packaged, frozen meats during such hours as their stores are open for the sale of merchandise, unless the hours coincide with those of the meat cutters. The union's aim in limiting the sale of packaged meats to such hours only as its members are employed in the stores of the retailers is not only to prohibit consumers from purchasing the packaged meats after hours but also to cause consumers to purchase fresh meats from its member employees in preference to purchasing the frozen packaged meat from other clerks, and thereby to tend to increase the employment of more of its own union members at each retail outlet.

Unquestionably the provision is not only of direct benefit to the union and its members in the manner stated but undoubtedly it also gives rise to other incidental benefits. But, be that as it may, the vital question here is whether the provision may be said to be reasonably related to either working conditions or the bargaining power of the union members. In short, is it a proper labor objective and if it is, may it be sustained as against our laws against restraint of trade?

[*Contract with Union May Restrain Trade*]

The first contention of the defendant Union is that the action is not maintainable against it because by our statute against restraints of trade, trade labor unions are excluded therefrom. The answer to that is that the provision relied upon is a false quantity in a case such as this as was expressly held in *Overland Pub. Co. v. H. S. Crocker Co.*, 193 Cal. 109, 117. It was there said: "Furthermore, the proviso in the Cartwright Act that labor, skilled or unskilled, is not a commodity within the meaning of the act does not authorize any such agreement as was here made between employers and employees."

[*Union Conduct Not Privileged*]

The next contention urged by the defendant Union is to the effect that the primary purpose back of the provision in the contract is to enlarge employment opportunities for its members and so may not be classed as an unlawful labor objective even though it has the effect of restraining trade. That this contention may not be sustained is the holding of the following cases.

[*Authorities*]

In *Mayer Bros. Poultry Farms v. Meltzer,* 80 N. Y. S. (2d) 874, the plaintiff was engaged in New Jersey in freezing, packaging and selling poultry. It arranged to sell its products in the retail food stores of New York City. The defendant Union of Meat Cutters, located in New York City, quickly discerned that it was to its advantage to exclude the products of the plaintiff and that thereby more of its own members would be employed. To that end it made demand upon the retailers to refuse to sell the products of the plaintiff. As a result of the demand agreements between the union and the retailers were entered into. The case, it will be noted, differs from the instant case only in that the embargo there was absolute, whereas in the instant case it is only partial. In the course of its opinion, the court said:

"The purpose of defendant's activities which are sought to be enjoined, as alleged in the complaint and moving affidavits and admitted in an affidavit by defendant's president, is to keep away from the New York City market all frozen kosher poultry slaughtered elsewhere. Plaintiff's frozen products had been making inroads in this area, and were evidently resulting in reductions in prices to consumers and in the quantity of poultry slaughtered in New York City. Defendant's aim is to limit this market to poultry which is slaughtered in this city, so as to obtain better wages due to a more favorable 'economic climate' than would otherwise prevail.

"The defendant contends that since wages may indirectly be affected, this is a legitimate labor objective. It is true that the pay of the shochtim from their employers varies with the quantity of animals which they kill, and that their remuneration is affected by the number of fowl that they slaughter. This is not different in principle from the basis on which any pieceworker is paid, and it does not transform into a labor matter every economic question affecting the volume of the employer's business. The defendant's contention overlooks the fact that there is no dispute concerning wage scales. It does not appear that any demands for a higher rate of pay have been made against the employers of defendant's members, let alone against plaintiff.

"A private embargo to prevent foodstuffs from entering New York City is not a lawful objective, and is not made so by using procedures which would be legitimate if directed toward the accomplishment of other purposes."

In *Allen Bradley Co. v. Local Union,* 325 U. S. 797, the defendant electrical union procured collective bargaining agreements with the contractors of New York City to employ only the defendant union's members and to install only such electrical equipment as was manufactured in New York City by equipment manufacturers who in turn employed only members of the self-same union. In the language of Justice Black:

"The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members. To achieve this latter goal—that is, to make more work for its own members—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product.

"The union therefore waged aggressive campaigns to obtain closed shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements in the New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members."

The court thereupon held that the effect was to restrain trade and that the arrangement was violative of the Sherman Act and was in no sense immunized by the labor objectives of the union.

As recently as April 4, 1949, the Supreme Court of the United States passed on questions here involved in the case of *Giboney, et al. v. Empire Storage and Ice Co.,* — U. S. —. In that case a local ice and coal drivers

union in Kansas City, Missouri, sought to induce nonunion ice peddlers to join the union, one of the objectives being to better wage and working conditions of the ice peddlers and their helpers. As most of the nonunion peddlers refused to join the union, the union set about to obtain from all Kansas City wholesale ice distributors agreements that they would not sell ice to nonunion peddlers. Agreements were obtained from all distributors except the Empire Storage and Ice Co. Thereupon the union peacefully picketed the Empire. Under the Missouri restraint of trade statutes, such an agreement is a crime punishable by fine of not more than $5,000 and by imprisonment in the penitentiary for not more than five years. Additionally, the statute provides that a person injured may institute an action for triple damages. Evidently the statute does not expressly provide that injunctions may be granted. In view of the situation, Empire sought to restrain the concerted efforts of the union on the ground that it was in violation of the anti-trade restraint statute and prayed for an injunction against the picketing. The union resisted, contending that they had the right to picket under the First and Fourteenth Amendments because there was a labor dispute and that the picketers published only the truthful information to the effect that Empire was selling ice to peddlers who were not members of the union. The trial court issued an injunction restraining the union from placing pickets or picketing around or about the buildings of Empire. The decision was upheld by the Supreme Court of Missouri. In the Supreme Court of the United States the union in attacking the Missouri statute challenged the power of the state to issue an injunction against their conduct since, as they asserted, the primary objective of their combination and picketing was to improve wages and the working conditions. In the language of the court:

> "On this premise they argued that their right to combine and to picket and to publish must be determined by focusing attention exclusively upon their lawful purpose to improve labor conditions, and that their violation of the state anti-trade restraint laws must be dismissed as merely incidental to this lawful purpose."

In speaking to that contention, Justice Black said:

> "It is contended that though the Missouri statute can be applied validly to combinations of businessmen who agree not to sell to certain persons, it cannot be applied constitutionally to combinations of union workers who agree in their self-interest to use their joint power to prevent sales to nonunion workers. This contention appears to be grounded on the guaranties of freedom of speech and press stemming from the Fourteenth and First Amendments. Aside from the element of disseminating information through peaceful picketers, later discussed, it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people . . . To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. . . .
>
> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute . . . But the record here does not permit this publicizing to be treated in isolation. For, according to the pleadings, the evidence, the findings, and the argument of appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop 'selling ice to nonunion peddlers.' Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against a Missouri law,—a felony.
>
> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now . . ."
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> * * *
>
> "We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law . .

"We hold that the state's power to govern in this field is paramount, and that nothing in the constitution guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen, or others. . . ."

We are not without pertinent authority in this state. *Overland, etc. v. H. S. Crocker Co.*, 193 Cal. 109, was an action for double damages under the Cartwright Act (Restraint of Trade Act). In that case the plaintiff, a printing concern, alleged that the defendants, likewise printing concerns, had entered into an agreement among themselves and with certain unions which prohibited the members of the unions from working for the plaintiff so long as plaintiff continued to refuse to join the defendant employers union. It was held that the agreement was illegal. The court said:

"Therefore, as this agreement between the labor unions and the defendants (printing concern employers) resulted in a combination or conspiracy in restraint of trade, it fell within the operation of the Cartwright Act, *supra*, notwithstanding the fact that some of the parties to the agreement were labor unions."

In view of the foregoing case it is plain that the last quotation above is applicable to the case here.

[*Injunctive Relief Authorized*]

The next contention that is urged by the defendants is that an injunction does not lie under the provisions of the Cartwright Act. To sustain this position the defendants refer to the following quotation found in *Overland, etc. v. Union Lithographing Company*, 57 Cay. App. 366, reading as follows:

"Furthermore, the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. (Sec. 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See also, *National Fireproofing Co. v. Mason Builders Assn.*, 169 Fed. 259 [26 L. R. A. (N. S.) 148, 94 C. C. A. 5251].)"

The statement is not only *dicta*, but, what is more, relies on a case which is likewise *dicta* on the point involved. Before discussing this phase of that case it should be noted that the defendants named therein comprised labor unions and printing concerns who had entered into the agreement referred to in *Overland, etc. v. H. S. Crocker Co.*, in 193 Cal. 109. The District Court of Appeals held the complaint did not state a cause of action. Accordingly the statement of the court that an injunction could not issue under the Cartwright Act was *obiter dicta*. Inasmuch then as the statement is *dicta* it is not binding on this or any other court. Turning to the statute we find it gives a person injured by an agreement, conspiracy or combination in restraint of trade the right to recover double damages. The statute does not intimate that an injunction may not issue as is the case under the original Sherman Anti-Trust Act, which expressly provided that no injunction could issue except at the instance of the federal government. As the Cartwright Act, in the language of our Supreme Court in *Speegle v. Board*, 29 Cal. (2d) 34, merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law it would seem that the remedies at common law continue except to the extent they are expressly changed by the Act. The only remedy that is changed is the one which permits double damages rather than ordinary damages. Be that as it may, the restraint here is violative not only of the Cartwright Act, but of the common law as well. As was said in the *Speegle* case,

"Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful. * * * Combinations between insurers or insurers and insurance agents for the purpose of stifling competition in the insurance market and fixing insurance rates are clearly in violation of the common law rules against restraint of trade."

[*City Ordinance*]

Despite the holdings in the foregoing cases, the defendant Union contends that the provision for the stopping of *meat sales* at 6:00 p.m. and on Sundays and holidays was ruled to be a proper and lawful union objective in *Smith Market v. Lyons*, 16 Cal. (2d) 402. That case did not so rule. In that case the Union peacefully picketed the plaintiff's non-union market located in Long Beach, to induce it to enter into a contract with it to employ only members of the Union. It was held that this was a lawful objective and that the market was not entitled to an injunction against the Union merely because the agreement tendered to

it by the Union contained a provision which required night and Sunday closing when a City ordinance required such closing. The provision was a lawful objective in that case because of the City ordinance and not otherwise.

Rosenberg v. Raskin, 80 C. A. (2d) 335, likewise cited by the defendants on this phase of the case, is not in point.

That equity will enjoin the violation of acts, combinations or agreements in restraint of trade upon the ground of avoiding a multiplicity of actions is well established by the authorities. *Lee Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161; *Hawarden v. Houghiogheny & L. Coal Co.*, 111 Wis. 545; 36 Am. Jur. "*Monopolies*" etc. § 214.

The demurrer are overruled. A preliminary injunction will issue along the lines of the restraining order.

[¶ 62,411] Hillman Periodicals, Inc., Alex L. Hillman, Phil Keenan, Morris B. Levine, individually and as officers of Hillman Periodicals, Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 131—October Term, 1948. Decided April 25, 1949.

Petition to review an order of the Federal Trade Commission. Petition dismissed and order affirmed.

Federal Trade Commission Act

Petition to Review Order Dismissed—Extent of Commission's Power to Enforce Statutes.—Petition to review a Federal Trade Commission order prohibiting use of the terms "unabridged," "complete and unabridged," or "full length novel," in connection with the sale of reprints of books, is dismissed where there is sufficient evidence that petitioners violated Section 5 (a) of the Federal Trade Commission Act. The fact that petitioners have discontinued their unlawful practices in part does not deprive the Commission of power to make such order as it determines necessary to prevent their revival. What order is necessary to enforce the statute fairly and adequately, after findings of particular violations have been made, is a matter as to which the judgment of the Commission is controlling, unless its discretion has been clearly abused.

Affirming the Federal Trade Commission cease and desist order in Dkt. 5440.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.278, 6620.073.

Joseph Schultz and Henry E. Schultz, attorneys for petitioners; James W. Cassedy, Assistant General Counsel; John W. Carter, Jr., Special Attorney, for Federal Trade Commission; W. T. Kelley, General Counsel, Walter B. Wooden, Associate General Counsel.

Before CHASE, CLARK and FRANK, Circuit Judges.

[*Nature of Action*]

PER CURIAM: After due notice and hearing, the Federal Trade Commission ordered the petitioners, who publish and distribute magazines and books in interstate commerce, to cease and desist from certain practices in regard to reprints. A substantial part of the business of petitioners consists in reprinting and distributing in small paper covered books so-called western, detective and thriller stories.

[*Requirements of Order*]

The order in its negative aspects required them to refrain, in connection with the distribution of reprints from which substantial part of the original text had been deleted, from representing in any manner that they were "unabridged" or "complete and unabridged" or "full length novel" or any other term of similar import to designate or describe them.

In its affirmative aspects the order required the petitioners to put the word "abridged" on the front cover and title page of such reprints 'in immediate connection with the title and in clear, conspicuous type." If the reprint had an additional wrapper or cover bearing the title the word "abridged" was to be placed on that in a like way. All advertising of such reprints was required to indicate clearly

that they were abridged "unless the title of each and every reprint so advertised be immediately accompanied in equally conspicuous type by the word abridged." Whenever a new title was used in place of the original it was required that "such substitute title be immediately accompanied, in equally conspicuous type, by the title under which such story was originally published."

[*Findings Based on Adequate Evidence*]

The Commission made findings on adequate evidence which establish the facts for us. *Benton Announcements v. Federal Trade Commission,* 2 Cir., 130 F. 2d 254, These facts show that the petitioners have violated Sec. 5(a) of the Federal Trade Commission Act. 52 Stat. 111; 15 U. S. C. A. Sec. 45(a). See *Federal Trade Commission v. Standard Education Society,* 302 U. S. 112.

[*Commission's Power To Make Order*]

Though they have discontinued their unlawful practices in part, that did not deprive the Commission of power to make such order as it determined necessary to prevent their revival. *Federal Trade Commission v. Goodyear Tire & Rubber Co.,* 304 U. S. 257; *National Silver Co. v. Federal Trade Commission,* 2 Cir., 88 F. 2d 425; *Educators Association v. Federal Trade Commission,* 2 Cir., 108 F. 2d 470. What order is necessary to enforce the statute fairly and adequately, after findings of particular violations have been made, is a matter as to which the judgment of the Commission is controlling unless its discretion has been clearly abused. *Herzfeld v. Federal Trade Commission,* 2 Cir., 140 F. 2d 207. No abuse has been shown.

[*Order Affirmed*]

Order affirmed.

[¶ 62,412] Daniel L. Gardella v. Albert B. Chandler, et al.

In the United States District Court for the Southern District of New York. Civ. 43-539. April 19, 1949.

Sherman Antitrust Act

Baseball and Interstate Commerce—Purpose of Injunctive Relief—Injunction Denied. —A motion of a professional baseball player for an injunction reinstating him into the baseball league was denied since the position of the parties would be altered and issues would be prematurely disposed of. In addition the litigant failed to show irreparable damage.

See the Sherman Act annotations, Vol. 1, ¶ 1650.275.

[*Purpose of Motion*]

CONGER, J.: Motion for a mandatory injunction compelling defendants to reinstate plaintiff as a player of the National or American League; or, in the alternative, restraining defendants from interfering with plaintiff in pursuit of his calling as a professional baseball player.

[*Assuming Jurisdiction, Relief Denied*]

Whether the Court has power to issue a preliminary injunction in an action for treble damages under the Anti-Trust Acts, I find it unnecessary to decide. Assuming it has, even though I doubt it, all of the reasons for denying a similar application in *Martin, et ano v. Chandler, et al,* decided April 1, 1949, apply here. It would disturb the *status quo;* and it would necessitate a premature disposition on disputed issues of law and fact. Further, the plaintiff has not made sufficient showing of irreparable damage *pendente lite.*

Motion denied.

Settle order.

[¶ 62,413] Auburn Capitol Theatre Corporation and Hubert P. Wallace v. Schine Chain Theatres, Inc., et al.

In the United States District Court for the Southern District of New York. Civil No. 48-736. April 21, 1949.

Sherman Act, Clayton Act

General Provisions as to Venue—Convenient Forum—Motion to Dismiss Denied.— In an action instituted in the Southern District of New York by a theatre company against a chain of film distributors, a motion by individual defendants who reside in the Northern District, to dismiss the action for lack of venue and in the alternative to have the action severed and transferred for improper venue or transferred on the ground of convenience was denied on all grounds. The court ruled that by virtue of Section 1406 (a) of the Judicial Code the action could not be dismissed even though venue was improper. As to the alternative plea, it was held that venue was supported by Section 1392 (a) of the Code relating to actions where defendants are located in the same state but in different districts. Having found the forum neither vexatious nor oppressive, a transfer on the ground of convenience was denied.

The Court ruled as to the priority to be given litigants in examining each other for evidence. As a general rule the party who serves his notice first is entitled to priority.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291, 1640.619.

For plaintiffs: Milton Pollack, Milton Handler, Richard F. Wolfson, Philip B. Kurland, Gerald Saperstein, all of New York, New York.

For defendants Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises Corporation, Schine Lexington Corporation, Chesapeake Theatres Corporation, J. Myer Schine, Louis W. Schine, John A. May; Willard S. McKay, Cravath, Swaine & Moore, Alfred McCormack, Albert Rosenblum, all of New York, New York.

[*Nature of Motion*]

RYAN, J.: This action is brought under Section 7 of the Sherman Act, as amended, 26 Stat. 210, and Section 4 of the Clayton Act, as amended, 38 Stat. 731, 15 USCA 15, to recover treble damages.

The corporate defendants,—Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Company, Inc., Schine Enterprises Corporation, Schine Lexington Corporation and Chesapeake Theatres Corporation, and the individual defendants—J. Myer Schine, Louis W. Schine and John A. May, move before answer to dismiss the action pursuant to Fed. R. Civ. P., 12(b) (3), upon the ground that they are not amenable to suit in this district under the provisions of the anti-trust laws. In the alternative, they seek a transfer of the action to the Northern District of New York.

(1) Section 1406(a) of the Judicial Code provides,

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

The provisions of this section are applicable to anti-trust actions notwithstanding the special venue provisions of the Clayton Act. The action may not be dismissed even though venue is improper; the issue on this motion then is, whether the action should be severed and transferred as to the moving defendants for improper venue under this section, or transferred on the ground of convenience under Section 1404(a), 3 Moore *Federal Practice* 2d. ed. p. 2141, Sec. 19.04.

[*Residence of Parties*]

Plaintiff, Auburn Capitol Theatre, is a New York corporation and plaintiff, Wallace, is a New York resident; both reside in the Northern District.

The defendants may be grouped as follows: (1) the "Schine" defendants, being those who were defendants in *Schine Chain Theatres, Inc. v. United States,* 334 U. S. 110; (2) Schine Chain Theatres of Ohio, Inc., and (3) five major and three minor distributors of motion pictures. Schine Chain Theatres of Ohio, Inc., apparently, is a defunct corporation; it was not served with process but was mistakenly joined as a defendant, it has not appeared and since it is not a party to this action may be disregarded on this motion.

All the distributor-defendants have answered with the exception of Radio-Keith Orpheum Corporation which has procured an extension of time. None of these defendants join in making the instant motion,

but copies of the moving papers were served on them. None have appeared or submitted affidavits or memoranda. Whether this indicates indifference on their part or whether they feel that they are not parties to the motion because notice thereof was not addressed to them, we do not know. In any event, as to them venue is not in question.

The three individual defendants are residents of Fulton County in the Northern District of New York. Of these, J. Myer Schine was found and personally served in this district, and the other two in the Northern District.

The first five corporate defendants above-named are New York corporations; the sixth, Chesapeake Theatres Corporation, is a Maryland corporation. All have been served in this state and no motion has been made to quash service. For this motion, it must be taken that defendant, Chesapeake, transacts business within the state.

[*General Provisions as to Venue*]

It is not necessary here to determine whether venue is properly laid under the special venue provisions of the Clayton Act, for venue is supported by Section 1392(a) of the Code. This section relates to venue in actions where defendants are located in the same state, but in different districts. It provides that,

> "Any civil action, not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts."

This action is not of a local nature and all the defendants, for purposes of venue, are deemed residents of this state. 28 USCA 1391(c).

Anti-trust plaintiffs are not deprived of the benefits of these general venue provisions. *Cf. Sonken-Galamba Corporation v. Atchison, T. & S. F. Ry. Co.*, 29 F. Supp. 796. The venue provisions of the anti-trust laws were enacted to give anti-trust plaintiffs special venue privileges in addition to those granted by general venue statutes. *United States v. National City Lines*, 334 U. S. 573; they were intended to facilitate the prosecution of anti-trust actions, not to replace or make unavailable general venue provisions. Under this section the action is properly brought in this district and the motion to dismiss (or more properly to sever and transfer) must be denied.

[*Convenient Forum*]

(2) Section 1404 is but a codification of the doctrine of *forum non conveniens.* It did not change the doctrine as set forth in *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501; applying the rule laid down there transfer must be denied, on this ground. The eight distributor-defendants have their principal places of business in this district. They have not sought a transfer. Although the action affects plaintiffs' property located in Auburn, N. Y., the greater portion of the alleged conspiratorial and illegal acts are alleged to have occurred in New York City and to have been consummated through the New York offices of the distributor-defendants. These defendants are now being examined here without objection from them and their records concerning these acts are here. It cannot be said that the choice of forum is either vexatious or oppressive. A transfer would not serve the interests of justice, nor would it be convenient for all the parties or witnesses.

Having found this forum convenient, it is not necessary to determine whether Section 1404 is to be applied to those anti-trust actions where venue is laid under the special provisions of Sections 4 and 12 of the Clayton Act. *Cf., United States v. National City Lines, supra; United States v. National City Lines,* 80 F. Supp. 743; *Hayes v. Chicago, R. I. & P. R. Co.,* 79 F. Supp. 821; *Nunn v. Chicago, Milwaukee, St. P. & P. R. Co.,* 80 F. Supp. 745; *Pascarella v. N. Y. Cent. R. Co.,* 81 F. Supp. 95; *Cullinan v. N. Y. Cent. R. Co.,* (Hulbert, J. unreported, Civ. 47-412; 12/19/48).

[*Change in Balance of Convenience*]

Suggestion is made by the moving defendants that a settlement of the differences between plaintiffs and the distributor-defendants might be effected, leaving the claims against the "Schine" defendants alone to be litigated; in the happening of such event, the balance of convenience might be changed so as to weigh more heavily in favor of a transfer to the Northern District. This seems, presently, under the facts shown by the affidavits, to be at most only a conjecture, but should it come to pass, the denial of transfer at this time shall

be deemed to be without prejudice to renewal.

Motion to transfer is also denied.

[*Ruling as to Examinations*]

The "Schine" defendants also move to vacate and set aside plaintiffs' notice of examination or to stay the taking of depositions until defendants complete their examination of plaintiffs. Plaintiffs, too, move for similar relief with respect to defendants' notice of examination.

The "Schine" defendants served their notice on February 18, 1949, before answer and simultaneously with their motion to dismiss or transfer, setting March 4, 1949 for the taking of depositions. Plaintiffs served their notice later on the same day, setting February 24, 1949 for the taking of depositions.

(3) As a general rule, the party who serves his notice first is entitled to priority. *Graver v. Schenley Products Co.*, 26 F. Supp. 768. This rule is not, however, inflexible. It is true that plaintiffs must establish their case by proof to be elicited, in large measure, from defendants, but by reason of the Government's anti-trust litigation they are fully advised of the nature, extent and availability of such proof. Defendants have been diligent; no special circumstances appear which would warrant taking from the "Schine" defendants their priority of examination.

Plaintiffs shall appear for examination in New York City, at a time and place to be specified in an order to be settled; such examination shall continue daily until completed. Within 5 days after completion, the "Schine" defendants' examination shall begin; the individual defendants and Willard S. McKay shall be examined in New York City, excepting however, that such portion of these examinations as shall require the production of records shall be held in Gloversville, New York, where also the remaining employees and officers of the "Schine" defendants shall be examined.

Settle orders on notice to all parties.

[¶ 62,414] The United States of America v. Wallace & Tiernan Company, Inc., et al.

In the Supreme Court of the United States. October Term, 1948. May 2, 1949. No. 416.

On appeal from the United States District Court for Rhode Island.

Sherman Antitrust Act

Illegal Jury—Dismissal of Indictment—Subpoena Not Unreasonable Search.—An indictment charging violations of the Sherman Act was dismissed on the ground that the court's practice of intentionally excluding women from the grand jury panel rendered that body illegally constituted, and previously impounded documents were ordered returned. Subsequently the District Court declared that certain subpoenas thereby became unreasonable searches. On appeal it was held that the Government was entitled to introduce the documents demanded in the subpoenas, as evidence in subsequent civil proceedings. The Supreme Court decided that while an illegally constituted jury necessitates the dismissal of an indictment, the exclusion of women from that body, being a circumstance that bears only a remote relationship to search and seizure, does not make a validly issued and served subpoena amount to an unreasonable search in violation of the Fourth Amendment.

See the Sherman Act annotations, Vol. 1, ¶ 1610.345.

Reversing the decision of the United States District Court for Rhode Island, reported at ¶ 62,305.

For appellant: Philip B. Perlman, Solicitor General; Herbert A. Bergson, Assistant Attorney General.

For appellees: Edwards & Angell, Attorneys for Wallace & Tiernan Company, Inc., et al. (Charles H. Tuttle, Loren N. Wood, William H. Edwards, of Counsel); Hogan & Hogan, Attorneys for Novadel-Agene Corporation, et al. (Edward T. Hogan, Laurence J. Hogan, of Counsel); Hinckley, Allen, Tillinghast & Wheeler, Attorneys for Builders Iron Foundry, et al. (S. Everett Wilkins, Jr., Matthew W. Goring, of Counsel), all of Providence, Rhode Island.

Mr. Justice Black delivered the opinion of the Court.

The basic question here is whether the Fourth Amendment's prohibition of unreasonable searches and seizures bars the United States from utilizing certain documentary evidence in this civil antitrust proceeding instituted in the United States District Court

of Rhode Island. Subsidiary procedural questions involve the doctrine of *res judicata*.[1] We proceed at once to consideration of the important basic question since for reasons later given we reject the subsidiary *res judicata* contentions.

[*Silverthorne Case Discussed*]

First. Whether the Government has a right to utilize the documentary evidence in this civil proceeding can be best understood by an immediate reference to this Court's holding in *Silverthorne Lbr. Co. v. United States,* 251 U. S. 385. Appellees here contend that the *Silverthorne* holding is a complete and permanent bar to the Government's introduction of the documents as evidence, to the use of the documents to obtain other evidence, or for any other purpose.

The facts in the *Silverthorne* case as found by this Court were these: The Silverthornes having been indicted were arrested at their homes early in the morning and detained in custody for some hours. While so detained Government officers "without a shadow of authority" went to the office of their company and made a clean sweep of all the books, papers and documents found there. "All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once." The District Court ordered all books, etc., returned on a finding that the search and seizure violated the constitutional rights of the parties. Photographs and copies of the papers having been made, a new indictment was returned based upon the knowledge thus obtained. Subpoenas were then issued calling for production of the original papers. Upon refusal to produce, one of the Silverthornes was imprisoned for contempt.

This Court viewed the whole performance of the unlawful search and seizure of the Silverthorne books and papers as an "outrage," planned or at least ratified by the Government. Under these circumstances it was held that the Government was neither entitled to use the original documents nor any knowledge obtained from the originals, the photostats, or the copies. The rule announced was that evidence or knowledge "gained by the Government's own wrong" is not merely forbidden to be "used before the court but that it shall not be used at all." Other cases in this Court have applied the same rule.[2] It is an extraordinary sanction, judicially imposed, to limit searches and seizures to those conducted in strict compliance with the commands of the Fourth Amendment.

[*Facts at Bar Distinguished*]

In the case before us, however, United States officers did not go to the appellees' offices and seize their documents. Officers served a court subpoena on appellees calling on them to produce certain designated documents for use in a grand jury investigation. Appellees challenged the subpoena on the ground that it was so broad and sweeping as to constitute an unreasonable search and seizure under the Fourth Amendment. The District Court at all times has rejected this contention, and appellees do not urge it here. Thus it cannot be thought that the form of the subpoena or the method of its enforcement constitutes even a "constructive" search or seizure barred as "unreasonable" by the Fourth Amendment. *Oklahoma Press Co. v. Walling,* 327 U. S. 186, 202-208. And up to this point nothing that happened in this case is even remotely analogous to the situation that evoked this Court's condemnation in the *Silverthorne* case. But the

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[1] Appellees have moved to dismiss this appeal taken by the United States under § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, as amended, Pub. L. No. 773, 80th Cong., 2d Sess., § 17 (June 25, 1948). The judgment appealed from was as follows: "The Government's 'request' for judgment and relief prayed for in the complaint is denied and judgment may be entered dismissing the action without prejudice. It is so ordered."

This judgment followed the court's action in denying the Government's motions for production of documents essential to prove the Government's case. The record fails to sustain appellees' contention that the Government invited the court to enter this order denying relief and dismissing the action. That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned. *Wecker v. National Enameling Co.,* 204 U. S. 176, 181-182. See also *United States v. National City Lines,* 334 U. S. 573, 577, and *Bowles v. Beatrice Creamery Co.,* 146 F. 2d 774. The motion to dismiss the appeal is overruled.

[2] *Weeks v. United States,* 232 U. S. 383; *Johnson v. United States,* 333 U. S. 10; *Go-Bart Co. v. United States,* 282 U. S. 344; *Byars v. United States,* 273 U. S. 248; *Gouled v. United States,* 255 U. S. 298; *United States v. Lefkowitz,* 285 U. S. 452; *Trupiano v. United States,* 334 U. S. 699; and *cf. Harris v. United States,* 331 U. S. 145; *Zap v. United States,* 328 U. S. 624; *Davis v. United States,* 328 U. S. 582.

District Court found and appellees here urge that subsequent developments in this case call for application of the *Silverthorne* rule. Those developments were as follows:

The grand jury before which the documents were produced returned an indictment against appellees and others charging violations of §§ 1 and 2 of the Sherman Act.[3] Shortly after we decided *Ballard v. United States,* 329 U. S. 187, the District Court on motion of appellees dismissed the indictment on the ground that the court practice of intentionally and systematically excluding women from the grand jury panel rendered the grand jury an illegally constituted body. On the same day the court granted appellees' motion for return of the previously impounded documents. Later the court ordered the Government to return a number of photostats that had been made of the original documents. In an opinion discussing return of the photostats the District Court reaffirmed its belief that the "subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury." The Court held, however, that "when the grand jury turned out to be illegally constituted and the indictment was dismissed . . . the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment . . ."

[*Illegal Jury Results in Dismissal of Indictment Only*]

In order to implement a congressional policy to have the grand jury "a truly representative" cross section of the community, we held in the *Ballard* case, *supra,* that exclusion of women from the grand jury required dismissal of an indictment. The effect of the District Court's holding here was to add to the *Ballard* requirement for dismissal of the indictment a further extraordinary sanction devised by this Court to prevent violations of the Fourth Amendment. For here there was no official culpability in issuance or service of the *subpoena duces tecum.* The sole ultimate reason for the District Court's application of the *Silverthorne* rule was that no women were on the grand jury, a circumstance that bears only a remote if not wholly theoretical relationship to search and seizure. We cannot agree that the *Silverthorne* rule requires such a result.

[*Refusal to Extend Exclusionary Rule*]

Aside from the limited extent to which the Fourth Amendment applies to the subpoena process, see *Oklahoma Press Co. v. Walling,* 327 U. S. 186, there are other reasons why the *Silverthorne* exclusionary rule should not be extended to the situation in this case. That rule stems from the Fourth Amendment. This Court has said that the Fourth Amendment command rests "upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities." *Trupiano v. United States,* 334 U. S. 699, 705; see also *McDonald v. United States,* 335 U. S. 451, 455-456. The *Silverthorne* search and seizure was made without any authority from a magistrate. And the seizure was so sweeping in nature that it probably could not have been authorized by a search warrant. *Weeks v. United States,* 232 U. S. 383, 393-394. The *Silverthorne* exclusionary rule as explained in that case and others is designed to safeguard the privacy of people, and to prevent seizure of their papers and property except in compliance with valid judicial process. As tersely stated in the *Silverthorne* case the rule's purpose is to prevent the Fourth Amendment from being reduced to "a form of words."

[*No Invasion of Privacy*]

Only by engaging in the most exaggerated apprehensions can the action of the prosecuting officers in this case be considered a threat to the Fourth Amendment. They went to the court for their subpoena. The court approved it. There is no claim that the subpoena was obtained or served in an improper manner or that any Government officer committed a wrong in the way the documents were handled or return. At least many of the documents were highly relevant to the serious monopoly offenses charged against appellees. That there were no women on the grand jury did not contribute to any invasion of appellees' privacy. Dismissal of the indictment could not transform what had been proper official conduct into the type of conduct condemned in the *Silverthorne* and other cases.

[*Specious Argument*]

It is true that a metaphysical argument can be made to support a strained analogy

[3] 26 Stat. 209, as amended 50 Stat. 693, 15 U. S. C. §§ 1, 2.

between the situation here and that in the *Silverthorne* and other cases. That argument is that the "illegal" grand jury was only a "so-called" grand jury, and that the considered judicial command for production of papers before it must be treated as though the court had ordered production of papers before a group of appellees' competitors. This argument has a superficial plausibility on the word level, but if our attention is directed to substance rather than symbols the speciousness of the argument is exposed.

[*Injury Remedied*]

Whatever injury appellees may have suffered resulted from the absence of women on the grand jury and that injury has been remedied by freeing appellees from prosecution under the indictment. Furthermore the search and seizure here, if such it can be called in any true sense, was not the kind that has prompted this Court to hold that the Government has by wrongful conduct of its officers forfeited all opportunity to make use of evidence unlawfully seized. We decline to extend the *Silverthorne* rule to such an extent. The Fourth Amendment, important as it is in our society, does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here. We hold that dismissal of the grand jury because no women were on it is no sufficient reason for holding that the Government is barred from making use of the summoned documents.

[*Subsidiary Procedural Questions*]

Second. At the same time the District Court ordered the indictment dismissed it also ordered that the documents be returned to the defendants. The Government did not appeal from the order dismissing the indictment. See *United States v. Hark,* 320 U. S. 531, 535-36. It is contended that by its failure to appeal, the Government is barred by the doctrine of *res judicata* from challenging the dismissal and return orders.

Assuming that the Government by failure to appeal is barred from challenging the court's holding that the grand jury was illegally constituted and that the documents were properly ordered returned, it by no means follows that these orders permanently barred the Government from any future use of the documents as evidence. For the Government forfeited no rights to use the documents in a future valid proceeding by failing to appeal from the dismissal of the indictment—a dismissal it believed to be supported by our holding in the *Ballard* case. And dismissal of the pending indictment after holding the grand jury illegal created a situation where appellees were entitled to return of their papers as a matter of course. Consequently an appeal from the return order alone, even if such an appeal could have been taken, would have availed the Government nothing. For the foregoing reasons we hold that orders dismissing the indictment and requiring return of the documents did not affect the Government's right to have the documents produced in these civil proceedings.

For the same reasons we hold that the Government's right to demand production in this civil case was not affected by the District Court's later order requiring return of photostatic copies of the documents. Return of the photostats, like return of the originals, necessarily followed from the dismissal of the indictment. This was recognized by the District Court when in directing return of the photostats the court said, "Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

Third. For their claim of *res judicata* appellees also rely on a third order of the District Court "precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents." This order was entered prior to the court's action in this civil proceeding in which it quashed the *subpoena duces tecum* and refused to order production of the documents. Appellees contend that this order was a "decree of judicial outlawry" against any future Government use of the papers or knowledge acquired from them; that the Government could have but did not appeal from the order; that for this reason the "decree of judicial outlawry" had become final and binding upon the Government at the time it asked for production in this proceeding. The Government denies that the order had or was intended to have the broad proscriptive effect urged by respondents. In addition, the Government contends that the order was interlocutory and therefore not appealable. On this latter premise the Government relies on "familiar law that only a final judgment is *res judicata*

as between the parties." *Merriam v. Saalfield,* 241 U. S. 22, 28.

To some extent both phases of the contention—scope of the order and its appealability—depend upon whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances. See *Cogen v. United States,* 278 U. S. 221. The circumstances here we think show that the order now considered was not one of permanent general "outlawry" against all use of the documents involved, but an order to prevent their use in a particular criminal proceeding then pending.

After the court had dismissed the indictment because no women were on the jury, the Government filed in the same District Court an information charging the same offense. The defendants filed a motion in the information proceeding (1) to dismiss the information; (2) in the alternative to dismiss and expunge those facts of the information based on knowledge obtained from the papers and documents; (3) to preclude and restrain the United States from using in any way or for any purpose knowledge or evidence obtained from or contained in the documents. The court denied (1) and (2) but granted (3). The motion, court opinion, and court order bore the title and number (6070) of the criminal information proceeding. During the argument colloquies took place between court and counsel which emphasized that the motion related to "Criminal 6070."

The motion was argued at length before the district judge. Government counsel took the position that the court's order on the motion would not be appealable. See *Cobbledick v. United States,* 309 U. S. 323; *United States v. Rosenwasser,* 145 F. 2d 1015. He therefore asked the court to be careful about the form of the order, expressing apprehensions that counsel for appellees would later argue that the order entered in the criminal proceeding was broad enough to bar use of the documents in the civil proceedings. Government counsel indicated his plans subsequently to present the issue of the Government's right to use the documents in this civil proceeding, taking the position that an appeal would then lie. He therefore asked the court to await entry of any order until his plans could be carried out. Appellees' counsel told the court that "The plans which Mr. Kelleher has concern Civil 6055. This is Criminal 6070." And the court told Government counsel that the preclusion order would preclude use of the documents "only in this [criminal] action." The court further said to Government counsel that if the court made a wrong order "Then you can go ahead as you contend or plan to go ahead in your civil action." Finally, just before conclusion of the hearing on the order, the court told Government counsel, "I don't see how this is going to prejudice you in some other case, and this Court is only concerned with 6070 [criminal information charge] at this time, as I understand it."

We hold that the proceedings leading up to the preclusion order must be deemed a part of the criminal proceedings, see *Cogen v. United States,* 278 U. S. 221, 227; that the order did not preclude use of the documents except in these proceedings; and that this order does not stand as a bar to consideration of the availability of the documents for use as evidence in this civil case.

Other contentions of appellees have been considered and found to be without merit.

Reversed.

[¶ 62,415] Rochette & Parzini Corporation v. Campo.

In the New York Supreme Court, Bronx County. Special Term, Part I. N. Y. L. J. 1525, April 28, 1949.

New York Antitrust Act

Refusal To Supply Labor—Monopoly in Labor Market.—After failing to secure a collective bargaining agreement with a union which was found to enjoy a monopoly over the supply of labor in the industry, a member of an organization of employers took court action

for equitable relief. It was held that the union's refusal to furnish labor in order to maintain a high level of prices constituted a violation of Section 340 of the General Business Law and an order was made to restrain the union from interfering with the plaintiff in the performance of any lawful contract obtained by it and from preventing the plaintiff from securing union men.

See the New York Antitrust Act, annotations, Vol. 2, ¶ 8615.20.

[*Review of Facts*]

BRISACH, J.: Plaintiff brought this action against the defendant asking for a variety of equitable relief. The evidence discloses that the plaintiff was a member of an organization of employers who operated under collective bargaining agreement with the defendant union for many years prior to, and particularly between the years 1934 and 1941, but suspended activities during the war years.

After cessation of hostilities plaintiff, individually and as a member of the association, attempted to enter into a new collective bargaining agreement with the defendant but to no avail.

The evidence shows that the defendant union is comprised of approximately thirty to thirty-five members, which constitute all of the available manpower in the entire industry, and enjoys a monopoly in the supply of labor in the metropolitan area.

[*Nature of Refusal*]

Defendant's refusal to furnish labor or manpower to plaintiff is based on its own defined contention that the prices were getting too cheap in the industry and that the defendant union would refuse to furnish labor to subcontractors, and classified plaintiff as subcontractor, in direct contradiction to the evidence as furnished by plaintiff that the character of its business was the same since its inception some forty years ago, except that it suspended its business during war years, from 1941 to 1946.

Plaintiff has sustained the burden of proof in establishing its case and the defendant offered no evidence to controvert any of the plaintiff's testimony, and from the evidence it is clear that the acts of defendant constituted a violation of section 340 of the General Business Law and that plaintiff is entitled to the relief sought in the complaint (see *Falciglia v. Gallagher et al.*, 299 N. Y. Supp., 890; *Clark v. Curtis*, 273 App. Div., 797, aff'd 297 N. Y., 1014; *Albrecht v. Kinsella*, 119 Fed., 2d, 1003; *J. H. Wallace v. Smith*, Ohio Court of Common Pleas, decided February 23, 1949, vol. 4, L. R. R., Man., 854).

[*Relief Granted*]

Settle findings and judgment in accordance with the above decision (1) restraining defendant from interfering with the plaintiff in the performance of any lawful contract obtained by him; (2) enjoining the defendant from preventing plaintiff from securing union men in the performance of any lawful contract obtained by it; (3) restraining defendant from threatening plaintiff or any person with whom he may contract from issuing any statement, do any act, or perform any act on the part of defendant, its agents or servants tending to prevent plaintiff from obtaining union men.

[¶ 62,416] United States v. The Northeast Texas Chapter, National Electrical Contractors Association, et al.

In the United States District Court for the Northern District of Texas, Dallas Division. Criminal Action No. 11952. February 5, 1949.

Sherman Antitrust Act

Electrical Contractors—Insufficient Allegations—Indictment Dismissed.—In a criminal action charging a number of electrical concerns and individuals with violating the Sherman Antitrust Act, the indictment was quashed and the case dismissed since the indictment did not particularize the offense charged. A mere quoting of the statute is not sufficient to put a defendant on notice of the character of the offenses for which he is to be tried.

See the Sherman Act annotations, Vol. 1, ¶ 1630.225.

For the United States: Edward R. Kenny, R. T. McHugh, W. H. McManus, Attorneys for the Department of Justice, Washington, D. C.

For Westinghouse Electric Supply Co. and E. Robinson: George Wright of Thompson, Knight, Wright, Weisberg & Simmons, Dallas, Texas.

For Northeast Texas Chapter, National Electrical Contractors Ass'n, Henry Grable, Roy T. Gay, George L. Harris, N. T. Ivey, Lawrence Martin, J. L. McLure, E. D. Rainey and T. C. Sands: W. B. Harrell, Nash Adams, Dallas, Texas.

For General Electric Supply Co., G. L. Ralston and H. B. Sudicum: Russel V. Rogers, J. P. Rice, Dallas, Texas.

Beckett Electric Supply Co., Percy Rawlinson and J. C. Robinson: Biggers, Baker & Lloyd, Dallas, Texas.

For Meletio Electric Supply Co. and Jack Meletio: Burford, Ryburn, Hincks & Ford, Dallas, Texas.

Judge's Opinion

Nature of the Case

This is an indictment charging a number of corporations and individuals with the violation of the Sherman Anti-trust Act.

Motion to Dismiss

The defendants have offered a number of objections to the indictment, among which is a motion to dismiss, in that it fails to describe the offenses attempted to be charged therein with sufficient definiteness and certainty to inform said defendants, or any of them, of the nature or cause of the accusations made against them.

The Sherman Law

The Anti-trust Act was seemingly written before our legislators grew so voluble as some of them now appear to be. Stated in a few words, the law is substantially as follows:

"Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this Title to be illegal shall be deemed guilty of a misdemeanor * * *" 15 USCA 1-7.

The Indictment

The indictment contains some twenty-nine sections. The first twenty sections name the defendants, including five corporations, all being electrical concerns, and some fourteen individuals. Other sections set forth definitions, defining various terms pertaining to the business of the defendants, referring also the volume of business done by members of the Association indicted as one of the defendants. Count No. 1 of the indictment is embraced in Section 21 and is as follows:

"Beginning in or about the year 1946, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentment of this indictment the defendants have been engaged in a combination and conspiracy in restraint of the aforesaid trade and commerce among the several states in electrical equipment and services in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. Sec. 1), commonly known as the Sherman Act".

Count #2 of such indictment is embraced in Section 25 as follows:

"Each and every allegation contained in this indictment numbered 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 and 20 are here realleged with the same force and effect as though said paragraphs were here set forth in full. The acts alleged in this indictment to have been done by the defendant corporation Northeast Texas Chapter, NECA, were authorized, ordered or done by the officers, agents, or directors of said chapter, including the officers, agents or directors named as defendants herein".

Rule Seven

Bearing upon the sufficiency of the indictment we are cited by all parties to *Federal Rules of Criminal Procedure,* the pertinent part of which is Rule 7, Section C, "The indictment . . . shall be a plain, concise, and definite written statement of the *essential facts* constituting the offense charged." (Italics ours).

The Purpose of the Law

The Sherman Anti-trust Act was clearly for the purpose of protecting the buying and selling public, insofar as it was affected by

interstate commerce, against monopolies and corners being made or had upon any given subject of commerce or service, such being declared unlawful. The law was designed to prevent the unreasonable restraint of trade or commerce by controlling the prices of any given commodity. It is not, however, every act of pricing of a given commodity that comes within the category of unlawful acts, any more than the forgery of a man's name, unless it is done with intent to injure or defraud. In an often-cited authority, the *Apex Hosiery Co.* case, 310 U. S. 495, we find this declaration of law:

> "A . . . significant circumstance is that this Court has never applied the Sherman Act in any case . . . unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . .".

At about the time this proceeding was instituted, the government seemingly instituted similar actions at other points in the United States, namely, at San Francisco, Seattle, and Springfield, Missouri, the one at Dallas now under consideration being the fourth. The motion to quash the indictment in the Seattle case was disposed of on the 17th of last June before trial Judge Black. From his opinion we take the following statement:

> "Plaintiff's memorandum states that since about last November indictments have been returned in Federal Court against electrical contractors in Texas, Missouri and in this Court in Washington. Such memorandum says, 'The charges of these indictments, while not identical, are quite similar'."

In holding the indictment insufficient, the trial Judge uses the following language:

> "But charges of price fixing as to electrical systems which are a part of Seattle buildings, regardless of how censurable such practices may be, will not support federal prosecution for price fixing of 'equipment' moving in interstate commerce when there is not a single allegation that interstate commerce of such 'equipment' is or is intended to be restrained or burdened thereby".

The Missouri indictment has also been dismissed by the trial court, Justice Reeves, in which he says:

> "In the instant case there is not a single averment that the free flow of commerce was affected or would have been affected in any way whatsoever by the exactions made by the defendants upon owners and builders".

The California case was heard upon the merits, and the proof in the light of the indictment was held insufficient. The reasoning of the courts in the Washington and Missouri cases is believed to be sound.

The government insists that the language of the indictment is well within the language of the statute itself and for that reason it is sufficient. Referring back to Rule 7 of Criminal Procedure, it is noted that "the indictment shall contain *the essential facts* constituting the offense". In an anti-trust case, as with many other offenses, a mere quoting of the statute is not sufficient to put a defendant on notice of the character of the offenses for which he is to be tried. This can be perceived by a layman, taking for illustration the statute on housebreaking or burglary. It is not sufficient to charge "A" in an indictment with the general term of burglary, nor merely to quote the statute. It is true the defendant may know in his own mind that he is entirely innocent and feel competent to defend himself but, if during the trial the government should bring a case of circumstantial evidence where a burglary was committed, where the defendant was seen in the locality of its commission and other attending facts that would make a case against the defendant, and the defendant had in the meantime heard nothing about this burglary's having been committed until he was confronted with the evidence in the trial itself, he would have no opportunity to prepare his defense to overcome the government's case of circumstantial evidence. It thus becomes important, in the language of the Rule, to accompany the charge, or embrace in the charge, a statement of the essential facts constituting the offense alleged.

The Court in the Sixth Circuit, dealing with an indictment under the present Sherman Anti-trust Law, makes the following ruling, as summed up in the syllabus, which is borne out by the decision in the body:

> "Under the act of July 2, 1890, 'to protect trade and commerce against unlawful restraints and monopolies,' an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be

tested by the specific facts alleged to have been done or committed." 52 F. 104.

The First Circuit, bearing on this same question, in an opinion by Justice Putnam, says:

> "This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest . . . And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the *court to see* that they *are so*, and to enable the defense to properly prepare to meet the charge made against it." 55 F. 638.

Manifestly, all the evidence that would be offered in the event of a trial on the merits would not pertain to one defendant, or be applicable to him. Under the general and indefinite language contained in the indictment, a defendant would be unable to know, as the trial progressed, whether the government's evidence was looking to his conviction or to that of his co-defendants. We are confronted with a situation not unlike that found in the *Reardon* case, again by Justice Putnam, in which he says:

> ". . . the . . . indictment . . . is clearly defective, because it fails absolutely to allege anything in the way of showing wherein the transactions complained of were unlawful. Of course, general phraseology is used charging illegality and all that; but it is impossible to ascertain from what is said here wherein what was done was unlawful." 191 F. 457.

So viewing the motion to dismiss the indictment it becomes unnecessary to pass upon the other motion pertaining to the trial.

The indictment is quashed, and the case is dismissed.

[¶ 62,417] Ultra-Life Laboratories, Incorporated v. L. W. Eames.

In the Kansas City Court of Appeals. April Session, 1949. No. 21,111. May 9, 1949.

Appeal from Henry Circuit Court.

Sherman Antitrust Act

Property Rights in Secret Formulas—Agreement Not To Disclose Trade Secrets—Injunction Granted.—In an action taken by a manufacturer of poultry feeds and concentrates for an injunction to restrain a hatchery operator from breaking a contract in which he agreed not to teach or disclose trade secrets relating to a method and process for the culling of chickens, the Court approved the decision of the lower Court, where the defendant had sought to avoid the contract by pleading that its provisions contradicted the antitrust laws, by declaring that the property rights in secret formulas and processes acquired by a valid contract will be protected by injunction against those who through a breach of trust attempt to apply the secret to their own use.

See the Illinois Antitrust Law, Vol. 2, ¶ 8235.

For appellant: Poague, Poague & Brock, Clinton, Mo.

For appellee: Harold G. Baker, East St. Louis, Mo., George H. Miller, Sedalia, Mo.

BOYER, JOHN S., Commissioner, gave the opinion to the Court.

Appeal from Henry Circuit Court

[*Review of Pleadings*]

[*Digest*] This is an action in equity for injunctive relief from the violation by defendant of his contractual obligations. Plaintiff obtained a final judgment by the terms of which defendant was restrained from teaching or disclosing trade secrets of the plaintiff related to a certain method and process for the culling of chickens known as "Eamesway" and which had been taught and was being taught in the Eames Institute of Poultry Technology, an institute then owned by the plaintiff. Defendant was further restrained from the use of the names and terms "Eamesway" and "Eames Institute of Poultry Technology" and from soliciting and advertising in any manner to teach said method of culling poultry under any name or names whatever.

The defendant has duly appealed. The points for consideration presented in his brief pertain only to claimed errors in the findings of fact and conclusions of law made by the trial judge. The adequacy and propriety of the pleadings are not questioned, and although they are somewhat extended a brief reference thereto will suffice for an understanding of the issues which are raised thereby.

The amended petition states that plaintiff is an Illinois corporation with offices in East St. Louis; that it is and for many years has been engaged in the business of manufacturing and selling poultry feeds, concentrates, medicines, and remedies under the names of "Ultra-Life Feeds" and "Ultra-Life Poultry Concentrates" in connection with which it gathers and distributes to its customers and their patrons information regarding the breeding, care, feeding and culling of poultry; that in the spring of 1936, plaintiff learned that the defendant was using a method and process for culling chickens wherein by means of a physical examination and internal palpation of the organs, it could be determined whether or not a chicken was capable of and was producing eggs, and whether or not it would be profitable to retain said chicken in a flock as a producer of eggs; that thereafter defendant was employed by plaintiff to demonstrate his method and process under the sponsorship and supervision of plaintiff, and defendant was to devote his entire time to the business of plaintiff after September 1, 1936, except he was to be at liberty during the hatching period to operate his hatchery at Forest City, Iowa; that while defendant was engaged by plaintiff he developed and perfected his method of internal culling; that defendant desired to establish a school for the purpose of teaching his method and process and in 1938, in partnership with one C. W. Gates, he established the Eames Institute of Poultry Technology under the sponsorship of the plaintiff; that plaintiff spent large sums of money advertising the Eames method and furnished facilities for the conduct of the school; that the Eames method of culling poultry became identified with plaintiff's products; that prior to June 10, 1940, defendant and his partner were in disagreement and the partnership was dissolved, and as of that date plaintiff for valuable consideration acquired all the right, title, interest and privileges theretofore derived and to be derived from said Eames Institute of Poultry Technology; that both of said partners assigned all their right, title, interest and privileges in said partnership, including the names "Eames-Way" and "Eamesway" which were then used in reference to said method and process, to plaintiff and agreed not to teach, disclose or sell any information considered trade secrets concerning said method and process for a period of twenty years except to plaintiff; that thereafter defendant was employed by plaintiff, and in the course of said employment conducted schools wherein said method was taught under the name "Eamesway" to certain selected persons, and the Eames Institute of Poultry Technology continued as a department or division of plaintiff's business and was so advertised at great expense, with the knowledge and consent of defendant; that defendant continued in the employ of plaintiff until April 30, 1947, at which time he voluntarily left the employ of plaintiff to engage in the operation of a hatchery and to sell a spraying device; that on or about July 22, 1947, the defendant, in violation of the terms of his said contract dated June 10, 1940, proceeded to conduct schools under the name and style of Eames Institute of Poultry Technology, or a name or names similar thereto, where he taught said method and process, advertised said schools and said method and process; that he solicited students for said schools from lists of prospects compiled by plaintiff which said lists were the property of plaintiff; and in the course of such advertising identified himself as having been associated with plaintiff in the operation and conduct of said Eames Institute of Poultry Technology; that prior to August 11, 1947, defendant announced his plans to open and conduct a school under the name of Eames Institute of Poultry Technology, or a name or names similar thereto, in the town of Clinton, Henry County, Missouri; that he advertised for students to attend said school in violation of his contract and contrary to the right, title and interest of the plaintiff. The petition concludes with an allegation of facts showing the lack of an adequate remedy at law, and that unless defendant is restrained plaintiff will suffer irreparable damage.

The answer of defendant admits the execution of the contract of August 1, 1938, and of the contract dated June 10, 1940, and denies all other allegations. The answer alleged that the contract of June 10, 1940, was executed in the State of Illinois and the validity and construction thereof will be governed by the law of that state; that said

contract is void and of no effect because its provisions are contrary to public policy and in restraint of trade; that the petition failed to state a cause of action; that plaintiff did not have any proprietary right or any other right in the Eames method of internal culling of poultry; that plaintiff is not engaged in the business of teaching methods of culling poultry and therefore could suffer no damages; that no trade secrets were actually sold and delivered to plaintiff; that the internal culling of poultry is not a secret, but is known to divers other persons; that the contract is illegal because it violates the antitrust laws of the United States and of the State of Illinois, and because it attempts to create a monopoly on behalf of the plaintiff. Defendant alleged damages to him in the sum of $10,000, and prayed the court to increase the injunction bond to that amount.

[*Grounds of Appeal*]

The brief on behalf of appellant presents two principal points for consideration in an effort to show error in the findings and judgment of the court. First, that plaintiff did not prove a trade secret existed. Second, that the contract he is charged with having violated is void and against public policy. In reference to the validity of the contract, and in the course of the argument, the following admissions and statements were made by counsel for appellant: "In order to clarify defendant's position may we state that we are in complete accord with the plaintiff's contention that trade secrets may be sold and the buyer may take a covenant from the seller that the seller will not disclose the trade secrets to any other person. Such contracts are not in restraint of trade." And this further statement in connection with the argument that the contract is unduly restrictive: "The plaintiff says that an employer or vendee can take a covenant against the disclosure of a trade secret without any limitation as to time or space. This is true where there is actually a trade secret." The principal authorities cited by appellant to sustain his contention that the contract is void and against public policy are not in point because no trade secret was involved in those cases, all of which is clearly shown in the case of *Larx Co. v. Nicol,* 28 N. W. (2d) 705, 711, wherein the Supreme Court of Minnesota in considering the validity of an Illinois contract, with extended compilation of authorities, held the law to be to the same effect as that admitted by appellant in his last quoted statement. It is thus seen that the validity of the contract is made to depend upon the existence or non-existence of a trade secret being involved in the sale and transfer of defendant's business to the plaintiff. Addressing attention to that question, appellant says that the court must determine first whether or not internal culling of poultry is a trade secret. That is not stating the problem as we understand it. So far as the existence of a trade secret is concerned it is not a question whether internal culling is such, but whether the Eames system and process is a trade secret. Probably the best and most generally accepted definition of a trade secret is the following from the *Restatement of the Law of Torts,* Sec. 757 (b), where it is stated: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Further on in the same section is the following: "Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to secure the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

[*Authorities Reviewed*]

Taking into account the appropriate factors for consideration, we are of opinion that the findings and conclusion of the trial court were fully justified and amply supported by the evidence in the case. The defendant was not in position to deny that his processes and methods were secret. His contract not to teach or divulge such methods is in itself an admission of a positive character that such methods were secret. *S. Jarvis Adams Co. v. Knapp,* 121 Fed. 34, 40. In a discussion of this subject, Callman in his work on *Unfair Competition and Trademarks,* 1945 Edition, Vol. 1, Sec. 53.3, p. 666, states: "Express agreement not to disclose any of the processes and methods * * * is a positive acknowledgment of the fact that such processes and methods are secret; the

stipulation would otherwise be meaningless." Williston on Contracts, Revised Edition, Vol. V, p. 4626, says:

> "The owner of a secret on selling it, may effectively promise not to compete by making use of the process himself or divulging it to others. Indeed, the sale of a secret process as such carries with it the implied obligation not to disclose it to others."

There are many cases which support the conclusion of the court and show a great variety of subjects entitled to protection as trade secrets. Some of them are: *Sandlin v. Johnson,* 141 F. (2d) 660; *Larx Co. v. Nicol,* 28 N. W. (2d) 705; *International News Service Co. v. Associated Press,* 248 U. S. 215, 39 Sup. Ct. 68; *F. W. Dodge Co. v. Construction Information Co.,* 183 Mass. 62, 66 N. E. 204; *Pressed Steel Car Co. v. Standard Steel Car Co.,* 210 Pa. 464, 60 Atl. 4.

In the case of *Board of Trade of the City of Chicago v. Christie Grain & Stock Co.,* 198 U. S. 236, 25 Sup. Ct. 637, 639, Justice Holmes, in discussing a similar problem, said:

> "In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein v. Donaldson Lithographing Co.,* 188 U. S. 239, 249, 250. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

There are other cases holding that absolute secrecy is not required and that others might have knowledge of a trade secret, but this is no defense to one who discloses the trade secret in violation of a contract. *Vulcan Detinning Co. v. American Can Co.,* 72 N. J. Eq. 387, 67 Atl. 339, 342, 343; *Radium Remedies Co. v. Weiss,* 173 Minn. 342, 217 N. W. 339; Callman on *Unfair Competition and Trademarks,* 1945 Ed. Vol. 1, Sec. 53.3, p. 672.

Appellant contends that because other persons have for many years used internal culling of poultry, and the method is of general knowledge in the poultry industry, it is therefore not a trade secret. Citations in support of this contention are not in point. In the case of *Brunson v. Reinberger & Collier,* 203 S. W. 269, 134 Ark. 211, the court was unable to ascertain that the original trade secrets had been acquired from the plaintiff, and whether or not any confidence had ever been violated. In *Sach v. Cluett, Peabody & Co.,* 31 N. Y. S. (2d) 718, the court held that trade secrets are property and will be protected in equity against unauthorized disclosures. In *Godefroy Mfg. Co. v. Lady Lennox Co.,* 134 S. W. (2d) 140, the St. Louis Court of Appeals held there was an independent discovery by the defendant of its method, and no proof that defendant was in possession of plaintiff's secret formula. In *Chadwick v. Covell,* 151 Mass. 190, 23 N. E. 1068, the opinion recognized that a trade secret should be protected by courts of equity. In *Southwest Specialties Co. v. Eastman,* 130 Kansas, 443, 286 P. 225, the court said there was no express contract not to disclose the trade secret, and that there was in fact no trade secret involved.

While the validity of the contract in question must be determined by the law of the place where the contract was made, matters respecting the remedy depend upon the law of the place where the suit is brought. *Ruhe v. Buck,* 124 Mo. 178, 183, 27 S. W. 412. In consideration of the remedy to which plaintiff is entitled, we then look to the law of Missouri where the rule is well established that secret formulas and processes are property rights which will be protected by injunction against those who through a breach of trust or a violation of confidence attempt to apply the secret to their own use or to impart it to others. *Luckett v. Orange Julep Co.,* 271 Mo. 289, 196 S. W. 740; *Germo Mfg. Co. v. Combs,* 209 Mo. App. 651, 240 S. W. 872, 881; *Charles Reilly Optical Co. v. Burke,* 41 S. W. (2d) 909; *Harrington v. National Outdoor Adv. Co.,* 355 Mo. 524, 532, 196 S. W. (2d) 786; *Sandlin v. Johnson, supra.* When trade secrets are involved the law of Illinois is in accord with the Missouri rule. *Witkowsky v. Affeld,* 283 Ill. 557, 119 N. E. 630; *Victor Chemical Works v. Iliff,* 299 Ill. 532, 547, 132 N. E. 806, 813.

An outstanding fact in this case, which appellant overlooks or ignores, is that the plaintiff purchased a business known as the Eames Institute of Poultry Technology with all the rights and privileges incident thereto.

That business has been sponsored and developed at an enormous expense to plaintiff, and plaintiff has a property right which equity will protect against such an unlawful invasion as that attempted by defendant.

[*Lower Court Judgment Affirmed*]

According to the authorities heretofore cited and having in mind the nature and extent of plaintiff's business, which is in effect nationwide, the judgment of the court is not unduly restrictive. In view of all of the foregoing the judgment should be affirmed. The Commissioner so recommends.

SPERRY, C., not sitting.

PER CURIAM. The foregoing opinion of BOYER, C., is adopted as the opinion of the court. The judgment is affirmed.

DEW, P. J. and CAVE, J., concur; BLAND, J., absent.

[¶ 62,418] In the Matter of the Application of Harry Alexander, Inc. et al., to Quash Grand Jury Subpoenas Duces Tecum.

In the United States District Court of New York, Southern District. M-11-188. January 3, 1949.

Sherman Antitrust Act

Unreasonable Subpoena—Documents not Essential—Portions Stricken.—Certain items and classifications were ordered to be stricken from a subpoena taken out by the Government which required members of an electrical contractors association to produce an unreasonable quantity of documents before a grand jury empaneled to determine as to the possible existence of restraints of trade in the electrical contracting industry which might involve violations of the antitrust laws.

See the Sherman Act annotations, Vol. 1, ¶ 1630.156.

For applicant: Weisman, Grant & Jaffe, John Harlan Amen, William J. Butler, New York, New York.

For the United States: J. Francis Hayden, Special Assistant to the Attorney General, New York, New York.

[*Nature of Applicants' Problem*]

CLANCY, D. J., District Judge: This is an application made by thirty-five members of New York Electrical Contractors Association, Inc., to quash subpoenas *duces tecum* purporting to require production by each of them of a mass of papers before a grand jury. The answering affidavit says that the Government has "information indicating possible restraints of trade in the electrical contracting industry which may involve violations of the Antitrust law" and it is the amorphous intangible charge embodied in this guarded language that is to be examined. The applicants have presented their problem to the Court with a lucid factual exposition of their business and their business methods, the nature and number of the records required to be produced and the effect on them and on their business of attempted obedience to the subpoenas. Every fact they state is ignored in the Government's answering affidavit which may be summed up as a series of unsupported conclusions that all the papers called for are essential sometimes, it is said, to investigation and sometimes to prosecution under an imaginary indictment.

[*Constitutional Provisions Governing a Subpoena*]

The constitution requires that the forced production of documents by subpoena be not unreasonable. *Boyd v. U. S.*, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43. It was said in *McMann v. Securities Exchange Commission*, 87 Fed. (2d) 377; "The search is 'unreasonable' only because it is out of proportion to the end sought as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds." The Antitrust Division can hardly take seriously the notion that a grand jury or its successor or successors will ever see any considerable part of the material these applicants are called on to produce. Both grand jurors and prosecutors are human beings and he would be a person of incredible competence and capacity who could contain or absorb any significant fraction of it over a long time. It is sworn to and not

contradicted that "'one of the thirty-five applicants has 9600 active contracts and accounts for maintenance alone and that just in its maintenance business it experiences a turnover of 1000 contracts and accounts per year. The records of this department alone, exclusive of correspondence would require a minimum of fifteen cabinets of four drawers each." This is an inconsiderable part of the intended product of the Government's dragnet. The subpoenas express a studied attempt to include what is incorporated in the imaginative concept of every shred of paper in a contractor's office and to avoid the possible exclusion of anything there. In *Brown v. U. S.*, 276 U. S. 134, can be found a sample of what a proper subpoena calls for when the author must depend for description in classifications. The matter demanded was "probably material" on its face and could readily be located by an intelligent clerk.

[*Authorities against Applicants Distinguished*]

The Government leans entirely on excerpts from opinions but when the cases are read they will be found irrelevant to the case of these applicants. The subpoenas in *Consolidated Rendering v. Vermont*, 207 U. S. 541; *Norcross v. U. S.*, 209 Fed. 13 and *U. S. v. Invader Oil Corp.*, 5 Fed. 2715, were coextensive with the definite charges in those cases. *Oklahoma Press Co. v. Walling*, 327 U. S. 186, sustained the investigatory power of the Fair Labor Standards Administrator. *Shotkin v. Nelson*, 146 Fed. (2d) 402, sustained the War Production Board's authority to examine the books and records for one year of a dealer in essential war material.

The Judge in *Matter of Eastman Co.*, 7 F. R. D. 760, had the benefit of three earlier judgments to acquaint him with the nature of what was relevant and proper when he limited the subpoena in accordance with Rule 17-c. We have only the face of the subpoena to serve as a guide.

[*Order of the Court*]

Items I and II are allowed with the following elisions: After the words "Operating Committee" in the second line of item I, omit everything down to and including "group thereof" in the fifth line. Omit the words "manufacturing, producing" in the eighth line and all that remains in paragraph I after the word "licensing" in the ninth line. Classification No. 23 must be stricken. From paragraph II are stricken classifications D, F, G, H and I. Incorporate in the order items I and II as thus modified. The subpoenas are otherwise vacated and quashed. What has been allowed should reveal some evidence if any exists of any past or present crime of which the applicants possess evidence and serve as a sufficient basis for intelligent process and progress thereafter.

[¶ 62,419] United States v. Consumers Ice Company, Louisiana Ice Company, Inc., Morgan Vivian Ice Company and Samuel Ross Morgan, Sr.

In the United States District Court for the Western District of Louisiana. Criminal Action No. 12,087. May 13, 1949.

Sherman Antitrust Act

Production of Documents—Personal Papers—No Immunity Granted.—The motion of an individual manager and owner of three named ice companies to dismiss a criminal prosecution, alleging conspiracy to restrain trade and monopolization of the ice business, on the grounds of immunity from prosecution guaranteed to him when he delivered up his personal papers in response to a subpoena was denied. The Court found the affairs of the individual and corporate defendants to be so badly mixed it would be difficult to tell where his personal interests ended and corporate dealings began. It was held that to grant immunity in such circumstances would open the door to abuse by those individuals seeking relief from personal responsibility for their illegal activities.

See the Sherman Act annotations, Vol. 1, ¶ 1630.539.

For plaintiff: Malcolm E. Lafargue, United States Attorney, Shreveport, La.

For defendant: Horace L. Flurry; Jacob M. Raey; Fred D. Turnage; S. W. Plauché, Jr., Lake Charles, La.

[*Pleadings*]

DAWKINS, J., District Judge: Defendants, Samuel Ross Morgan, and three corporations, Consumers Ice Company, Inc., called Consumers; Louisiana Ice Company, Inc., called Louisiana; and Morgan Vivian Ice Company, Inc., called Vivian, are charged in an indictment returned October 22, 1948, with violation of Sections 1 and 2 of Title 15 U. S. C. (Anti-Trust Act.) It is charged that Morgan, the individual, "within three years next preceding this indictment has been associated with or employed by defendant corporations, and controls, or within said three year period has controlled operations of defendant corporations. He has done and caused to be done within said three year period many of the acts hereafter alleged."

The indictment consists of two counts and in the first he and the corporations are charged with having agreed and conspired to restrain trade and commerce in the ice business, and (2) with monopolizing trade and commerce in the ice business within the areas described in the indictment.

All defendants, including Morgan, filed written pleas of not guilty, the latter with reservation of the right to file a motion to dismiss. On the same day, January 19, 1949, Morgan filed a motion to dismiss on the grounds that he had been given immunity from prosecution because the Court had issued a *subpoena duces tecum* requiring him to produce before the grand jury, which returned the indictment, records and documents as set forth in Exhibit A, attached to said motion to dismiss, and that the "said records, data, and evidence were defendant's personal papers, in his possession and under his control in his status as manager and proprietor of his non-corporate business". The immunity was claimed under the 5th Amendment to the Constitution and Title 15, Section 13 U. S. C. (Act of February 25, 1903, C. 755, Sec. 1, 32 Stat. 904).

Findings

On October 11th, 1948, there was issued a subpoena to Morgan individually to appear before the grand jury at Monroe on the 18th of that month in the case of *"U. S. v. Genally"*.

On October 8th, 1948, the District Attorney presented to this Court and there was granted an application for writs of *subpoenas duces tecum* addressed "to the president and/or official of the Consumers Ice Co., Shreveport, La."; "to the president and/or official of the Louisiana Ice Co., Shreveport, La."; "to the president and/or official of Morgan Ice Industries, Inc., Shreveport, La."; and "to the president and/or official of Morgan Ice Co., Shreveport, La.", commanding them all to produce "before the grand jury . . . on Monday, October 18th, 1948 . . . all documents described, listed and set forth" in Exhibits B to E, both inclusive. The descriptions in each instance were identical and were made part of the subpoenas addressed to the officers of the corporation as follows:

"Exhibit B" was attached to Consumers, "Exhibit C" to Louisiana, "Exhibit D" to Morgan Industries, Inc. and "Exhibit E" to the subpoena addressed to Morgan Ice Co.

Returns on the *subpoena duces tecum*, addressed to Louisiana, showed three attempts were made to serve the same upon Charles Elkins, "secretary-treasurer, both at its place of business, 2465 Texas Avenue and at his residence", twice on October 12th and again on the 14th without success, and it was finally returned unexecuted on October 18th, 1948, the date on which the documents were ordered to be produced before the grand jury.

No service was made upon Morgan Ice Industries, Inc., and according to testimony of defendant, Morgan, there was and is no such corporation.

Service upon Morgan Ice Co. was made "through S. R. Morgan, upon instructions from the United States Attorney". Again according to Morgan, there was also no corporation by this name, but he and his wife carried on the activities hereinafter mentioned, under this appellation as a registered trade name.

The following is the list of the papers and documents called for as attached to each subpoena addressed to the several corporations:

"1. All invoices, records of accounts, bills of lading from railroads and other public concerns, and records of transportation by privately owned trucks or by contract holders on all ice shipped or transported from your ice plant or plants to a destination outside the State in which said plant or plants are located during 1947 and 1948.

"2. All correspondence, office memoranda and all minutes of meetings of the board of directors, and all minutes of

the meetings of the stockholders during the period from January 1, 1942 to October 1, 1948, which refer to the following subject matter:

"a. The ownership of the stock in the corporation;

"b. To the election of directors and officers of the corporation;

"c. To the designation of the managers of the business operations of the corporation;

"d. To the acquirement of any ownership interest in, or operating control of, the business of any person, company or corporation engaged in the manufacture or sale and distribution of ice in the territory in which you operated the manufacture, sale or distribution of ice on October 1, 1948.

"3. All price lists and records of prices of ice in effect by you during the years 1947 and 1948, including wholesale and retail prices at your plants or plant and on your distribution routes.

"4. All records of quantities of ice produced in each of your plants and the total sales from each of said plants during the years 1947 and 1948.

"EXHIBIT E."

Morgan appeared before the grand jury and the following is a transcription of what took place and his examination before that body:

"Testimony of Samuel Ross Morgan before Grand Jury Convened at Monroe, Louisiana, on October 18th, 1948

"By Mr. Flurry:

"Q. Mr. Morgan, will you state your full name so that the reporter may take it down?

"A. Samuel Ross Morgan.

"Q. Where do you live?

"A. Shreveport, Louisiana.

"Q. What is your street address?

"A. 775 Thora Boulevard.

"Q. Did you receive a subpoena from the United States District Court to produce certain documents before the Grand Jury?

"A. I did.

"Q. Have you brought with you these documents?

"A. As far as I know, yes, sir.

"Q. Did that subpoena which you received call for all invoices, records of accounts, bills of lading from railroads and other public transportation concerns, and records of transportation by privately owned trucks or by contract haulers on all ice shipped or transported from your ice plant or plants to a destination outside the State in which said plant or plants are located, during 1947 and 1948?

"A. I think so, yes, sir.

"Q. Have you produced those records?

"A. I have, as far as I have been able to locate them. I might add, if I may, I have not been active in this clerical department and two of my clerical help had an accident immediately after this subpoena—one fell and broke two or three ribs and I have been deprived of that help and still another is hospitalized and I have done the best I can. I have what you wish.

"Q. If you have any of those documents which have not been produced by you here this morning, where would those documents be located?

"A. They would be at 2465 Texas Avenue in Shreveport.

"Q. And who would be in charge of those clerical records?

"A. Well, I would. I am continuing with a young lady over there a further search for anything that would be further responsive. I think I have everything asked for.

"Q. Did you also bring all correspondence, office memoranda and all minutes of meetings of the Board of Directors, and all minutes of the meetings of the stockholders during the period from January 1, 1942 to October 1, 1948, which referred to the following subject matter: The ownership of the stock in the corporation?

"A. Well, I am sorry I have to tell you that those records are under *subpoena duces tecum* in the First Division, Circuit Court of Caddo Parish, but I can give it to you from memory.

"Q. What about the same documents relating to the election of directors and officers of the corporation?

"A. That is embodied in the minute book, of course, which is impounded.

"Q. The same documents with reference to the designation of the managers of the business operations of the corporation, would that also be incorporated?

"A. That would be in the corporate minutes.

"Q. And to the acquirement of any ownership interest in, or operating control of, the business of any person, company or corporation engaged in the manufacture or sale and distribution of ice in the territory in which you operated the manufacture, sale or distribution of ice on October 1, 1948?

"A. That is correspondence with reference to that?

"Q. Yes, correspondence, office memoranda and minutes of meetings.

"A. There has been nothing to that effect that I know of.

"Q. All price lists and records of prices of ice in effect by you during the years 1947 and 1948, including wholesale and retail prices at your plant or plants and on your distribution routes.

"A. Well, we only have two prices—

"Q. We are not asking you to testify, Mr. Morgan, unless you want to sign a waiver of immunity as to what transpired in your business. We are merely asking you for the corporation records.

"A. Well, I don't have any such records.

"Q. Do you have any records of quantities of ice produced in each of your plants and the total sales from each of said plants during the years 1947 and 1948?

"A. I do not have any plants.

"Q. Well, I meant the corporation, not you individually?

"A. Yes, those records are here.

"Q. The records which you have produced, Mr. Morgan, for the corporation, they are the records of the corporation made in the due course of business?

"A. That is correct.

"Q. That is all we wish to ask you, Mr. Morgan. We are not asking you to testify as to the operations, etc. We only want to identify the records.

"A. Does that mean I am excused?

"Q. Yes, but you may leave the records. Mr. Morgan, Mr. Plauche explained to me that your wife was over at the hotel and she was not feeling very well and we consented she remain over at her hotel room and in order to save her the embarrassment of service of a subpoena at the hotel Mr. Plauche said she would be glad to come over voluntarily.

"A. She is subject to your pleasure at any time.

"Q. I think we might as well let you bring her over and she can be excused when we are through with her.

"A. Yes, sir.

"Mr. Flurry: That is all. Thank you."

The documents produced before the grand jury are contained in a pasteboard box and consist of letter fileholders offered in the trial of this motion to dismiss and were numbered by defendant's counsel as mover's numbers 1, 3, 4, 5, 6, 7 and 9, together with a more or less unintelligible memorandum book marked Mover 8.

Exhibit No. 1 embraces some several separate folders, bearing the labels, "Vivian Ice Company, Daily Reports", from April to October 1948, both inclusive. They purport to show the ice produced and the disposition made of it each day of the month with deposit slips in the name of the Vivian Ice Company, issued by the Bank of Vivian, La.

Mover No. 3 consists of some four folders labelled "Daily Reports, Morgan Ice Company, Longview, Texas", for the months of June to September, both inclusive, 1947, and are all of substantially the same character as those described as found in Mover No. 1.

Mover No. 4, labelled "Daily Reports—Morgan Ice Company, Dallas, Texas", for August and September, 1947 and consists of identical printed forms filled out as in the other two exhibits. However, there were no deposit slips attached to these forms as in the case of the Vivian Ice Co.

Mover No. 5 is a folder labelled "Independent Ice and Cold Storage Company, Mr. Walter B. Chandler, Shreveport" and contains carbon copies of two letters addressed to the said Chandler, dated respectively June 16th and July 16th, 1947, and samples of a letterhead labeled "Morgan Ice Companies, Shreveport, Louisiana", with "S. R. Morgan" on the left hand margin, and a similar blank envelope.

Mover No. 6 bears the label "Fair Colvin, Shreveport" and consists of carbon copies of letters dealing with proposals for handling the ice of several dealers of ice in the Shreveport area.

Mover No. 7 is labelled "City Ice Service, Inc.,—Mr. Moss, Shreveport" and contains carbon copies of letters addressed to Mr. W. S. Moss, manager City Ice Service, Inc., and signed variously "Louisiana Ice Co., Consumers Ice Co., by S. R. Morgan" and Consumers Ice Co., Louisiana Ice Co., Inc. by S. R. Morgan" and others also signed "S. R. Morgan."

Mover No. 9 contains a folder labelled "City Ice Service, Inc. . . . contract . . . Mr. Moss", another labelled "Texas and Pacific Rwy. Co.—Frt.—bills paid—1948", and a stock book marked "Consumers Ice Co., Shreveport", the latter indicating that three certificates were issued on October 31, 1947, as follows:

Certificate No. 1 to S. R. Morgan, Jr., "original issue", 126 shares, Certificate No. 2 to S. R. Morgan, Jr. for William Ellis Morgan IV, 123 shares, and Certificate No. 3, Mrs. Maude W. Morgan, for one share.

As stated above, there was also addressed to S. R. Morgan individually a subpoena to appear as a witness.

Conclusions

The transcript of Morgan's examination before the grand jury, as well as the *subpoenas duces tecum* addressed to the corporations, all show that the purpose was to inquire into the affairs of these corporations as the same bore upon the issue of whether there had been a violation of the anti-trust laws in the handling of ice in interstate commerce. No *subpoena duces tecum* was addressed to Morgan nor was his name as an officer in any of those directed to the corporations. Such papers as were brought before the grand jury were produced by Morgan, notwithstanding there was no effective service on the Louisiana Ice Co., Inc., and in response to a subpoena directed "to the president and/or official of Morgan's Ice Co., Shreveport, La. Morgan had made known to the server of the process that there was no corporation known as Morgan Ice Co., but under instructions from the U. S. Attorney service had been made upon Morgan in the manner stated, that is, upon "Morgan Ice Companies through S. R. Morgan".

If the statements of Morgan as a witness in the trial of this motion to dismiss are accepted, there were at least three corporations, to-wit: Louisiana Ice Co., Inc., Consumers Ice Co., Inc., and Morgan Vivian Ice Co., Inc., during the major portion of 1947 and all of 1948, a part of the period about which the grand jury was inquiring, and all their books and records were kept in the same office at 2465 Texas Avenue in the city of Shreveport, Louisiana. This defendant also testified that his son, S. R. Morgan, Jr., owned controlling interest in the Louisiana while this defendant's wife, Mrs. Maude W. Morgan, owned the major interest in the Consumers and Vivian, as well as one-half interest in all the earnings arising from a business carried on by Morgan individually in handling the output of the first of these corporations and in the operating of the other two under leases. In response to questions by the Court, however, Morgan admitted that, insofar as his wife was concerned, he actually made the decisions, operated and controlled all of these affairs of his wife in such manner as he saw fit. The files and documents produced show that he dealt indiscriminately with the affairs of the corporations in their or his name on all matters as he happened to choose at the particular instant. The result is that this and their affairs, if his testimony is to be accepted, are so badly mixed, it would be difficult to tell where his personal interests ended and corporate dealings began. Morgan claims to have leased each of the ice plants of Consumers and Morgan Vivian for the same price of $6,000 per year, notwithstanding the differences in their capacities; and their reports on employees for social security purposes, etc. were made in the names of the corporations. There is no question but that he and his family control all these three corporations, as well as operations of other plants at a number of smaller places both in Texas and Louisiana.

[*Claim to Immunity Not Established*]

It is significant, as Morgan admitted, that there were no written contracts of leases or of agreements to take the output of any plant and to handle matters in the manner he claims was done under the trade name of "Morgan Ice Companies". Much of his testimony, both before the grand jury and on the trial of this motion, is mixed up and conflicts, as will be seen by careful examinations. The summons to him as a witness did not command him to produce anything, and it was particularly obvious from the *subpoena duces tecum* that the Government was asking for corporate records. If Morgan saw fit to mix up his personal affairs with those of the corporations and to produce his own papers along with theirs, especially in view of the warning that was given him when he appeared before the grand jury, he has no one to blame but himself and it is not believed that he can now claim immunity in such circumstances. If this were permissible all that anyone would have to do in carrying on activities in violation of the anti-trust laws, would be to mix his personal affairs with those of the corporations, and when they were haled into court, voluntarily produce the whole in response to subpoenas addressed to them, and as to which he denies any official relationship, and thus plead the protection of the law, notwithstanding he might have been the one whose genius conceived and executed the entire scheme of law violation; and he would thus have the benefit of the corporate interests in all matters of responsibility for their illegal activities.

It is the view of this court that the motion to dismiss should be denied.

Proper decree should be presented.

[¶ 62,420] The People of the State of California v. Max Part, et al.

In the California Superior Court, County of Los Angeles. No. 556,977. 62 Los Angeles Daily Journal, No. 113, page 1. April 28, 1949.

California Unfair Practices Act

Price Cutting in Cigarette Business—Individual and State Remedies—Injunction Denied.—Injunctive relief was denied in an action brought by the Attorney General against jobbers and wholesalers of cigarettes for alleged price cutting in violation of the Unfair Practices Act. It was held that the Legislature could not have contemplated that injunctive relief would be granted to the State in addition to the private parties directly injured. Since it was well established at the time the Act was passed that equity would not enjoin violations of a criminal statute the Legislature, in the absence of express words to the contrary, could not have intended the rule to be circumvented. There was nothing in the language of the statute, the Court ruled, to support such intent. The state can not be interpreted so as to come within the term "person" as defined by the Act.

Section 3369 of the Civil Code authorizing state use of the injunction was held to be confined to the common law concept of unfair competition which was extended in its scope by judicial definition but not to the extent of the statutory definition found in the Unfair Practices Act.

See the California Unfair Practices Act annotations, Vol. 2, ¶ 8068.80.

Memorandum Ruling

[*Issues Before the Court*]

HANSON, CLARENCE M., Superior Judge: The decisive question presented by this and 29 other related cases, all instituted by the Attorney General against various jobbers and wholesalers of cigarettes, engaged in cutting prices in violation of the Unfair Trade Practices Act, is whether the State may enforce the Act through the injunctive process.

The Act is one of a series of four distinct acts enacted by the legislature, for the purpose—as stated by it—to preserve and regulate competition. One of the Acts deals with contracts in restraint of trade; a second with combinations in restraint of trade; a third with Fair Trade Contracts; and the other being the one before us, with Unfair Trade Practices. Only two of the Acts just mentioned prescribe remedies for their enforcement, i. e., the one with respect to Combinations in Restraint of Trade and the other the Unfair Trade Practices Act. The latter Act provides for both civil and criminal remedies. Any violation of the Act is made a misdemeanor punishable by a fine of not less than $100 nor more than $1,000, or by imprisonment not exceeding six months or by both, *for each single violation.* In addition, the Act with respect to civil liability provides that "Any person or trade association may bring an action to enjoin and restrain any violation" of the Act "and, in addition thereto, for the recovery of damages."

The Act defines the word "person" as used in the preceding quotation as being "any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation." Accordingly, unless the State comes within the scope of the definition just quoted, it may not under the terms of that Act maintain this action for injunction unless other general statutes so provide.

[*Nature of the Act*]

At common law, selling below cost or price cutting was not unfair competition which alone at common law was actionable. Accordingly, the Unfair Trade Practices Act is not declaratory of the common law, but is strictly a statutory extension thereof. As the Act in question creates not only rights and liabilities but provides within the framework of the Act remedies along with the manner of their enforcement, it seems plain that no other remedies may be invoked unless they clearly embody a direct reference to the Act, expressly or by necessary implication.

The Act, it is clear, is primarily for the benefit of the vendors of merchandise and of benefit to the consuming public only so far as it preserves competition. Competition implies not monopoly prices, but low prices. Accordingly, it may not lightly be assumed that the legislature having provided a remedy in favor of all persons injured by a violation of the Act, either by way of double

damages or injunction, or both—and additionally for fine and imprisonment for violators at the instance of the State—contemplated that the taxpayers' money should be spent by the State in an endeavor to enjoin violators, when that right was given to all persons directly injured. It would seem that if the legislature had desired to vest that power and duty in the State it would not have granted it to the persons directly injured, but would have limited their rights to double damages. As it was well established at the time the Unfair Trade Practices Act was enacted that equity would not enjoin violations of a criminal statute, the legislature could hardly have contemplated that the rule could or should be circumvented by legislation. To permit the State to enjoin a violation of the statute which prescribes criminal penalties is nothing more or less than to permit the State to enjoin violations that are made criminal by the express terms of the statute. There is nothing in the language of the statute to support any such intent by the legislature unless the word "person" as defined by the statute is interpreted as including the State. To be sure, it is true, as contended by the Attorney General, that the State in certain instances has been classed as a "person," "association," or "organization" or "public corporation"—all of which phrases are embodied in the statutory concept of a person. In that connection it is true, as contended by the Attorney-General, that a state is regarded as a "person" within the purview of the federal Sherman Anti-Trust Act, but it is equally true that the United States is not. The reason is that the United States alone and none of the individual states is *parens patriae* under that Act. In the Act before us the state is the *parens patriae*. Hence the same rule, it seems, should be applied. Without citing further examples or cases it is enough to say that if the legislature had contemplated that the Act was so decidedly important as a supposed public welfare act as to warrant vesting the injunctive process in and at the instance of the state, it would have said so by apt words. As was pointedly said by the Supreme Court of the United States in *United States v. Cooper*, 312 U. S. 600:

"The United States is a juristic person in the sense that it has the capacity to sue upon contracts made with it or in vindication of its property rights. The Sherman Act, however, created new rights and remedies which are available only to those on whom they are conferred by the Act. The precise question for decision, therefore, is whether, by the use of the phrase 'any person' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.

"Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

In the instant case this court, using these aids of construction, is unable to find that the legislature intended by the use of the word "person" to include therein the State of California.

[*Scope of Code Definition of Unfair Competition*]

It is next argued that as the language of Civil Code § 3369 vests in the Attorney General the right to procure an injunction to enforce a penal law in cases, of nuisance or unfair competition, which latter phrase is defined as including "unfair or fraudulent business practices," the statute encompasses within that phraseology violations of the Unfair Trade Practices Act. If the legislature had intended by its expanded definition or "unfair competition" as that phrase is defined by the common law to include the statutory definition as set forth in the Unfair Practices Act, it seems it would have expressly said so. The phrase "unfair competition" as it was known to the common law has been extended in its scope by judicial definition, but in no instance to the extent of the statutory definition found in the Unfair Trade Practices Act. Hence it would seem that at best it was the expanded judicial definition and not the statutory definition which the legislature had in mind by the language it used in Civil Code § 3369. There is a definite support for that viewpoint in *International etc. v. Landowitz*, 20 Cal. (2d) 418. In that case the trial court denied an injunction to prohibit the continued violation of an ordinance even though the statute pursuant to which the ordinance was passed specifically granted the right to an injunction. The denial was

based by the trial court on the claim that the statute was unconstitutional. . . . By the time the case reached the Supreme Court the statute had been repealed. The Supreme Court, however, in deciding the case, stated that even if the statute was not unconstitutional and even if it had not been repealed an injunction could only have been granted on the theory that Civil Code § 3369 was applicable. In holding that section could not be applied, the court said:

"Since 1933 it is true, section 3369 of the Civil Code has provided that any person performing an act of unfair competition may be enjoined. As used in that section, unfair competition means 'unfair or fraudulent business practice . . .' (Civil Code, Section 3369 (3)) . . . the statutory definition of 'unfair competition' thus incorporated in Civil Code Section 3369 is not essentially different from that which has historically furnished the basis for equity injunctions against unfair competition. Such injunctions were not directed against business practices like the ones involved here which, if unfair, are made so under special statute. Those actions ordinarily involved the fraudulent passing off of one person's goods as those of another. (*American Philatelic Soc. v. Claiborne,* 3 Cal. 2d 68, 697 (46 Pac. 2d 134); *A. L. A. Schechter Poultry Co. v. United States,* 295 U. S. 495, 531-532 (55 S. Ct. 837, 49 L. Ed. 1750, 97 A. L. R. 947); See *Nims, Unfair Competition* (2d ed. 1917) p. 547; *Chaffee, Unfair Competition* (1940), 53 Harv. L. Rev. 1289, 1301; 24 Cal. Jur. 6283 . . .

". . . Civil Code section 3369 contains no broader a definition of the term 'unfair competition' than existed at common law and in itself furnishes no basis for an injunction against the violation of the penal ordinance involved in this case."

Viewing that section of the Civil Code in the light it is viewed by the Supreme Court I have no occasion to determine whether the section is open to the challenge made to its constitutionality.

In passing it may be remarked that the identical question which is here presented has within the past few weeks been presented in two other superior courts of this state. In each instance, one a ruling by Superior Judge Buck, sitting in San Joaquin County and the other by Superior Judge Dehy sitting in the Riverside court, the decision was against the Attorney General.

For the reasons herein stated, I am of the view that the demurrer should be sustained without leave to amend; the restraining order discharged, and the request for a preliminary injunction denied. So ordered.

[¶ 62,421] Tag Manufacturers Institute et al. v. Federal Trade Commission.

In the United States Court of Appeals for the First Circuit. October Term, 1948. No. 4287. May 12, 1949.

Petition to review an order of the Federal Trade Commission.

Federal Trade Commission Act

Order Set Aside—Agreement Provisions Unlawful.—A cease and desist order prohibiting manufacturers of tag products, pin tickets, and other pricing and marking devices from conspiring to fix prices, terms and conditions of sale for their products through use of a price reporting plan, has been set aside. It is not unlawful for tag manufacturers to participate in a tag industry agreement which (1) requires tag manufacturers to report prices, terms and conditions of sales to the administrator of the agreement, which information is disseminated to all tag manufacturers in a published price list, (2) allows tag manufacturers to make off-list transactions, (3) sets forth that tag manufacturers furnish copies of invoices to the administrator of the agreement which indicate quantity, grade, purchaser, and terms of sale, accompanied by a full statement of information covering samples, over-shipments, and free goods, which is disseminated to all tag manufacturers in tables showing the quantities sold and the sales value, (4) permits the institution of a proceeding for assessment of "liquidated damages" if an investigation indicates a violation of any reporting obligation of such a tag manufacturer, where incomplete dissemination of market information might cause pecuniary damage to the other manufacturers, and (5) requires that tag manufacturers render information compiled freely available to any person. Such an agreement is no more than a plan for the exchange of information as to

past transactions, and cannot be considered a price-fixing scheme to restrain and suppress competition.

Setting aside the Federal Trade Commission's cease and desist order in Dkt. 4496.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6380.63.

Before MAGRUDER, Chief Judge, WOODBURY, Circuit Judge, and PETERS, District Judge.*

Robert E. Canfield, with whom William W. Corlett, Francis C. Lowthrop, and Wise, Corlett & Canfield were on brief, for petitioners.

Walter B. Wooden, Associate General Counsel, and Everette MacIntyre, Assistant Chief Trial Counsel, with whom W. T. Kelley, General Counsel, was on brief, for respondent.

Opinion of the Court

[*Nature of Action*]

MAGRUDER, Chief Judge: Petitioners in this case ask us, pursuant to the authority of § 5(c) of the Federal Trade Commission Act, as amended (38 Stat. 719, 52 Stat. 112), to review and set aside or modify a cease and desist order of the Federal Trade Commission. The petition contains sufficient allegations of fact to establish this court as a proper forum for review.

[*Facts*]

On May 2, 1941, the Commission issued its complaint against the present petitioners, the Tag Manufacturers Institute (hereinafter called the Institute), an unincorporated trade association, Frank H. Baxter, trading under the name of Frank H. Baxter Associates, individually and as secretary-treasurer and executive director of the Institute, and twenty-nine corporations and two partnerships each engaged in the business of manufacturing tag products. The complaint alleged that beginning more than three years prior to May 2, 1941, and continuing to that date, petitioners "have entered into and carried out an understanding, agreement, combination, and conspiracy to restrict, restrain, suppress and eliminate price competition in the sale and distribution of said tag products" in interstate commerce; that pursuant to said agreement, petitioners "have fixed and maintained, and still fix and maintain, uniform prices, terms and conditions of sale for said tag products"; that the acts and practices of petitioners "have a dangerous tendency to and have actually hindered and prevented price competition" in the sale of tags in interstate commerce, have placed in petitioners the power to control and enhance prices on said products, have unreasonably restrained such commerce "and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

There followed a protracted proceeding before the Commission, with a transcript of testimony of more than 2500 pages and exhibits numbering 1500 more or less. Finally, after a hearing on exceptions to the trial examiner's report, the Commission on May 19, 1947, issued its findings of fact and the cease and desist order now under review.

The manufacturing petitioners sell and distribute approximately 95 per cent of the tag products purchased and used in the United States, with 55 per cent of the business of the industry shared by the four largest manufacturers.

Certain standardized tags are made in advance of sale and sold out of stock, such as plain unprinted stock shipping tags. However, over 80 per cent of the business is in made-to-order tags, the varieties of which are almost unlimited, representing as they do selective combinations of materials and processes, or component elements, in various sizes and shapes. The much greater part of the products of the industry, particularly of made-to-order tags, is sold direct to consumers, but there is a considerable volume of sales to distributors and others for resale. To some extent, tag manufacturers buy from other manufacturers, for resale, types of tags which they do not themselves manufacture. Orders for tags are generally small in dollar value, averaging between $20 to $40, and a thousand or more orders are placed with manufacturers each business day.

In such an industry, it would evidently not be practicable for a manufacturer to give

* Judge Peters heard the oral argument and participated in the conference at which a tentative decision for the petitioners was taken. The draft of this opinion was not completed until after the onset of his serious illness. It must therefore be recorded that Judge Peters does not participate in the judgment of the court.

a price on each order, based upon an individual cost estimate of that order. Hence, early in the history of the industry, manufacturers began to issue price lists to their salesmen, distributors and customers. The simple stock tags were customarily listed at stated prices for the finished product. With respect to the more elaborate, and infinitely various made-to-order tags, the price lists would enumerate the prices of the various basic components, such as tag stock, strings, wires, punches, eyelets, stapling, gumming, printing, etc.—from which the price for any particular tag, made up from the desired combination of components, might be computed.[1]

A price list is normally not construed to be a general offer in the sense that a contract would be formed by a communication from an intending buyer stating that he agrees to take a specific quantity of the goods at the listed price; rather, the preferred construction is that the price list is merely an invitation to customers to make offers to buy on the basis of the list prices. 1 Williston on Contracts (rev. ed. 1936) § 27. The price list does serve to indicate to the trade the scale of prices which the seller hopes and expects to maintain in the generality of future transactions until further notice. If he should later wish to take advantage of changed market conditions warranting an increase in the price level, he would naturally put out a revised price list. If, on the other hand, the seller experiences difficulty in maintaining the scale of prices in his extant price list, and is increasingly obliged to make off-list sales at lower prices, the price list will eventually lose its significance and a revised one will be issued to the trade. In other words, from the nature of things it is reasonably to be expected that off-list sales would be the exception rather than the rule, and that the greater portion of sales would be at the prices stated in the seller's current price list. This is particularly true in an industry such as the tag industry, with its wide variety of products and tremendous number of sales transactions each of small dollar volume on the average.

The issuance of price lists by tag manufacturers had become established as a general practice in the industry prior to the formation of the Institute and prior to the execution of the various Tag Industry Agreements, later to be described, which formed the principal basis of the Commission's complaint against petitioners.

The Institute was organized in 1933, and has operated continuously since that time. All the manufacturing petitioners have become members of the Institute. At all times since its organization, the active management of the Institute has been in the hands of petitioner Frank H. Baxter, secretary-treasurer and executive director. The Institute has concerned itself with typical trade association activities, and among other things has fostered efforts at more refined standardization of tag products and components thereof.

While the National Industrial Recovery Act (48 Stat. 195) was in effect, a Code of Fair Competition for the Tag Industry was promulgated February 1, 1934. The Code Authority consisted of the Executive Committee of the Institute and such other persons as the Administrator for Industrial Recovery designated. Under the Code, a so-called "open-price plan of selling" was prescribed, under which each member of the industry was required to file a schedule of his prices and terms of sale; manufacturers who did not file such a schedule were "deemed to have filed a schedule conforming . . . with the schedule . . . on file which states the lowest price and the most favorable terms." It was provided that no filed sched-

[1] The following extract from an exhibit indicates the enormous variety of tag products:

"There are eight standard sizes of shipping tags and according to the T.M.I. Manual of Standard Specifications, these are commonly available in forty-nine different grades of stock. There are thirty-six varieties of printing in reasonably common use and any tag can be delivered in any of four forms, namely unstrung, strung, wired or with fasteners attached. Multiplying 8 by 49 by 36 by 4 gives 56,448 possible items based on the eight standard sizes of shipping tags.

That is, however, only the beginning. Shipping Tags can be furnished in other than standard sizes and in special qualities of stock, nor is the kind of printing necessarily limited to the thirty-six varieties above referred to. There are different qualities of strings and wires which can be attached in many different lengths and there are several styles of tag fasteners used every day of the week. Other special features available on Shipping Tags include serial numbers of which there may be from 1 to more than 100 on each tag, varnishing, paraffining, lacquering, special patches, punches and perforations, and various sizes and qualities of metal eyelet reinforcements.

Besides shipping tags the industry manufactures merchandise tags in considerable variety, subject, not only to the variations just discussed, but to considerably greater variety in sizes than is commonly among shipping tags."

ule "shall be such as to permit the sale of any product at less than the cost thereof" to the filing member, determined in a manner thereinafter prescribed. Further, it was provided that no member of the industry "shall sell such product for less than such price or upon terms or conditions more favorable" than stated in his filed price schedule. A revised schedule might be filed at any time, but such revision was not to become effective until seven days after the date of filing, "provided, however, that an increased price may become effective at such earlier date as the member filing the same shall fix." Petitioners concede that these price-fixing provisions of the Code would have been illegal except for the exemption from the anti-trust laws contained in the National Industrial Recovery Act.

[*Scope of Tag Industry Agreements*]

After the National Industrial Recovery Act was invalidated in *A. L. A. Schechter Poultry Corp. v. United States,* 295 U. S. 495 (1935), members of the industry adopted a succession of four Tag Industry Agreements, so-called, in 1935, 1936, 1937 and 1940. The 1940 agreement was in effect when the Commission's complaint was filed, and was still in effect at the time of the final hearing before the Commission. Four of the manufacturing petitioners were not subscribers to the first two agreements, but all of them were parties to the 1937 and 1940 agreements, and all tag manufacturers who were parties to a particular agreement were members of the Institute at the same time. One of the subscribers to the two later agreements, the Whitney Manufacturing Corporation, was not a tag manufacturer but a tag jobber, and hence a customer of tag manufacturers.

Each of the agreements provided that Baxter, in his business style Frank H. Baxter Associates, should undertake the administration of the terms of the agreement. Minimum wage provisions were contained in all four agreements, and industrial homework was outlawed by the 1937 and 1940 agreements. Otherwise the agreements were concerned chiefly with the reporting and dissemination of industry statistics. There was some variation in detail in the series of agreements, but these variations need not now be elaborately set forth. It is sufficient for present purposes to set forth with particularity only certain features of the 1940 agreement upon which the controversy chiefly turns.

The 1940 agreement is stated to be between certain manufacturers and distributors of tag products, thereinafter called the "Subscribers," and Frank H. Baxter Associates, thereinafter called the "Associates." The agreement recites the desire of the Subscribers "by voluntary action to foster fair competitive opportunities in the public interest, by gathering and disseminating information regarding the essential factors entering into their commercial transactions, and to preserve and maintain a free and open market for the sale and distribution of their products;" and the willingness of the Associates (Baxter) "to undertake and faithfully perform the duties essential to the effective and impartial administration of this Agreement."

Article I of the 1940 agreement defines the products embraced by the agreement by reference to a list contained in an appendix attached thereto. It further prescribes the monthly sum to be paid by each Subscriber to the Associates (Baxter) as compensation for the services to be rendered thereunder. In addition it is provided that each Subscriber shall at the outset deliver to the Associates (Baxter) a monetary deposit ($500 for the larger companies), to constitute a Revolving Fund out of which the Associates, as trustees, shall pay for the account of any Subscriber damages or assessments due under the terms of the agreement. All the parties "agree that the undertakings embraced by this contract shall at all times constitute the entire agreement between the parties, or any of them, relating to cooperative action in connection with transactions in the products"; that "any cooperative activities by and between the parties, or any of them, which may tend to extend these undertakings . . . shall constitute a breach thereof"; that the determination by a Board of Arbitration that there has been such a breach "shall have the effect of terminating the contract between that party or those parties found to have been in breach hereof and the other parties hereto."

Article II of the 1940 agreement requires the Subscribers to report to the Associates (Baxter) the prices, terms and conditions of each sale of or contract to sell any tag products covered by the agreement. Each such report shall be mailed to Baxter "not later than the close of the business day following

that on which such sale or contract of sale was made"; and "shall include a full description of the transaction reported, including such specific items as the Associates may from time to time specify as necessary to a complete understanding of the prices, terms and conditions reported." Further, each Subscriber is required, at the effective date of the agreement, to send to Baxter "a complete statement of his published list price and terms, including his policies, for himself and his agents, regarding quantity differentials, trade classifications and discounts, credit terms, cash discounts, deferred and partial shipments, delivery terms, overruns and underruns, samples, overshipments, free goods, special services, and rebates or concessions of whatever nature; and complete specifications of his products." As often as a Subscriber's published list prices, terms or conditions of sale may be revised, "he shall report such revision to the Associates not later than the close of the business day following publication thereof." It is further provided that the reporting of published list prices and revisions thereof shall as to sales and contracts of sale "consummated on the basis of such published prices, terms and conditions," constitute the reporting of such transactions as required in the earlier portion of Article II. A further important provision of Article II is as follows:

"(5) The provisions of this Section are intended only to set forth the obligations of the Subscribers to report to the Associates all price-information affecting the products and every change in any element thereof, actually effective prior to such report. Nothing herein shall be construed as a limitation or restriction upon the right of each Subscriber independently to establish such prices, or such terms and conditions of sale, or policies of whatever nature affecting prices or sales as he may deem expedient. Nothing in any report made to the Associates by any Subscriber hereunder shall be construed as a representation or pledge as to prices, terms, conditions of sale, or policies in current or future transactions."

With reference to the use by Baxter of the foregoing information, it is provided:

"(6) The Associates shall disseminate information received pursuant to Article II hereof, to all Subscribers, in such form and to such extent as the Associates with the advice of the Subscribers may determine. Provided, however, that no price, term or condition of sale shall be publicized by the Associates until the same shall have appeared in a published price list or shall have been embodied in a closed transaction, whether a sale or contract of sale, or option or agreement to purchase.

All information relating to prices, terms and conditions of sale disseminated to the Subscribers pursuant hereto shall be freely and fully available to public agencies, distributors and consumers of the products, and to any other properly interested persons; and shall be disseminated in the same manner as to Subscribers, to such of them as may apply therefor and arrange for payment of the reasonable cost of such service.

Each Subscriber agrees that he will notify purchasers from him of the availability of this information."

Article III of the 1940 agreement requires each Subscriber throughout the life of the agreement to mail to Baxter "duplicates of every invoice or other memorandum of shipment or delivery of the products and of all credit memoranda applicable thereto. Such invoices and memoranda shall indicate quantity, grade or quality, price, destination, purchaser and terms of sale, and shall be accompanied by a full statement of all pertinent information covering samples, overshipments, free goods, special services, and rebates or concessions of whatever nature." All such duplicates must be mailed "not later than the close of the business day following that on which the originals thereof were mailed to their addressees." It is provided that the Associates (Baxter) "shall compile the information submitted to them pursuant to this Article in such a way as not to disclose the information of any one Subscriber or the names of any purchasers, and shall disseminate the same to all subscribers in tables showing the quantities of products sold and the sales value thereof; at such intervals and in such detail as the Associates, with the advice of the Subscribers, may from time to time determine."

Article IV of the 1940 agreement relates to the enforcement of the aforesaid reporting undertakings. It is recited that a breach of Article II or Article III by any Subscriber "resulting in the inaccurate, incomplete or tardy dissemination of market information which is the essential aim hereof will, it is agreed, cause pecuniary damage to every other Subscriber in proportion to the extent of his interest in the marketing of the products. And whereas the precise amount of actual damage in any given case would not

be susceptible of accurate determination," the Subscribers agree to a scale of "liquidated damages" therein specified. Thus, for delay in transmitting a report of any price, term or condition of sale pursuant to Article II, the liquidated damages are stated to be $5 per day for the period of such delay, provided that no assessment of damages shall exceed 10 per cent of the value of the transaction in question. For failure to transmit copies of invoices or memoranda as described in Article III "within ten (10) days after the date of mailing of the original of each such invoice or memorandum," the "liquidated damages" are stated to be an amount equivalent to 10 per cent of the aggregate value of all the Subscriber's transactions proved to be affected by such failure, up to a maximum of $100 applicable to a single day's billing by one Subscriber. For refusal promptly to respond to inquiries by Baxter or to submit books or records to examination as provided in Article IV, the "liquidated damages" are stated to be $25 for each day of such default, after receipt from Baxter "of formal demand therefor, citing this Section." Liquidated damages in accordance with the foregoing provisions are to be assessed by Baxter, under a prescribed procedure, which includes the right of an accused Subscriber to a decision by a Board of Arbitration by way of appeal from a determination by Baxter. Liquidated damages collected from each Subscriber are to be distributed *pro rata* among all other Subscribers. The Article ends with the following: "Nothing herein contained shall be construed as requiring, authorizing or permitting the Associates to assess liquidated damages, if and whenever their counsel shall advise against such action on the grounds that such assessment might constitute an unlawful penalty or forfeiture; or if and whenever the facts found in any given case do not establish probable actual damages."

The final Article in the 1940 agreement, Article V, provides for termination of the entire agreement "by written agreement of a majority of the parties"; and permits any Subscriber to terminate his obligations thereunder by giving written notice to Baxter not less than 120 days prior to the desired termination date. It is further provided that any manufacturer of tag products "may become a Subscriber to this Agreement at any time by signing the same and making the payments provided in Article I hereof." An appendix contains additional agreements by the Subscribers relating to minimum wages and overtime rates for work in excess of forty hours per week, and forbidding the employment of homeworkers.

In administering the agreement, Baxter developed what the Commission found to be "a very ingenious system of compiling, correlating, and reporting, to each of the respondent members, the price information filed by them with him." The price lists forwarded to Baxter by the various tag manufacturers after they have been issued to salesmen, distributors and customers, are by him assembled, classified and reflected in a loose-leaf volume entitled "Compilation of Prices, Terms and Conditions of Sale in the Tax Industry," supplemented by letter bulletins from time to time. As above indicated, the manufacturers are required to send in to Baxter reports of their sales or contracts of sales made at off-list prices, that is, transactions consummated on terms varying from those specified in the particular manufacturer's filed price list; and these reports of off-list transactions must be mailed to Baxter not later than the close of the business day following that on which the sale was made. Baxter sends out to all Subscribers daily bulletins, or "pink sheets," recording thousands of these off-list transactions each month, showing the name of seller, description of the tag product, quantity, list price, actual price of the particular off-list transaction, and the state where the customer is located, but not disclosing the name of the buyer. In addition, Baxter periodically compiles and sends out statistical information showing aggregate quantities of tag products sold and aggregate sales value thereof, but not disclosing the figures of any individual manufacturer or the names of any purchasers. This information Baxter derives principally from the duplicate invoices which manufacturers are required to forward to him under Article III of the agreement.

Petitioners and the Commission are at odds in characterizing the information correlated by Baxter in the aforesaid loose-leaf volume or Compilation. The Commission found that the prices of each of the subscribing manufacturers as contained in the Compilation "constituted both the current and future prices" of said manufacturers. Petitioners, on the other hand, say that the Compilation "is a book of reference with respect to past market conditions only." This disagreement seems to us to resolve

itself into a mere matter of nomenclature; the basic facts are clear. A new price list is reported to Baxter after it has been issued to the particular manufacturer's salesmen and customers. In that sense, it is a report of a past event. After the lapse of a few days, the information will be relayed by Baxter to the other Subscribers so that due correction of the Compilation may be made to conform to the revised price list. But the Tag Industry Agreement specifically recognizes that the manufacturers are free to make off-list sales; and in practice all of the subscribing manufacturers have freely done so. Therefore, the Commission is inaccurate in its finding that, when a price list is filed with Baxter, the prices so listed become and remain the prices for tag products of the Subscriber so filing until revised by notice to Baxter and the filing with him of a revised price list. Furthermore, a manufacturer making use of the Compilation at any given moment could not even be sure that the prices of a particular competitor listed therein were the prices contained in that competitor's currently effective price list; for the possibility could not be excluded that such competitor within the previous two or three days might have issued to the trade a revised price list, effective at once, which revision had not yet been relayed by Baxter in regular course.

On the other hand, it is obvious that the Compilation in the hands of the Subscribers is more than an object of academic historical interest and is designed for a practical business purpose. Manufacturers do not change their price lists every day. A price list may remain in effect for weeks, often for months, without change. While at any given moment it is possible that the most recently revised price list of one or two manufacturers might not yet have been reflected in the Compilation, there is every assurance that for the most part the Compilation discloses current price list information. Examination of the Compilation, together with the more recent "pink sheets" showing off-list sales, will give a quite accurate picture of the current price structure in the industry. Also, the "pink sheets" for several weeks past and recent revisions of price lists noted in the Compilation may disclose trends indicative of future market conditions. All this is true, even though each Subscriber remains free to change his price list at any time without prior notice, and though the Subscribers have made no commitment *inter se,* express or implied, to adhere to their published price lists. It is the contention of petitioners that the statistics thus made readily available under the Tag Industry Agreement are quite properly and lawfully disseminated in order that competition may be, not blind, but intelligent and informed.

[*Commission's Findings*]

Reference has previously been made to the NRA Code for the Tag Industry, under which it was unlawful for a tag manufacturer to make sales at prices or on terms more favorable to the buyer than those contained in his price schedule filed with the Code Authority; and under which a revised price schedule containing lower prices could not become effective until seven days after date of filing. The Commission found that the purpose of the Tag Industry Agreements "was to keep in force and effect the open price-reporting plan originally adopted under the National Industrial Recovery Act." We say without hesitation that this crucial finding is a pure assumption, not a rational inference from the evidence. Under the Tag Industry Agreement, a manufacturer may put into effect a new price list without prior notice to Baxter, and, though leaving unchanged his filed price list, he may make off-list sales also without prior notice to Baxter. The commitment is to report such transactions to Baxter after the event. Of course, a written agreement may be a sham to mask an actual understanding of the parties under the agreement negatives the possibility of an inference that the real agreement of the Subscribers was that they would adhere to their filed list prices. They all made off-list sales, and reported them to Baxter as required by the agreement. Off-list pricing has occurred without discernible territorial pattern, with no apparent correlation between the frequency of off-list sales and the size of the companies, or the types of tag products, or the size of the orders, or the classes of customers. There has been wide variation in the proportion of off-list business of individual manufacturers from week to week. The Commission found, as an over-all average, that approximately 25 per cent of the dollar value of the aggregate total sales of all the subscribing manufacturers has been at off-list prices. This figure the petitioners have accepted as correct.

The Commission further found as follows:

"A respondent member in filing an off-list or restricted offer with respondent

Frank H. Baxter for dissemination by him was in effect serving notice upon the respondent members competing with him that this was an unusual act and limited in nature and that he was not, in general, varying from his filed price list. Only to the extent that a respondent member repeated such off-list sales did such action affect the general price structure. Consequently, the publicity given to off-list sales among respondent members tended to restrain them from cutting prices and to cause them to maintain and adhere to their filed price lists as published in the general-offer price book [i. e., *Baxter's* "Compilation" above described]. Such publicity also informed all of the respondent members of the price activity of any particular members and placed the respondent members in a position to take retaliatory action if unsatisfactory pricing policies were followed by any particular respondent."

The foregoing is perhaps more in the nature of *a priori* argument than a finding of fact. In the many years of operation under the various Tag Industry Agreements, there have been untold hundreds of thousands of sales transactions. In the face of the finding that, on the average, 25 per cent of sales have been off list, an off-list sale certainly cannot be characterized as "an unusual act." We have already pointed out that from the nature of a price list, and the purpose it is designed to serve, one would expect that the greater proportion of sales would be at the prices stated in the seller's current price list; and it is certainly not surprising to find that 75 per cent of the sales of the subscribing manufacturers have been at list. Despite the fact that the Tag Industry Agreements have been in effect for a number of years, the Commission has produced no evidence indicating that the percentage of adherence to list prices has been on the increase, or indeed, that there is now a greater adherence to list prices than was the case prior to the promulgation of the NRA Code under which members of the industry were required to adhere to their filed price schedules. Nor is there evidence of "retaliatory action" by any Subscribers to coerce other Subscribers into adherence to list prices. They all engaged in off-list pricing to such an extent that it would be wholly irrational to infer that the essence of their agreement was that they would all adhere to their current price list on file with Baxter. The Commission argues in its brief that the requirement of disclosure of off-list sales "exposed the manufacturer who reduced his price to the odium of being a 'price cutter' or 'chiseler.'" Petitioners have aptly replied: "Someone has said that an odor which is common to all is offensive to none."

We quote now another important finding by the Commission:

"The effect of the operation of the open price-reporting plan under the agreements and in the manner hereinabove described has resulted in a substantial uniformity of prices for tags and tag products among the respondent members.

Such uniformity of prices is clearly indicated by examination of the prices, terms, and conditions of sale set out in the general-offer price books issued by the respondent Frank H. Baxter. In addition, a study was made by I. Chance Buchanan, who was called as a witness for the Commission in this proceeding. This witness studied and compared the offers of each of the respondent members for a selected test period and made a comparison of the prices reflected in the compilation set forth in the general-offer price books issued by the respondent Frank H. Baxter showing compilations of prices, terms, and conditions of sales as of May 12, 1939, and as of August 27, 1940. In making this study the witness prepared a series of tabulations showing the results of his investigation. Summarizing the results shown by these tabulations, it appears that at the beginning of the test period, May 12, 1939, the compilation reflected 96.8 percent uniformity and at the end of the period, August 27, 1940, the compilation reflected 97.5 percent uniformity of general-offer filed prices among the respondent members."

When the Commission finds that the operation of the price-reporting plan "has resulted in a substantial uniformity of prices," we take it the Commission is referring to uniformity of prices which buyers have been obliged to pay, though the finding is supported by reference to evidence relating to uniformity of price lists as reflected in the Compilation. In its brief, the Commission attributes to petitioners a "concession of a 75% uniformity in actual sales prices." It is clear that petitioners have made no such concession. They have conceded that approximately 75 per cent of their aggregate total dollar volume of sales has been at the prices in their respective price lists, which is quite a different thing. They have made no concession at all as to the percentage

of uniformity of their filed price lists as reflected in the Compilation.

Petitioners make what has impressed us as a strong attack upon the statistical validity of the price list study by the Commission expert Buchanan referred to in the above quotation. The study was selective, and did not purport to embrace all types of tag products. The trial examiner described the tags covered by the study as "a representative variety of tags." Petitioners point out, however, among other objections, that types of tags representing only 13 per cent of total business were given 71.69 per cent weighting in the study, whereas types of tags representing 87 per cent of total business were given 28.31 per cent weighting; that the types of tags thus over-weighted were stock tags, list prices of which are usually substantially uniform when market conditions are stable, whereas the types of tags thus under-weighted were made-to-order tags, the list prices for components of which usually have a greater degree of non-uniformity. Petitioners also point out that the study excluded sales to wholesalers and sales to government agencies, although wholesalers' discounts and discounts to government agencies, as shown on price lists, were characteristically non-uniform. It is also noted that the Buchanan study reflected a percentage of price list uniformity of the selected types of tags on two dates only, May 12, 1939, and August 27, 1940. Even in the case of stock tags, list prices of which are usually substantially uniform when market conditions are not changing, as petitioners concede, there are from time to time unsettled periods during which Subscribers are successively filing revisions of their price lists, which periods may extend over weeks or months, when there must obviously be non-uniformity in the filed list prices. Petitioners' statistical challenge to the conclusions of the Buchanan study are really not answered in the Commission's brief, except with the suggestion that it is "impracticable" for an appellate court to weigh "petitioners' complicated and labored objections without retrying the case."

[*Conclusion*]

We think the evidence does warrant a finding that during the life of the Tag Industry Agreements there has from time to time been considerable list price uniformity with respect to types of tags constituting a large portion of the industry's business. Such a finding, in conjunction with the unchallenged finding that on the average 75 per cent of the industry's business is done at list, would warrant the inference that during the years in which the Tag Industry Agreements have been in effect there has been a considerable uniformity of actual selling prices. The evidence does not, however, warrant the Commission's finding that the effect of the operation of the Tag Industry Agreements "has resulted in a substantial uniformity of prices for tags and tag products among the respondent members." In the first place, this implies that the instances of departure from uniformity are insignificant and unsubstantial—which certainly cannot be said. In the second place, there is no evidence that such uniformity as has existed is a result of the operation of the Tag Industry Agreements, for it does not appear whether there has been an increase or decrease of uniformity either in list prices or in actual selling prices since the agreements have been in operation.

The only evidence in the record giving a glimpse of actual competition between manufacturers for the same piece of business is Commission's Exhibit 1022. This exhibit was compiled by a Commission witness from "pink sheets" in Baxter's office covering a period during which the Tax Industry Agreement of 1937 was in effect, which agreement, unlike that of 1940, required the subscribing manufacturers to report to Baxter their off-list quotations as well as consummated sales. The exhibit covered a wide variety of tag products with respect to which the "pink sheets" disclosed a complete uniformity of list prices for the tag or its component parts. It showed over 400 instances in which two or more manufacturers quoted off-list prices to the same customer at the same time on the same piece of business. In 95 per cent of all the given instances, there was non-uniformity in the quoted prices. In every one of the instances where more than three manufacturers were bidding for the same order, the customer had a choice of different quoted prices. Counsel for the Commission was embarrassed when petitioners' counsel proceeded to point out to the trial examiner what the exhibit showed, and sought unsuccessfully to withdraw the exhibit from evidence on the ground that it had been introduced for another purpose. Thus, the only evidence in the record showing actual "shopping around" by tag buyers before placing an

order indicated that in 95 per cent of the instances there was competition among the rival manufacturers on the basis of price differentials. Not a single buyer was called by the Commission as a witness to testify that he tried shopping around on a price basis among two or more manufacturers and was met by uniformity of price quotations. Under the circumstances it is not reasonable to assume that the competitive picture etched by Commission's Exhibit 1022 is a distorted one.

In support of its conclusion, the Commission refers to the provisions in the Tag Industry Agreements designed to insure compliance with the reporting commitments of the Subscribers. Baxter was given access to the books and records of the Subscribers in the investigation of complaints of violations and in routine periodic checkups. The Commission found that Baxter "caused periodic checks to be made of the books and records of the various respondent members by a representative of his office to determine if they were adhering to the published prices and reporting all deviations therefrom." As phrased, this finding contains an ambiguous overtone which seems to imply that there was an agreement to adhere to list prices, and that Baxter examined the books to see if this agreement was being fulfilled. As previously indicated, there was no such agreement. The evidence is uncontradicted that Baxter's only concern with off-list transactions was to find out if they had been reported, after the event, as the agreement required. If the investigation indicated a violation of any reporting obligation of a Subscriber, Baxter would institute proceedings for assessment of "liquidated damages" as specified in the agreement. Total assessments for acts of non-compliance amounted to less than $10,000 for the period 1935-1941. The record contains not a single instance of an assessment for failure to adhere to a list price.

The provisions of the Tag Industry Agreement of 1940, above quoted, are carefully drawn on the theory that these assessments are in the nature of "liquidated damages," which are not to be imposed in the absence of a finding of "probable actual damages." *Cf. Sun Printing and Publishing Assn. v. Moore,* 183 U. S. 642 (1902). In fact there is evidence in the record of instances where the Board vacated assessments on the ground of lack of probable actual damages. The Commission consistently describes these assessments as "penalties." Whether they are "liquidated damages," as they purport to be, or "penalties," as the Commission calls them, is hardly decisive. If the reporting commitments they are designed to buttress are otherwise lawful, the agreement does not become a violation of the anti-trust laws or the Federal Trade Commission Act merely because the reporting plan is accompanied by a penalty provision which would not be legally enforceable.

Nor is the conclusion of the Commission strengthened by its finding that the administration of the reporting agreements "was materially assisted by the standardization of the component parts of tags and tag products developed and adopted under the auspices of the respondent Institute." As a matter of fact the foundation work in the direction of standardization was done many years before the Institute was organized. A simplified practice recommendation for paper shipping tags was developed by a general conference of producers, distributors and users of such tags under the auspices and with the active assistance of the Division of Simplified Practice, National Bureau of Standards, and was promulgated by the United States Department of Commerce. A revision was approved in 1939, and has been generally accepted by a large number of producers, distributors and users, and by various agencies of the government, including the Federal Trade Commission. These standardizations are deemed to be to the advantage of all concerned, including the consumer who, among other benefits, is thereby better enabled to know what he is buying and to make intelligent price comparisons. Of course, the detailed standardization of tags and components which the Institute has assisted in developing tends to make more serviceable, the information reported to Baxter under the Tag Industry Agreement and by him collated and disseminated among the Subscribers. But if the reporting agreement is otherwise lawful, such enhanced usefulness of the agreement as results from standardization would hardly infect it with illegality. See *Maple Flooring Manufacturers Assn. v. United States,* 268 U. S. 563, 566 (1925).

There has been some tendency to look askance at reporting agreements between competitors, where the information exchanged is reserved exclusively to themselves and withheld from buyers or the

public generally. Presumably this is because such secrecy more readily suggests the inference that the agreement is inspired by some unlawful purpose and precludes the argument that the information thus secretly exchanged serves a function similar to that of market information made available through the activities of commodity exchanges, trade journals, etc. See *American Column & Lumber Co. v. United States,* 257 U. S. 377, 411 (1921); *Sugar Institute, Inc. v. United States,* 297 U. S. 553, 596-7 (1936); with which *cf. Maple Flooring Manufacturers Assn. v. United States, supra,* 268 U. S. at 573-4. The Commission has therefore been at pains to discredit the provision of the Tag Industry Agreements which purport to render the information compiled by Baxter freely available to any interested person. It found that in practice "the respondent members gave only lip service to this provision and never adopted any practical plan whereby this information might be made available to buyers generally." As above stated, one of the Subscribers to the agreements was the Whitney Manufacturing Corporation, a tag jobber and a buyer from tax manufacturers. The 1940 agreement provided that the information "shall be freely and fully available to public agencies, distributors and consumers of the products, and to any other properly interested persons." It was further provided that the information should be disseminated, in the same manner as to Subscribers, to any persons who might apply therefor and arrange for paying the reasonable cost of the service. Subscribers agreed that they would notify their customers of the availability of this information. Under the 1937 agreement, copies of the Compilation were made available for general inspection at the various regional offices of Dun & Bradstreet. In 1940 this practice was discontinued and instead the subscribing manufacturers thereafter printed a statement on their respective invoices reading as follows: "In common with most tag manufacturers, we file up-to-date records of tag prices with Frank H. Baxter Associates, 370 Lexington Ave., New York City, where they are open for inspection." Baxter kept a Compilation available in his office at New York City for examination by any interested party. However, the Commission found: "While the record indicates that this compilation may have been occasionally examined by purchasers, this plan served no useful purposes for purchasers and consumers located outside the New York area and could not be considered as making this price information available to buyers generally."

We are clearly of opinion that if the reporting agreement is otherwise unobjectionable, it cannot be said to have become illegal for failure of the Subscribers to make the information generally available. Customers are notified on each invoice that "up-to-date records of tag prices" are open for inspection at Baxter's New York office. If a customer living outside New York City has any curiosity in the matter, he can use the mails; and there is no reason to assume that Baxter would not furnish the information requested. Nor is there any reason to assume that Baxter would not inform the inquiring customer of his right under the Tag Industry Agreement to subscribe to the service regularly. It is noteworthy that the Commission has failed to produce a single tag buyer to testify that he was unaware of the existence of this information service, or that he sought information from Baxter and could not get it, or that he sought to subscribe to the service and was refused. See *United States v. United States Steel Corp.,* 251 U. S. 417, 448 (1920). We agree with petitioners that availability "does not mean that the information must be crammed down the throats of buyers who are not interested in seeing it." None of the cases has gone that far.

We have come to the conclusion that the reporting agreements herein, and the practices of petitioners thereunder, are lawful under the controlling authorities. In the sense indicated earlier in this opinion, the issuance of a price list may be said to be an "announcement of future prices." The nature of price lists has not changed under the Tag Industry Agreements from what it has historically been in the industry. The price list is subject to change without notice, and may be freely revised at any time. Even while a particular price list is extant, the manufacturer is free to make sales at off-list prices. This has always been so (except under the NRA Code), and still remains so under the Tag Industry Agreement. When a new price list is issued, the agreement requires the manufacturer, after the event, to report such revised price list to Baxter. In effect the manufacturer thus says to Baxter: "Enclosed is a copy of the new price list which I put in effect yesterday by issuance to my salesmen, distributors and

customers." Once a price list has been issued to the trade it necessarily becomes pretty much public property. There is certainly nothing secret about it. It would be no great feat for a manufacturer to obtain copies of his competitors' price lists. The Tag Industry Agreement merely facilitates the assembling of such data. As to the obligation of Subscribers to report off-list sales and to furnish copies of all invoices, that is no more than the reporting of past transactions. The Commission has endeavored to show that the agreement was something more than this, that it was a price-fixing agreement having the purpose and actual effect of restraining and preventing price competition. We believe that such findings are unsupported by the evidence or by any reasonable inferences to be drawn therefrom. We say this with full recognition of our limited scope of review of findings of fact by the Commission. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73 (1934).

The Commission's reliance upon *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921), and *United States v. American Linseed Oil Co.*, 262 U. S. 371 (1923), is misplaced. Neither of these cases suggests that it is *per se* unlawful for competitors to agree to an exchange of trade data through reports to a central agency. In *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563, 580 (1925), the Court explains that its opinion in the *American Column & Lumber Co.* case "rests squarely on the ground that there was a combination on the part of the members to secure concerted action in curtailment of production and increase of price, which actually resulted in a restraint of commerce, producing increase of price." At a later point in the *Maple Flooring* case (p. 585), the Court, in referring collectively to the *American Column & Lumber Co.* and *American Linseed Oil Co.* cases, said: "The unlawfulness of the combination arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices." The Court decided in the *Maple Flooring* case (p. 586) that trade associations "which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce." We think the following observations of the Court in that case are also relevant to the case at bar (268 U. S. 582-3):

"It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exhange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from over-production. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, *or in any respect unlawful.* [Italics added.]

"It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. General knowledge that

there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell."[2]

In *Cement Manufacturers Protective Assn. v. United States,* 268 U. S. 588, 606 (1925), the Court said:

"We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

Upon the authority of the *Maple Flooring* case, the Court held that "such activities are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act."

In *Sugar Institute, Inc. v. United States,* 297 U. S. 553 (1936), the Court struck down an agreement which included a reporting feature with "a requirement of adherence, without deviation, to the prices and terms publicly announced." (P. 582; see also pp. 577-9, 585, 601.) Explaining the holdings in *American Column & Lumber* and the *Linseed Oil* cases, *supra,* the Court said (pp. 599-600): "And while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned." Chief Justice Hughes, speaking for a unanimous Court, also had this to say (p. 598):

"Further, the dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint *or in any respect unlawful.*" [Italics added.]

Obviously the *Sugar Institute* case is distinguishable from the case at bar for here, as we have seen, the parties have made no agreement to adhere to their filed list prices and, in fact, have departed therefrom whenever they saw fit. The distinction is sharply defined by a further extract from the *Sugar Institute* case (297 U. S. at 601):

"The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which the defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be."

It is true that the above cases all came under the Sherman Act rather than under the Federal Trade Commission Act. In *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, 694, 708 (1948), it was pointed out that whereas all conduct condemned by the Sherman Act may likewise be an "unfair method of competition" in violation of the Federal Trade Commission Act, the converse is not necessarily true; that individual

[2] Mr. Justice Brandeis, who knew something about these matters, expressed similar views in his dissenting opinion in *American Column & Lumber Co. v. United States,* 257 U. S. 377, 413 et seq. (1921).

or concerted conduct which falls short of being a Sherman Act violation may nevertheless constitute an unfair method of competition under the Federal Trade Commission Act. But in the case at bar the gravamen of the Commission's case against petitioners was that the agreement was more than a plan for the exchange of information as to past transactions, and was in fact a price-fixing scheme which in purpose and effect unduly restrained and suppressed competition. The Commission has not held, and would not be warranted in holding, that in the absence of these assumed features of Sherman Act violations (which we think are not supported by the evidence), the reporting agreement as such is nevertheless an "unfair method of competition" within the meaning of the Federal Trade Commission Act.

[*Order Set Aside*]

Since, in our view of the case, the cease and desist order will have to be set aside, it becomes unnecessary for us to consider certain seriously pressed objections by petitioners to the breadth of the order.

A judgment will be entered setting aside the order of the Commission.

[¶ 62,422] United States v. Morton Salt Co. United States v. International Salt Co.

In the United States Court of Appeals for the Seventh Circuit. No. 9753—9754. May 20, 1949.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Federal Trade Commission Act

Power of Commission to Enforce Compliance Report.—After a Court of Appeals has modified a cease and desist order of the Commission, under Section 5, prohibiting a price fixing conspiracy in the sale of salt, the Commission does not have the power to require "additional reports of compliance." The Court of Appeals retains exclusive jurisdiction to enter into such further orders as may become necessary effectively to enforce compliance.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.5336, 2212.5355, 2212.545, and Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.493.

Compliance Reports Under Section 6 of Act.—Section 6 (a) and 6 (b) of the Act cannot be utilized as an aid to a proceeding in which the Commission seeks to require salt manufacturers to make additional reports of compliance with a cease and desist order issued under Section 5. Not only does the language fail to reveal any interdependence of the two sections, but the opposite is indicated. Section 6 is directed solely to a "corporation," while Section 5 refers to any person, partnership, or "corporation." Section 6 is concerned with annual and special reports, while Section 5 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission." The term "special report," as used in Section 6, means something entirely different from "an additional or supplemental report showing the manner and form of compliance."

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6126.

Penalties Under Section 10 of Act.—The Commission cannot, under Section 10, recover forfeitures for failure of respondent salt manufacturers to comply with an order requiring reports of compliance with a cease and desist order issued under Section 5. Section 10 provides for recovery for failure to file "any annual or special report . . . within the time fixed by the Commission." No forfeiture is provided for failure to file "an additional and supplemental report showing the manner of compliance," with a cease and desist order.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6130.

Affirming the judgment of the United States District Court for the Northern District of Illinois, reported at ¶ 62,296, concerning FTC Dkt. 4319.

Before Major, Chief Judge, Minton and Duffy, Circuit Judges.

[*Nature of Action*]

MAJOR, Chief Judge: This action was commenced by the United States against numerous defendants, including International Salt Company and Morton Salt Company. From an adverse judgment entered August 20, 1948, the government separately appealed as to these two defendants. Only issues of law are involved in each appeal, and, being identical, they may appropriately be considered and disposed of in a single opinion.

The action, according to the complaint, was instituted by the Attorney General upon request of the Federal Trade Commission (hereinafter called the Commission) for the enforcement of a Commission order "requiring additional reports of compliance," and to recover forfeitures for failure of defendants to comply with such order. The action is predicated upon Title 15 U. S. C. A. Sec. 49,[1] which vests the several District Courts of the United States with jurisdiction to direct a corporation to comply with an order issued by the Commission, and Sec. 50, which vests any District Court with jurisdiction of suits by the United States for the recovery of forfeitures if a corporation fails to file any report so required within the time fixed by the Commission.

The order sought to be enforced was issued by the Commission on September 2, 1947, under the authority asserted to reside in Rule XXVI, promulgated by the Commission, and Sec. 46 (a) and (b) of the Act. The complaint sets forth verbatim the order relied upon and the notice of default served on the defendants. There are attached to the complaint numerous exhibits, including a copy of Rule XXVI.

[*Previous Opinions*]

The court below in a well reasoned opinion held that it was without jurisdiction to entertain the cause of action. *United States v. Morton Salt Co.* and *International Salt Co. v. United States,* 80 F. Sup. 419. This holding was predicated upon the conclusion that the Commission's order of September 2, 1947 was invalid because issued without authority. It is obvious, so we think, that the right to maintain the instant action is dependent upon the validity of the order.

[*Facts*]

The issue thus presented calls for a further statement of the factual situation. On September 18, 1940, the Commission issued its complaint under Sec. 45, charging defendants and others with engaging in an unlawful conspiracy to fix prices on and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint. A petition for review of the Commission's order was filed by the defendants in this court which rendered its opinion March 8, 1943. *Salt Producers Association v. Federal Trade Commission,* 134 F. 2d 354. On April 20, 1943, this court entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. In effect, this court by its decree enforced the modified cease and desist order under Sec. 45 and commanded these defendants (as well as the others) to obey said decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Sec. 45 (1), and it required the defendants to file a compliance report within ninety days and reserved to this court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof . . . ." Within the time thus designated in the decree of this court, each of the defendants filed a report with the Commission showing the manner and form in which they were complying with the court's decree. In the interim, during a period of more than five years, no question has been raised by the Commission as to the form or content of such compliance reports, and during said period the defendants have not been charged with a violation of the decree of this court and no request has been made by the Commission that this court order or direct an investigation into defendants' conduct.

The government apparently senses the insecurity of its position if it be held that the

[1] Section numbers used in this opinion, unless otherwise noted, refer to the Federal Trade Commission Act, Title 15 U.S.C.A.

order sought to be enforced was in aid of or for the purpose of enforcement either of the decree of this court or the Commission's cease and desist order modified to conform therewith. And so any such purpose on the part of the Commission is disclaimed. There was no attempt, so it is asserted, to enforce either the court's decree or the Commission's order, but "the sole purpose of the order requiring the reports was to inquire as to the manner of compliance by defendants with the Commission's modified order to cease and desist . . . and this Court's decree enforcing that order." We have some difficulty in following a theory that the purpose was merely to obtain information as to whether defendants have been violating the decree of this court and at the same time denying that such purpose bears any relation to its enforcement. We are informed that if the defendants are shown to have violated the order of the Commission modified in conformity with the decree of this court, two courses are open, (1) it can certify the facts to the Attorney General under Sec. 56 of the Act, requesting that he file a civil suit seeking civil penalties under the provisions of Sec. 45 (1), or (2) it can petition this court for a rule requiring defendants to show cause why they are not in contempt of court.

[*Action Based on Previous Proceeding*]

We, as the court below, do not agree with the government's contention that the Commission initiated a new investigation. The record plainly discloses that the controverted order was issued in connection with and as a part of the proceeding theretofore had under Sec. 45; in fact, the order itself calls for "an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943." "Additional and supplemental" to what? The answer must be that such reference was to the report of compliance required by the decree of this court and that the order was only a further step in the proceeding of which this court retained jurisdiction. Any doubt in this respect is dispelled by the fact that the order of September 2, 1947 is given the same title and docket number as the Commission's original order dated November 10, 1941.

[*Exclusive Jurisdiction of Court*]

As already noted, this court retained jurisdiction "to enter such further orders . . . as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The jurisdictional reservation thus provided was in conformity with Sec. 45 of the Act; in fact, a reading of this section discloses in unmistakable fashion that every vestige of jurisdiction over a proceeding such as that under discussion was definitely lodged with the Court of Appeals. The court is given the power to enter a decree "affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed," and "the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." It is also provided, "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari." Not only was the court endowed with jurisdictional power, but by subsection (d) it was provided that such jurisdiction "shall be exclusive."

Thus, with enforcement jurisdiction so firmly and exclusively lodged in a Court of Appeals both by the statute and decree of the court, it would seem that one who asserts such jurisdiction to reside elsewhere is confronted with a heavy burden which can be met only by a rule or statutory provision, which makes clear a legislative purpose to impair or divide the jurisdictional responsibility provided in Sec. 45. Language which only confuses the situation or raises a doubt should not be accepted as sufficient.

[*Analysis of Section 46 Presented*]

An analysis of Sec. 46 furnishes no sound basis for the contention either that it can be utilized as an aid to a proceeding under Sec. 45 or that it was intended to impair or detract from the unambiguous and exclusive jurisdictional provision of that section.

Sec. 46, so far as relevant, empowers the Commission in paragraph (a) "To gather and compile information concerning, and to investigate . . . the organization, business, conduct, practices, and management of any corporation . . . and its relation to other corporations and to individuals, associations, and partnerships," and in paragraph (b) "To require, by general or special orders, corporations, . . . or any class of them, or any

of them . . . to file with the commission . . . annual or special, or both annual and special, reports or answers in writing to specific questions . . .," which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to other corporations, partnerships, and individuals . . . ."

Not only does the language fail to reveal any interdependence of the two sections, but the opposite is indicated. Sec. 46 is directed solely to a "corporation," while Sec. 45 refers to any "person, partnership, or corporation." Also, Sec. 46 is concerned with "annual or special, or both annual and special, reports," while Sec. 45 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission."

Both sides have set forth, particularly with reference to Secs. 45 and 46, a large amount of legislative history, a discussion of which would serve no useful purpose. It can be safely said, however, that such history discloses that Secs. 45 and 46 were not intended as complementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in *F. T. C. v. Millers' National Federation,* 47 F. 2d 428, 429, wherein the court stated: "The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation." See also *F. T. C., et al. v. Claire Furnace Co., et al.,* 274 U. S. 160, 170.

The report required by the controverted order, as already noted, calls for "an additional or supplemental report showing the manner and form of compliance," while Sec. 46 is limited to "annual or special reports." In order to bridge this gap we are urged to hold that there is no difference between "an additional or supplemental report" and a "special report." We are not impressed with this reasoning. It seems reasonably plain to us that the term "special report," as used in Sec. 46, means something entirely different and distinct from "an additional or supplemental report showing the manner and form of compliance." This view is strengthened from the fact that Sec. 50, upon which the instant forfeiture action is predicated, provides for recovery for failure to file "any annual or special report . . . within the time fixed by the Commission." It is of significance that this forfeiture section and Sec. 46 characterize the report precisely in the same manner. No forfeiture is provided for failure to file "an additional or supplemental report," as called for by the Commission's order in the instant matter. In fact, reports so designated are not, so far as we are aware, referred to any place in the Act.

Admittedly, the report required by the Commission's order in the instant matter is not an "annual report," and we think it equally plain that it is not a "special report." This view finds support in the House Committee's report on interstate and foreign commerce (Report No. 533, 63rd Congress, 2nd Session), wherein annual and special reports are discussed. The congressional committee stated the purpose in authorizing the Commission to require special reports as follows: "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." It thus appears that the purpose of the "special report" was to enable the Commission to obtain information which had not been furnished in the "annual report." In other words, the "special report" was intended as additional or supplemental to the "annual report" but not as additional or supplemental to an order of compliance under Sec. 45.

[*Substance of Rule XXVI*]

Irrespective, however, of Sec. 46, the Commission argues that its order is authorized by Rule XXVI. The substance of this rule is contained in two unnumbered paragraphs. The first paragraph requires that a report of compliance be made to the Commission within sixty days (1) after a cease and desist order has been issued by the Commission, or (2) where the parties stipulate to cease and desist. This paragraph contains a proviso as follows: ". . . provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a

circuit court of appeals, the time for filing report of compliance will begin to run *de novo* from the final judicial determination . . . ." We do not understand the government to contend that this paragraph is of any aid to its contention in the instant situation. Obviously, it is not because reports of compliance were made by the defendants within the time fixed by the court. It is interesting to note, however, that this court in its decree fixed ninety days within which the defendants were required to comply rather than the sixty days provided in the rule. It would seem either that the rule was not called to the court's attention or that it was ignored. And we have no doubt that the sixty-day limitation contained in this proviso was not binding upon the court, which had the authority to fix such time for compliance as it saw fit.

The Commission relies upon the second paragraph of the rule, which provides:

> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

The scope of this rule appears to depend upon what is meant by "such order . . . and any party entering into such stipulation." Does it refer only to an order entered by the Commission and a party entering into a stipulation as provided for in the first paragraph of the rule, or does it include a court decree or an order of the Commission merged therein, as the plaintiff here contends?

The Commission, in support of its authority, relies upon Sec. 46 (g), which provides:

> "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Thus, two powers are conferred upon the Commission, (1) to classify corporations and (2) to make rules and regulations, and such powers are joined by the conjunction "and," which would indicate that the latter power is related to the former. As already noted, it is only Sec. 46 which is limited to corporations, while Sec. 45 includes any "person, partnership, or corporation." If the plaintiff's contention be accepted that the Commission is authorized by this provision to promulgate a rule directed to the enforcement of Sec. 45, then the exclusive jurisdiction which that section confers upon courts becomes little more than an empty gesture. We need not labor this point, however, because what we have said concerning Sec. 46 as it relates to Sec. 45 is also pertinent to Rule XXVI. In our view, the authority contained in Sec. 46 (g) must be limited to Sec. 46. Use of language which indicates a broader scope is not difficult to understand because at the time of the insertion of Sec. 46 (g) there was no Sec. 45, and when the latter section was added there was a failure to remove or modify Sec. 46 (g). If the latter section be given the scope urged by the plaintiff, the Commission would have the authority by rule to impair or share the "exclusive jurisdiction" which is expressly conferred upon the courts by Sec. 45.

And it appears that the plaintiff in the lower court placed no such reliance upon this rule as it does here. At any rate, that court (80 F. Sup. 419, 425) stated: "The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)." The plaintiff here insists that its position was misinterpreted and quotes from its brief in that court. We note, however, the following statement from its quotation: "This rule was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof." In our view, that was the purpose of the rule and the extent of its intendment. We are of the view that it furnishes no support for the controverted order before us.

[*Judgment Affirmed*]

Plaintiff also argues that the Commission has the inherent power to require reports of compliance with its orders to cease and desist. We need not explore the validity of this argument as it is beside the point. We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do

The judgment appealed from is affirmed.

Dissenting Opinion

MINTON, Circuit Judge, dissenting. A cease and desist order of the Federal Trade Commission that has become final without review or after review by this Court and is not complied with, may result in a judgment by a District Court for a civil penalty under 15 U. S. C. Sec. 45 (1) or enforcement proceedings before the reviewing Court of Appeals, 15 U. S. C. Sec. 45 (d). Noncompliance may result in dual action—one, for a penalty before the District Court; two, for enforcement by contempt proceedings by the Court of Appeals; or a choice between the two remedies. Punishment for past delinquencies would seem to lie with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is an attempt by the Commission to get the facts upon which to base a judgment as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both.

Does the Act authorize the Commission to use the procedure it has adopted here to get the facts? We must assume that the Commission is unable to tell from the data furnished whether there has been compliance. Public officers are presumed to act in good faith until the contrary has been made to appear. The Commission finds the authority for the present procedure to obtain the facts under 15 U. S. C. Sec. 46 (a) and (b) and under Rule 26 [1] promulgated by the Commission. It is the position of the Commission that either the rule or the statute is sufficient to justify its action.

It seems to me that when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized act, as the majority of this Court seems to think. In view of the case, it is unnecessary to deal with Sec. 46 (a) and (b) and the narrow, restricted construction thereof, as indulged in by the majority of this Court. I find ample support for the procedure of the Commission contained in its rules, read in conjunction with the provisions of the statute. Sec. 46 (g) of the statute provides:

> "Sec. 46. Additional powers of the commission.
>
> "The commission shall also have power—
>
> ". . .
>
> "(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

This, it will be noted, is a part of Sec. 46 which the majority of this Court holds applies only to corporations. The section just quoted specifically refers to Secs. 41-46. Sec. 45, which is within this reference, deals with persons, partnerships, and corporations, and the cease and desist order here involved arose out of a Sec. 45 proceeding. It seems clear to me that Congress by Sec. 46 (g) gave a broad power to make rules for the carrying out of the provisions of the whole Act. Under this power, the Commission promulgated Rule 26, the pertinent provisions of which read as follows:

> "In ever case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *provided, however,* that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run *de novo* from the final judicial determination;
>
> ". . .
>
> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, set-

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[1] 12 Fed. Reg. 5448, August 12, 1947.

ting forth in detail the manner and form in which they are complying with said order or with said stipulation."

We are dealing here with a cease and desist order that has been reviewed by this Court. The rules of the Commission provide that in such a case, the time for filing a report of compliance *begins to run* from the final judicial determination. Nothing is said as to *how long after the time commences to run* the report of compliance shall be filed with the Commission. Apparently the reviewing court's order fixes that time and in the instant case, this Court fixed it at ninety days. Obviously, this rule in no manner interferes with the jurisdiction of this Court to make or enforce its order. Under this rule, whose validity is not challenged here, and which rule has the effect of law, the Commission may require a party to such cease and desist order "to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order."

What the Commission did on September 2, 1947, in the instant case was to require the defendants to file within thirty days after the service of notice additional reports showing in detail the manner and form in which the defendants had been and were complying with the cease and desist order and the decree of this Court, together with some supporting data. On September 22, 1947, the Commission, at the request of one of the respondents in the cease and desist order, but not one of the defendants here, extended the time for filing the additional reports and data to November 1, 1947. The other eighteen respondents in the order complied. Apparently the Commission's procedure did not impress them as unusual. The defendants refused to comply and, being in default for more than thirty days after November 1, 1947, the Commission on February 27, 1948, served notice of default upon the defendants, and, upon their further failure to comply within thirty days, instituted the instant proceeding, pursuant to 15 U. S. C. Sec. 50, which provides:

"If any corporation required by said sections to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day . . . ."

This Sec. 50 refers to "special reports" required by *"said sections,"* that is, Secs. 41-46 and 47-58 which are the essential provisions of the Act. True, the Commission's proceedings refer not to "special reports" but to "additional," "further" and "supplemental" reports. It seems to me to say the latter are not special reports is to indulge in a refinement in language that would not be countenanced even in a criminal proceeding. I think "additional," "further" and "supplemental" are the equivalent of "special," since they are all reports not required in the usual course.

The majority have stressed what it sees as an interference with this Court's jurisdiction to enforce its decree. This is a bit unsubstantial, it seems to me. If the facts obtained justify proceedings, the Commission might proceed only for the penalty under Sec. 45 (1). In that instance, the Commission would not have to consult this Court at all. If it sought enforcement it could only be in this Court in full recognition of its jurisdiction.

What this case adds up to is this: That the defendants have refused deliberately, and with full consciousness of the consequences, to comply with an order of the Commission made pursuant to lawful authority, and such deliberate refusal comes squarely within the punitive provisions of Sec. 50. The Commission's rules have been published in the Code[2] as a part thereof, following 15 U. S. C. Sec. 45 (1946 Edition). Since the regulations, which are authorized by the statute, together with the statute authorized the procedure which the Commission has followed, the defendants have certainly not been misled. I would reverse the judgment of the District Court.

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[2] The present rule is Rule 25 in the Code, the same number as in prior publications of the rule in 11 Fed Reg. 7074-7075, June 26, 1946; 10 Fed. Reg. 7388, June 20, 1945.

[¶ 62,423] United States v. The Linde Air Products Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 46 C 783. May 3, 1949.

Sherman Antitrust Act, Clayton Act

Exclusive Dealing Contracts—Restraint of Trade Not Established—Welding Process Patent.—In a civil proceeding the Government failed to establish its allegations that a corporation holding the patent for the composition and method of an electric welding process had violated Section 2 of the Sherman Act when it sold welding rod upon the condition that purchasers contract for their entire requirements. Exclusive dealing contracts are not intrinsically illegal, the court ruled, and in this case they cannot be deemed a factor in restricting the opportunities of competitors to market their product. Unique services such as development by research were responsible for bringing customers to the vendor initially and retaining them over the years. The stipulation in the contract as to time was held to be no more than a normal and reasonable business plan by which both parties' operations for one year could be projected more efficiently.

See the Sherman Act annotations, Vol. 1, ¶ 1270.401.

See the Clayton Act annotations, Vol. 1, ¶ 2023.49.

Discount from Non-Contract Price—Concurrent Use of Entire Requirement Contracts —Lessening of Competition.—Injunctive relief was awarded to the Government in a civil proceeding when it was held that a corporation holding a patent for the composition and method of an electric welding process had violated Section 3 of the Clayton Act by offering a half cent per pound discount from non-contract price to those customers purchasing rod under entire requirements contracts. It was a fair assumption that the discount rendered such a price lower than that of competitors. The combination of the discount and the requirements contracts clearly tended to lessen competition to a substantial degree and to create a monopoly.

See the Clayton Act annotations, Vol. 1, ¶ 2023.49.

For the plaintiff: Otto Kerner, Jr., George B. Haddock, Melville C. William, Willis L. Hotchkiss, Special Assistant to the Attorney General, Chicago, Illinois.

For the defendant: George J. O'Grady, c/o Daily, Dines, White & Feedler, Chicago, Illinois.

Memorandum, Findings of Fact, Conclusions of Law, and Judgment

[*Pleading*]

CAMPBELL, District Judge.: This is a civil proceeding, brought by the Government, for alleged violations of Section 2 of the Sherman Act and Section 3 of the Clayton Act. The pertinent portions of those sections are:

> Section 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." (15 U. S. C. A. 2.)
>
> Section 3 of the Clayton Act: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery supplies or other commodities of a competitor of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (15 U. S. C. A. 14.)

The complaint charges that "Beginning in or about May 1938 and continuing to and including the date of the filing of this complaint, defendant Linde, in violation of Section 2 of the Sherman Act, has attempted to monopolize, and has monopolized, sales in interstate trade and commerce of welding rods used in the Unionmelt Welding Process

by entering into contracts with about 80 per cent of the users of the Unionmelt Welding Process for the sale of welding rods for use in the process within the United States, each contract being on the condition agreement, or understanding that the purchaser shall not use welding rods of a competitor of Linde in the Unionmelt Welding Process. Said contracts and each of said contracts substantially lessen competition in, and tend to create a monopoly of, the sale of welding rods used in the Unionmelt Welding Process in violation of Section 3 of the Clayton Act."

The Unionmelt Welding Process is the subject of United States Patent No. 2,043,960 issued June 9, 1936 to defendant as assignee of the inventors Lloyd Jones, Harry Kennedy and Maynard Rotermund, who filed the patent application on October 9, 1935. The patent relates both to a process or method of electric welding, and to compositions for use therein. Litigation as to the validity of the claims of the patent developed subsequently, as a result of which, judicial determination has been made of validity. The United States Supreme Court in a recent decision, *Graver Tank v. Linde Air Products,* 335 U. S. 810, upheld the validity of flux claims 18, 20, 22 and 23. The Court held to be invalid flux claims 24, 26 and 27, and all process claims. Flux claims 19, 21, 25, 28 and 29 were not in issue.

[*History and Role of the Invention*]

There is no dispute between the parties as to the outstanding nature of the Unionmelt invention. It represented a remarkable improvement in the field of electric welding, and apparently caused a tremendous impact upon the manufacturing world. For example, the performance capabilities of the Unionmelt Process included:

(1) Welding steel plate 2½ inches thick in a single pass (one traverse along the seam to be welded) as compared with a maximum of ½ inch with any prior process.

(2) For the first time, welds of the highest quality—usable in high pressure boilers and other dangerous instrumentalities—could be produced automatically using a bare rod.

(3) Welding speeds and currents were multiplied many times over pre-existing maxima.

Installation of the process on a production basis generally involved considerable equipment and expense—a further testimonial to its industrial worth.

The foregoing discussion of the Unionmelt Process is, of course, undeterminative directly of the issues presented in this cause of action, but the Court deems it a necessary prelude in order that the subsequent activities of Linde might be considered against their proper background. It is entirely possible that defendant's operations could become distorted if viewed in the normal business perspective, rather than in the abnormal setting resulting from the introduction of a revolutionary industrial process.

The first public announcement of the Unionmelt process was made in October, 1938. Since that time, Linde has offered to license this process on standard terms to all applicants. In the early phases of the licensing program, Linde was the sole source of supply for rod suitable for use in the process. Linde has never manufactured its own welding rod, but purchases it from other concerns and, in turn, resells it to its licensees. Originally, nearly 100% of the rod used in the process was a patented rod—"Oxweld 29," patent to which was held by Linde and which expired in 1940. Except for special applications, apparently practically any steel rod may be used in the process, and there are now many concerns selling rod and wire which are suitable. Licensees are obliged to pay royalties on the basis of the amount of metal deposited in the welding operation. Therefore, if no metal is deposited, no royalty is due; and the royalty is due whether the licensee uses defendant's rod or not.

From the commencement of its licensing program, defendant attempted to sell all its welding rod under the following form of contract:

"The seller (Linde) agrees to sell and deliver, and the buyer agrees to purchase and take delivery of . . . the Buyer's entire requirements of bare rod electrodes for use in a process of electric welding known as the Unionmelt Welding Process . . . for the period of one (1) year beginning on the — day of 19— and continuing after said period from year to year until cancelled at the end of any then current contract year by notice in writing to that effect given by either party hereto to the other not less than 60 days prior to the end of such then current contract year."

Substantially, this was the form of contract signed by all contracting licensees. Approximately 528, or 81%, of the 651 licensees were also parties to these entire requirements contracts. About 95% of all rod deposited by licensees, is so deposited under this type of contract. Purchasers under the entire requirements contracts receive a ½¢ per pound discount from the non-contract price. However, shortly after the commencement of this action, defendant cancelled all outstanding requirements contracts, having discovered them to be more of a burden than a blessing. This was due to cost increases in the post-war period which had not been anticipated or provided for at the time the contracts were executed.

[*Exclusive Dealing Not Intrinsically Illegal*]

The Government has advanced the proposition that the requirements contracts sponsored by defendant are illegal *per se*. However, its theory does not conform to the recent view of the Supreme Court as expressed in the case of *United States v. Columbia Steel Co.*, 334 U. S. 495:

> "Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a non-patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*. * * *
>
> "The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product."

Having, therefore, concluded that the contracts are not illegal *per se*, it remains for the Court to determine whether they otherwise constitute an unreasonable restraint. In other words, it must be shown by the Government that the restraint accomplished by Linde in this case was accompanied by an intent to achieve a forbidden restraint. One of the factors to be considered in determining the legality of defendant's operations is the character of the market to be served, and the leverage on that market which this particular activity created or made possible. A second important test is the intent or purpose with which the operation was conceived. When a plan, through its actual operation, results in an unreasonable restraint, intent or purpose may be inferred; and, even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman and Clayton Acts.

In attempting to meet the above tests, the Government introduced considerable statistical evidence which was intended to prove that, since approximately 95% of all rod deposited by licensees had been purchased from defendant under requirements contracts, defendant actually did, and so intended to, unreasonably restrain trade and restrict the opportunities of competitors to market their product. However, this conclusion may merely be legitimately inferred, and is not the inevitable end-point of syllogistic reasoning. It is not inconceivable that competitors of an alleged monopolist find it impossible to sell their products simply for the reason that the prospective customers are too well satisfied with the good salesmanship and excellent service of said monopolist. It must be remembered that, in the case at bar, defendant was the sole company to make welding rod stocks available in proper quantities, condition and analyses for a considerable length of time after the Unionmelt Process was introduced to the public. Furthermore, throughout the years the process has been in existence, defendant has devoted itself constantly to research in order to develop the ideal rod to be used on any particular production job. It may be true, generally, that any type of wire may be employed in the process, but such

fact does not mean that satisfactory results could be achieved. These services, rendered by defendant, I am convinced are what brought customers to Linde initially and what retained them over the years. Admittedly, the requirements contracts bound the customers to defendant during the course of one year, but can that period of time be construed as being unreasonable? A requirements contract which would bind a purchaser for ten or twenty years would undoubtedly be contrary to the public interest and, therefore, unreasonable; but a one-year contract should not be relegated to the same category. It would appear to be no more than a normal and reasonable business plan, by which both parties' operations for the year could be projected more efficiently and accurately. In any event, defendant's customers were under no compunction to execute the contracts in the first instance, nor to continue them for a longer period than the one year stipulated therein. True, the agreement contained a provision for automatic renewal; but there was nothing surreptitious about it, nor was the process of cancellation at the end of the contract year burdensome to the purchaser.

The Government attached considerable importance to the following typical statements made by officers of defendant corporation, as indicating a purpose and a plan to exclude competitors from the welding rod field:

(a) Government's Exhibit # 18

". . . Although we want and expect to obtain the rod business. . . . If a Unionmelt licensee should mention the possibility of some other source of rod, we must admit there is no obligation in the Unionmelt welding process license agreement to buy our rod. However, besides the obvious advantage of a rod contract to us in assuring us the business, making possible quantity purchases and giving some basis for warehouse stock control, there are several advantages to using our rod."

(b) Cornwell Cross-examination — R. 286, 287

"Q.—As a matter of fact, didn't you always, prior to the time of the filing of this complaint, urge your subordinates to secure from licensees entire requirements contracts, if it was at all possible?

"A.—We were anxious to sell all the rod we could, and if that was a means of getting the rod business, that was the proper channel to follow, yes."

(c) Government's Exhibit #25—

"Rod for Unionmelt welding is invariably furnished by us."

(d) Government's Exhibit # 30—

"If you have any thoughts or suggestions in handling this matter they would be appreciated although we definitely left the idea with Mr. Ebersole that our agreement, because cancellation privilege had not been exercised, was in effect for at least another year."

However, it must be remembered that, to a limited degree, any sale of goods by a vendor necessarily involves the exclusion of a competitor, at least temporarily. The Court would not classify these statements as more than normal expressions of concern for sales that might well come from the lips of any businessman in the country, who intended to maintain his business as a going concern.

[*Effect of Discount*]

Had defendant extended itself no further in its attempts to secure the welding rod business to itself by means of the entire requirements contracts alone, the Court would be constrained to hold that no violation of the Anti-trust Acts had occurred. Defendant, however, introduced the additional element of a ½¢ per pound discount for all rod purchased under requirements contracts. In view of the fact that some purchasers bought in quantities of several hundred housand pounds at one time, a discount of this size would certainly not be *"de minimis."*

[*Authorities Examined*]

This discount, used, as it was, in conjunction with the entire requirements contracts in my opinion constituted a violation of Section 3 of the Clayton Act at least insofar as that Statutes states: ". . . where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Admittedly the Government failed to introduce any evidence as to what prices had been established by competitors of defendant; but it seems a fair assumption that the discount rendered defendant's price lower than that of its competitors. The combination of the discount and the requirements contracts clearly tended to lessen competition to a substantial degree and to create a monopoly. The case of *Lipson v. Socony Vacuum Corp.*, 87 F. 2nd

265, although not cited by either party herein, seems to express the view most favorable to defendant's present position.

"The question is, where the requirements that a sale of gasoline in tank cars and at a less price than in case of delivery in smaller quantities by tank trucks will only be made in case the retailer agrees to sell only the defendant's products, results in a lessening of competition in interstate transactions between the plaintiff and stations operated by the Standard Companies and by others in the same competitive territory, to the damage of the plaintiff?

"It is obvious from his declarations that the defendants' policy does not affect the amount of sales by the plaintiff of the defendants' products, but only his profits, since the inference is clear that he has supplied all demands of his customers for 'Socony' gasoline, though at a less profit than if he could buy on the tank car market. He does not allege, however, that he is equipped to accept gasoline at his filling station in tank cars, or that his profits are so small that he must give up supplying his customers with 'Socony' products. The inference is also clear that he buys and sells the products of other integrated or independent companies on the same terms as those of the defendants. There is obviously no discrimination in terms or price between him and other retail customers of the defendants. He is offered the same terms by the defendants as any other retail customer; and since it is alleged that all retailers sell at the same price, which is posted on their pumps at their retail outlets, and that the selling price of all gasoline is the same, at least throughout Massachusetts, competition in price, therefore, cannot result as between him and other retailers, though they deal exclusively in 'Socony' products.

" 'Competition' is defined as: 'The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms.' Webster's Dict. 'The struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time.' 12 C. J. 237. This, according to the planitiff's declaration, his competitors are not seeking to do by offering more favorable terms of sale of Socony products to purchasers.

"While we think it is alleged with substantial certainty that the defendants have fixed lower prices for their products in case of the importation of gasoline in tank car lots direct to their customers, provided the customer agrees to deal only in their products, yet it does not appear, owing to there being no competition in price between the plaintiff and other retailers of gasoline, that the result of defendants' policy is to substantially lessen competition in gasoline and other petroleum products between the plaintiff and stations operated by the Standard Companies, or those dealing exclusively in defendants' products, in the same competitive territory. If the plaintiff chooses to sell petroleum products of other competing companies of the defendants rather than to deal in the defendants' products exclusively, it does not follow, as a matter of law, that a refusal by the defendants to sell gasoline to the plaintiff at tank car prices constitutes a violation of the Clayton Act."

Concededly, the *Lipson* case might well be authority for the proposition that no right of action under the Anti-trust Acts accrues to an individual purchaser who, in order to receive a discount, must buy his entire requirements from a particular supplier. However, the same rule does not apply where the offense charged is a substantial lessening of competition between the particular supplier and other suppliers, similarly situated. Under the facts existing in the *Lipson* case, competition was not destroyed between retailers of gasoline, but rather since they all charged the same price, certain retailers suffered a reduction of margin of product to a limited degree. In the case at bar, however, it is not inconceivable that competitors of defendant might be eliminated from the field entirely by means of the combination of the discount and requirements contracts. Defendant's practices have been essentially the same as those condemned in *Carter Carburetor Corp. v. Federal Trade Comm.*, 112 F. 2nd 725, wherein it was stated:

"The petitioner thus has established within its own control a complete system of retail price maintenance, effective as to all sales to both contract and general cabinet service stations.

"The purpose and effect of General Bulletin No. 134 must therefore be considered in the light of that situation. The Bulletin advised that the preferential discount would be discontinued if a new carburetor line (defined as a carburetor made after June 23, 1934) was taken on without petitioner's written approval. Petitioner gave instructions that if the service stations 'should elect to keep the other line * * * the standard trade discount of 25% would then apply.' Petitioner's telegram to its field representatives stated that 'until they

make up their minds twenty-five per cent will be their discount.' The policy was enforced by increasing prices to some service stations which refused compliance and by threats of reduction of discounts made to others and by cancellation of contracts. It was made perfectly clear that their preferential discount would be available only on condition that they did not carry or take on a new competing line. Under these circumstances it is immaterial that those who handled petitioner's products were not obliged to affirmatively promise in express terms not to handle goods of Carter's competitors. The condition against handling the goods of competitors was made as fully effective as though it had been written in and affirmatively agreed to in express terms in the contracts. Of course it was necessary that petitioner's distributors should cooperate to effectuate the purpose because the distributors were the immediate source from which the service stations obtained their stocks directly. But there is, and was, no doubt that such cooperation was complete, both in actual practice and according to the terms of the contracts between petitioner and distributors. The arguments presented as to the right of an individual to contract or refuse to contract with whom he pleases must be related to the provisions of Section 3 of the Act intended to and did impose a condition that the purchaser should not deal in the goods of a competitor of petitioner within the prohibition of Section 3."

Similarly, in the case at bar, no affirmative promise was exacted from the various licensee-purchasers that they would not use a product competitive to that of defendant, but the discount, used in conjunction with the requirements contracts, patently imposed the condition, although indirectly, that such purchasers would not use the products of competitors. So employed, the practice is violative of Section 3 of the Clayton Act.

Defendant contends strongly that, in any event, the question is now moot and an injunction should not issue, even though its prior activities may have been violative of the Anti-trust Acts. In support of this theory, defendant states in its brief:

"Earlier in this brief the facts have been set forth as to the origin of Linde's use of requirements contracts for the sale of welding rod, the practical nullification of the operation of these contracts during the wartime period and the final abandonment of the contracts under post-war conditions of steel supply and prices. It has further been shown that the conditions which gave rise to the contracts no longer exist, and that instability of steel prices and shortness of supply may be expected to continue. Therefore there is no basis for belief that Linde will desire, or will be able, to use such contracts in the foreseeable future."

In regard to this assertion of mootness, it should be noted that the illegal practices were abandoned by the defendant of its own volition, as a result of economic expediency. Presumably, then, if advantageous economic factors were present in the future, defendant might voluntarily resume the practices which gave rise to the present action. Indeed, that defendant would contemplate such a move may be inferred legitimately from the testimony of Mr. Cornwell, a vice-president of Linde (R. 177-8). The rule as to whether a particular question has become moot was clearly stated in *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290:

". . . If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. The result does not and ought not to follow. * * *

"Private parties may settle their controversies at any time, and the rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of congress above cited. The defendants cannot foreclose those rights, nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of congress, by any such action as has been taken in this case. . . ."

Nothing contained in the language of *U. S. v. Hamburg-American Co.,* 239 U. S. 466, serves to strengthen the position assumed by defendant on this question. That case is

merely authority for the proposition that the subject is rendered moot by the intervention of a power beyond the control of either party, but does not purport to establish the rule that a defendant can make it moot by interjecting its own voluntary act.

[*Injunctive Relief Granted*]

For the reasons expressed above, I conclude that the combination of the entire requirements contracts and the discount granted in connection therewith, constitutes a violation of Section 3 of the Clayton Anti-Trust Act; and that the question of such violation is not now moot. The Government is, therefore, entitled to the injunctive relief prayed for in the complaint.

Counsel for the plaintiff may prepare and file with the Court, in writing, within thirty days from the date hereof, proposed findings of fact, conclusions of law, and a draft of a proposed decree, consistent with the views herein expressed, delivering copies thereof to counsel for the defendant. Within thirty days of the receipt of such copies, counsel for the defendant may prepare and file with the Court, in writing, his observations with reference thereto and suggestions for the modification thereof, delivering a copy of such observations and suggestions to counsel for the plaintiff. Within ten days thereafter counsel for the plaintiff may present to the Court, in writing, his reply to such observations and suggestions. Whereupon, the matter of making findings of fact, conclusions of law and a decree herein will be taken by the Court without further argument.

[¶ 62,424] Hyman Schiller, doing business under the name and style of Makegood Manufacturing Co. v. Mit-Clip Company, Inc. and J. M. Podoloff.

In the United States District Court for the Southern District of New York. Civil 49-267. May 13, 1949.

Sherman Antitrust Act, Clayton Act

Threats of Legal Action—Existence of Antitrust Claim Undecided—Transfer to Proper Venue.—A manufacturer's complaint, which alleged that a company incorporated and doing business in Minnesota and its treasurer had conspired to monopolize the suspender and elastic attachment trade by threatening to sue for patent infringements with the result that customers withdrew their trade in favor of the alleged conspirators, set forth sufficient facts to base a claim of unfair competition and for a declaratory judgment. The Court lacked jurisdiction to adjudicate upon the claim based on unfair competition since the summons was not served within its jurisdiction. As to the claim for a declaratory judgment the Court ruled that the action should have been in the judicial district in which the company was incorporated. On the assumption that the pleadings also stated a claim under the antitrust laws it was found that venue had been laid in the wrong district since the corporation cited was not an inhabitant of the judical district, was not found there and did not transact business there. The cause was therefore transferred to the district in which the process was served.

See the Clayton Act annotations, Vol. 1, ¶ 2032.

For the plaintiff: Harry Price, New York, New York.

For the defendant: Irving Fox, (Joseph Stern, of counsel) New York, New York.

LEIBELL, D. J., District Judge: Plaintiff filed a complaint in this action on February 25, 1949. The summons and complaint were served on the defendant, Mit-Clip Company, Inc., by the United States Marshal in Minnesota "by handing to and leaving a true and correct copy thereof with Wilfred Woolfson, Treasurer, personally at Minneapolis, Minnesota, on the 30th day of March, 1949". The return of the Marshal on the service of the summons and complaint was filed in this Court on April 4, 1949. The individual defendant, J. M. Podoloff, has not been served with process. The complaint alleges:—

"1. Jurisdiction arises under Title 28, Section 1337. Jurisdiction may also arise under Title 28, Section 1332 (a) (1) and 1338.

"2. Plaintiff is a manufacturer and seller of suspenders and elastic attachments of va-

rious types, including those for attaching gloves of children to other garments, and is located and is doing business at 709 Broadway, City, County and State of New York.

"3. Upon information and belief, Defendants are competitors and are in the same line of business as Plaintiff, Defendant J. M. Podoloff being a resident of 109 East 42nd Street, City, County and State of New York, but is a citizen of Minneapolis, Minnesota, and Defendant, Mit-Clip Company, Inc. is located in Minneapolis, Minnesota, and is a citizen of Minnesota, and both defendants are doing business in the City, County and State of New York.

"4. Defendants have been and still are in the City, County and State of New York and elsewhere in the United States in Conspiracy with each other, threatening suit against Plaintiff and its customers upon alleged patent rights, with the result of which said customers have failed to buy, or refuse to buy, various glove elastic attachments from Plaintiff and instead have bought them from Defendants, and these threats are false, fraudulent and malicious and without basis or foundation.

"5. Defendants in conspiracy have been and are attempting to set up a monopoly in said glove elastic attachments in violation of the Sherman and Clayton Acts by intimidating and inducing the trade and public, under threat of litigation, to purchase said glove elastic attachments from Defendants and to exclude and prevent Plaintiff from doing business in this field.

"6. Plaintiff's business has been severely damaged and injured to an amount not now known and he has no adequate remedy at law."

The prayer for relief is as follows:—

"7. WHEREFORE, Plaintiff prays judgment:

(a) enjoining Defendants and each of them and their agents from violations of Sherman and Clayton Acts for making threats of infringement;

(b) declaring that Defendants have no patent rights or other monopoly in elastic gloves attachments and declaring any patent that Defendants may have as void and invalid.

(c) awarding an accounting together with costs, counsel fees and other relief to Plaintiff."

On April 19, 1949 by a notice of notion based on an affidavit of an attorney and one of its officers (Pololoff) the defendant corporation moved this Court under Rule 12 (b) F. B. C. P. for an order:—

"1. To dismiss the action on the ground

"a. That the defendant, MIT-CLIP COMPANY, INC., is a corporation organized under the laws of the State of Minnesota and was not and is not subject to service of process within the Southern District of New York.

"b. That the defendant, MIT-CLIP COMPANY, INC., has not been properly served with process in this action, all of which more clearly appears in the affidavits of JOSEPH STERN and JOSEPH M. PODOLOFF hereunto annexed as Exhibit A and Exhibit B respectively.

"2. To dismiss the action on the ground that it is in the wrong district because:—

"a. The jurisdiction of this Court is invoked among others on the ground that the action arises under the Constitution and Laws of the United States.

"b. The defendant, MIT-CLIP COMPANY, INC. is a corporation incorporated under the Laws of the State of Minnesota and is an inhabitant thereof.

"3. For such other and further relief as to this Court may be just and proper in the premises."

The affidavit of Joseph M. Podoloff states:—

"Affiant further says that plaintiff alleges that this affiant is a resident of 109 East 42nd Street, City, County and State of New York. Affiant states that he is not now nor has he ever been a resident of the City of New York, nor has he ever resided there even temporarily. Affiant further states that prior to World War II, he resided in the City of Minneapolis for a period of 12 years; that at the time of World War II he enlisted in the U. S. Navy and was active therein and was not discharged therefrom until January, 1946; that when he was released from the Navy, he took up his residence in San Francisco, California; that from October 15, 1946 to January 19, 1948, this affiant resided in Berkeley, California, and maintained his home there together with his wife and family; that on June 19, 1948 he moved his wife and family to the City of Minneapolis, Minnesota, and since said date has resided at 4824 12th Avenue South in the City of Minneapolis, Minnesota; that this affiant has no other place of residence and has had no other place of residence since June 19, 1948, other than Minneapolis, Minnesota.

Affiant further says that sometime in February, 1948, the exact date of which he is not certain, he went to the City of New York and registered at the Commodore Hotel; that this affiant does not know whether or not the address set out

in the plaintiff's complaint is the address of the Commodore Hotel, but believes that such hotel is on East 42nd Street. Affiant further says that he stayed at the Commodore Hotel one night, consummated his business and left the city, and that he did not at any time take up residence in the City of New York and that he is still living in Minneapolis, Minnesota.

Affiant further says that he is the Treasurer of the Mit-Clip Company, Inc., a Minnesota corporation, with its principal place of business in Minneapolis, Minnesota; that the Mit-Clip Company, Inc. is engaged in Minneapolis, Minnesota in the manufacture of a clip which is fastened on one end to a child's mittens and on the other to the child's coat; that the entire process of manufacture is located in Minneapolis, Minnesota and all of the offices are in Minneapolis, Minnesota; that the product is sold through agents or representatives in states other than Minnesota, but that the Mit-Clip Company, Inc. has no offices in any city of any state other than Minneapolis, Minnesota, and that the company is doing business only within the State of Minnesota."

A further affidavit of Mr. Podoloff, sworn to April 26, 1949, also states:—

"* * * that he is the Treasurer of Mit-Clip Company, Inc.; that the Mit-Clip Company, Inc. was organized under the laws of the State of Minnesota on April 26, 1948; that all of the stockholders and officers of said corporation are residents of the City of Minneapolis, State of Minnesota; that the registered office of the corporation is 1940 Rand Tower, Minneapolis, Minnesota; that the sole business of the corporation consists of the manufacture or assembly of a device for saving or protecting children's mittens; that it consists solely of a web fabric or elastic band with clips which are attached to the coat of the child and to the mittens; that the clips are metal and are purchased from manufacturers of clips, said manufacturers located in the New England states. Fabric or elastic is purchased from manufacturers or jobbers. It is cut and assembled in Minneapolis. The corporation employs less than ten employees, who cut the elastic or fabric to short lengths and attach the clips to such cut fabric or elastic and box the same. This is the complete operation of the manufacture or assembly of the 'Mit-Clip' and is performed solely and wholly in the City of Minneapolis, Minnesota; that the product is sold mostly in the Middle West, with about 50% of the business being done in the State of Minnesota; that the gross sales for the winter season of 1948-1949 was $35,000.00.

That sometime in February, 1949, this affiant went to the City of New York, State of New York for the purpose of contacting prospective customers; that this affiant called on four prospective customers; that the entire time consumed in doing this required approximately a day and a half. This affiant arrived in the City of New York in the morning, called on three prospective customers, spent the night at the Commodore Hotel, called on a prospective customer the next day, and then left the City of New York and the State of New York; that his contact with the prospective customers consisting of showing them the 'Mit-Clip' item; that none of the customers purchased the item at that time, but in each case stated that they would discuss it with their buying departments, and if they were satisfied, would mail in an order to the Minneapolis office; that any other contact with any of such customers has been entirely through the U. S. Mail.

That aside from this affiant having been in New York City for approximately a day and a half in February, 1949, no officer or other representative of the corporation has been in the City of New York or State of New York; that the Mit-Klip Company, Inc. has no resident representative or any other type of representative in the State of New York, nor has it any dealers or jobbers located in the State of New York; that the corporation does not have nor does it maintain any branch plant, branch office or sales room in the State of New York; that it does not as a matter of fact have any sales office anywhere in the United States other than in Minneapolis, Minnesota. Affiant further states that the corporation's sole and only address is Minneapolis, Minnesota; that it has no address or telephone number in the State of New York, and that Mit-Klip Company, Inc. can be reached only at its office in Minneapolis, Minnesota. Affiant further states that at the present time the corporation has no agents or any other type of employee or any independent contractor representing it in the sale of its merchandise in the State of New York."

In a supplemental affidavit by plaintiff, sworn to May 4, 1949, he alleges:—

"Upon information and belief, although the Defendant corporation is located in Minneapolis, Minnesota, it is doing business in the Southern District of New York and it has built up a monoply in the subject matter in question in the Southern District of New York by correspondence and by visits of its officers to various customers of Plaintiff in the Southern District of New York."

That affidavit also alleges that defendant corporation is claiming certain patent rights and is making oral and other threats and has sent out a letter to the trade by its patent attorneys in Minneapolis. The concluding paragraph of plaintiff's supplemental affidavit alleges:—

"Upon information and belief, the [patent] applications filed by the Defendant corporation, if any, were not filed in good faith but were filed solely to give the Defendant a chance to circularize and threaten and intimidate the trade and build up a monopoly in these items, as it has now done. These threats, warnings and intimidations have been repeated again and again through the latter part of 1948 and the early part of 1949, and Defendant corporation at no time has made any bona fide attempt to bring suit or adjudicate its patent or other rights relating to its merchandise. During this period Plaintiff has been severely damaged and has lost considerable business, and finds itself unable to sell the subject matter of Exhibit A to many of its customers because of the activities of Defendant corporation."

On April 21, 1949 plaintiff's attorney served a notice of motion dated April 18th and based on an affidavit of plaintiff sworn to April 19th for an order—

"* * * during the pendency of this trial to enjoin Defendants singly and jointly from threatening suit, litigation or patent infringement against the customers or prospective customers of Plaintiff who purchase or desire to purchase fastening devices as set forth upon Exhibit A attached to these papers and for such other relief as may seem proper in the premises."

Plaintiff's affidavit of April 19th alleges:

"Among the products which have been sold by Plaintiff is a device for the retention of children's gloves having a short band of webbed fabric or elastic with clips to be attached to the sleeve and to the children's glove or mitten. The device as sold by Plaintiff is identified as Exhibit A while the device as sold by Defendants is identified as Exhibit B.

Defendants by written and oral malicious and unwarranted misrepresentations in the City of New York and elsewhere have terrorized and intimidated customers and prospective csutomers of Plaintiff as well as of others in the line and have made such customers fearful of buying these devices of the type of Exhibits A and B from anyone else other than Defendants, with the result that Defendants have built up a substantial monopoly in the manufacture and sale of these devices to the exclusion of Plaintiff and others in *intra* and interstate commerce."

There are also allegations in said affidavit that defendant's device could not be patentable because of the prior art and that defendant's claim to certain rights are under a patent which does not cover plaintiff's device.

There may be some question as to whether plaintiff has pleaded sufficient facts for the basis of a claim under either § 15 or § 26 of Title 15, U. S. C. (part of the antitrust laws). The complaint does allege the basis for a claim of unfair competition, and for a declaratory judgment that defendant's alleged patent is invalid and for an injunction. There is nothing to show that any violations of the trade-mark statute [15 U. S. C. 1051 et seq.] or the copyright law [17 U. S. C.] are in any way involved in plaintiff's claim.

Assuming this to be a suit under the anti-trust laws plaintiff has not met the specific and detailed allegations of Podoloff's affidavit, which show conclusively that the defendant corporation is not an inhabitant of this judicial district (the Southern District of New York), that it is not "found" here, and does not transact business here. Title 15 U. S. C. § 22.[1] *Eastman Kodak Co. v. Southern Photo-Engravers*, 273 U. S. 359; *United States v. Scophony Corp.*, 333 U. S. 795, 804-810. Hence the defendant corporation cannot be sued in this judicial district.

Assuming that this is a suit for unfair competition, this court would lack jurisdiction because the summons was not served on the defendant corporation within the State of New York as required by Rule 4(f) F. R. C. P.[2] If jurisdiction of the person of the defendant had been obtained by service

[1] "§ 22. District in which to sue corporation. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. Oct. 15, 1914, c. 323, § 12, 38 Stat. 736."

[2] "4. (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

within the State of New York, the Southern District would have been a proper venue under § 1391(a) of Title 28 U. S. C.[3] relating to jurisdiction founded only on diversity of citizenship.

Assuming this is a suit under T. 28 U. S. C. § 2201[4] for a declaratory judgment to have the patent, under which defendant claims certain rights, declared invalid and to enjoin any further claims of defendant corporation thereunder, then the corporation may be sued in the judicial district in which it is incorporated or licensed to do business or is doing business. The defendant corporation is incorporated under the laws of Minnesota, has its office in Minneapolis, is not licensed to do business in New York, and is not "doing business in New York".

Assuming this to be a suit under the anti-trust laws, and as to that the complaint may be open to attack on a proper motion[5], venue has been laid in the wrong district. The defendant has interposed timely and sufficient objection to the venue. Pursuant to § 1406 of Title 28 U. S. C.[6] the case will be transferred to the district in which defendant has its principal office and in which process herein was served, to the United States District Court for the District of Minnesota, Fourth Division, for which court is held at Minneapolis. Title 28 U. S. C. A. § 103.

Plaintiff's motion for a preliminary injunction will not be considered by this Court and is denied without prejudice.

Settle orders accordingly.

[¶ 62,425] Seagram-Distillers Corporation v. Rose Lang, Doing Business As Tower Liquor Store.

In the Minnesota District Court, County of Hennepin, Fourth Judicial District. No. 462490. April 25, 1949.

Minnesota Fair Trade Act

Definition of Distributor—Injunctive Relief Denied.—Action on a fair trade agreement can not be brought by a corporation unable to qualify as a distributor under the state laws. In a suit by such a company who sold to retailers through a third party termed an exclusive wholesale distributor, who was not a signatory to the agreement, injunctive relief to enjoin a retailer from selling brand whiskey below minimum prices

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[3] "§ 1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

[4] "§ 2201. Creation of Remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

[5] The following quotation from *Bell v. Hood,* 327 U. S. 678 at p. 681 is apposite:

"Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Templeton,* 185 U. S. 487, 493, 494; *Binderup v. Pathe Exchange,* 263 U. S. 291, 305-308. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair v. Kohler Die Co., supra,* 228 U. S. at 25. But cf. *Swafford v. Templeton, supra.*"

[6] § 1406. Cure or waiver of defects.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

was denied. To be a distributor of liquor in the state one must be licensed as such and by reason of the national scope of its stock ownership this company is not eligible to apply for or receive such a license.

See the Minnesota Fair Trade Act annotations, Vol. 2, ¶ 8424.

For the plaintiff: Morley, Cant, Taylor and Haverstock, Minneapolis, Minnesota.

For the defendant: Edward J. Callahan, Allen T. Rorem and Kaplan, Edelman and Kaplan, Minneapolis, Minnesota.

[*Syllabus*]

HALL, LEVI M., Judge: The above entitled matter came on for hearing before the undersigned, one of the judges of the above-named court on the 5th and 8th days of November, 1948, upon a demurrer to the complaint herein by the defendant Rose Lang, doing business as Tower Liquor Store, upon the ground that the facts stated in plaintiff's complaint do not constitute a cause of action against said defendant.

Edward J. Callahan and Allen T. Rorem, and Kaplan, Edelman and Kaplan appeared as attorneys for the said defendant, and Morley, Cant, Taylor and Haverstock appeared as attorneys for the plaintiff. At the oral argument of the demurrer, the attorneys for the plaintiff conceded in open court that the plaintiff, which according to the allegations of its complaint signed the contracts relied on by the plaintiff and established the minimum prices sought to be enforced herein, is not licensed as a distributor of liquor in the State of Minnesota, as provided for in M. S. A. Section 340.11, Subd. 1, cannot therefore lawfully sell liquor in Minnesota, and by reason of the national scope of its stock ownership is not legally eligible to apply for or receive such a license in Minnesota.

The matter having been duly heard and considered.

IT IS ORDERED, That said demurrer be and the same is hereby sustained upon the ground that the facts stated in the complaint do not constitute a cause of action.

MEMO

A demurrer has been interposed by defendant to plaintiff's complaint upon the ground that the facts stated therein do not constitute a cause of action against defendant.

[*Nature of the Action*]

The action is one for injunctive relief enjoining and restraining defendant, a retail liquor dealer, from advertising, offering for sale or selling Seagram's Seven Crown Blended Whiskey at less than the minimum retail price specified in certain contracts referred to in the complaint.

Defendant is not a party to the contracts relied on by plaintiff, all such contracts having been entered into with other retail liquor dealers in the State of Minnesota. Nevertheless, plaintiff asserts that such contracts are obligatory on the defendant by reason of M. S. A. Section 325.12.

The other party signatory to the contracts relied on is the plaintiff. But the plaintiff is neither the manufacturer of the product involved nor the distributor thereof in the State of Minnesota. The manufacturer and owner of the brand name is Joseph E. Seagram & Sons, Inc., an Indiana corporation, which is neither a party to the contracts nor a party to this action. This manufacturer in turn sells the product to the plaintiff corporation "as the exclusive distributor thereof in the United States of America". But it was conceded by plaintiff's attorneys in open court at the argument of the demurrer that the plaintiff is not licensed as a distributor of liquor in the State of Minnesota, as provided for in M. S. A. Section 340.11, Subd. 1, cannot therefore lawfully sell liquor in Minnesota, and, moreover, by reason of the national scope of its stock ownership is not legally eligible to apply for or receive such a license in Minnesota. The complaint alleges, accordingly, no selling by plaintiff in Minnesota and no distributions by plaintiff to retail dealers in Minnesota, but instead that the plaintiff sells the product to still a third entity, Distiller Distributing Company, "as exclusive wholesale distributor thereof in the State of Minnesota". Distillers Distributing Company in turn sells the product to retail dealers in the State of Minnesota, including the defendant. Distillers Distributing Company, the exclusive Minnesota

distributor, like Joseph E. Seagram & Sons, Inc., the manufacturer, is neither a party to the contracts relied on nor a party to this action.

[*Argument on Demurrer*]

The defendant argues in support of the demurrer, among other arguments, that the contracts relied on by the plaintiff for enforcement are insufficient as a matter of law because: (a) the plaintiff signing the same and stipulating the re-selling prices was neither (1) a "distributor" within the meaning of M. S. A. Section 325.10, nor (2) a "seller" within the meaning of clause (1) of M. S. A. Section 325.08, nor (3) in a seller-buyer relationship with the retailers who signed the contracts as required by clause (1) of M. S. A. Section 325.08; and (b) because the type of contract contemplated in the case of a wholesaler who sells to wholesalers for resale to retailers, which is specified in clause (2) of M. S. A. Section 325.08, was not utilized in this case.

[*Definition of Distributor*]

To be authorized by the trade mark owner to establish a minimum resale price, one must be a "distributor". M. S. A. Section 325.10. Lawfully to be a distributor of liquor in the State of Minnesota, one must be licensed as such. M. S. A. Section 340.11. It is conceded, however, that the plaintiff-signatory of the contracts relied on is not and cannot legally be licensed as such. The only authorized contracts with retailers establishing minimum resale prices are those between "buyer" and "seller" wherein the minimum prices are "stipulated by the seller". M. S. A. Sec. 325.08, Clause (1). But the plaintiff who signed the contracts relied on and stipulated the minimum price for resale is not a seller of liquor to any signatory retailer in Minnesota, nor to any nonsignatory retailer in Minnesota, including the defendant, and admittedly cannot legally be or become such a seller. Whatever else the Fair Trade Act (M. S. A. Sections 325.08 to 325.14) authorizes, it does not authorize the particular control here attempted of prices in Minnesota by persons who are legally prohibited from engaging in this state in the commerce sought to be controlled.

Special statutory provision exists for the case of a wholesaler who sells to another wholesaler for resale to retailers for resale to consumers. M. S. A. Section 325.08, Clause (2). That provision, however, even if available to the plaintiff, requires a wholly different type of contract from those pleaded and relied on in the complaint.

[*Demurrer Sustained*]

For the foregoing reasons the Court concludes that it is necessary to sustain the defendant's demurrer. Since the basic facts are such that these reasons cannot be overcome by amendment of the complaint no useful purpose would be served by ruling on the several other reasons urged by defendant in support of the demurrer, or by granting leave to amend the complaint, the defect not being remediable by amendment.

[¶ 62,426] Bristol-Myers Co. v. Picker.

In the New York Supreme Court, New York County. Special Term, Part IV. 121 N. Y. L. J. 1888, May 26, 1949.

New York Fair Trade Act

Trade-Marked Cosmetics—Cash Register Receipts—Injunction To Protect Goods Will and Minimum Prices.—An injunction was granted at the instance of a drug and cosmetic manufacturer restraining a retailer from granting cash register receipts redeemable for cash at 2½ per cent of the total purchase price in the sale of the manufacturer's brand name products, the prices of which were established by fair trade agreements. The Court was of the opinion that the practice was a device to enable the retailer to sell trade-marked articles at a discount, or cash rebate, on minimum contract prices while giving the appearance of nominal compliance therewith.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.15, 8604.45.

[*Issue Defined*]

Mr. Justice Pecora: This case squarely presents the problem of whether the use by defendants of so-called "cash register receipts" violates the provisions of the Fair Trade Law (secs. 369a and 369-b, General

Business Law). This law permits the making of contracts fixing the minimum prices at which branded or trade marked commodities may be resold by the buyer; and forbids the sale of any such commodities at less than such stipulated prices.

There is no substantial dispute as to the facts. This entire controversy revolves around the aforestated issue of law. Although the question has received the attention of Special Terms of this court there is not, in my opinion, any decisive authority thereon in the reviewing courts of this state.

[*Rulings Urged Upon the Court*]

Certain determinations have been made by appellate tribunals in other jurisdictions. They are strongly relied upon by defendants to defeat this action by plaintiff for a permanent injunction to restrain defendants from issuing cash register receipts to customers purchasing plaintiff's products. The principal cases in which those rulings were made are: *Weco Products Co. v. Mid-City Cut Rate Drug Stores* (131 Pac., 2d) and *Bristol-Myers Co. v. Lit Bros., Inc.* (6 Atl., 2d 843, Supreme Court, Pa., 1939). Those cases involved the use of trading stamps instead of cash register receipts. Their reasoning was avowedly followed by the Special Terms of this court in the cases of *Nechamkin v. Picker* (Nassau County, 197 Misc., 61) and *Palmer v. Angert* (Kings County, 86 N. Y. S., 2d, 529).

I have closely studied these interesting cases, as well as the others which have been cited by the learned counsel for defendants. I am constrained to say, however, that they fail to impress me, with the soundness of their rationale. Therefore, I deem it necessary to consider anew the question here posed.

[*Facts*]

The plaintiff manufactures and markets various drug and cosmetic articles bearing brand or trade-marks for which it has, over a period of many years, established a valuable good will. The two defendants, as copartners, own and operate a retail drug store in Lynnbrook, Long Island. There they sell to the general public many kinds of drugs and cosmetics, including the trade-marked products of plaintiff.

Seeking to avail itself of the permission of the Fair Trade Law (General Business Law, sec. 369-a), the plaintiff has fixed minimum retail prices for its products, by contracts made with their distributors. These contracts provide that the "Retailer will not, directly or indirectly, by any means, device, combination sale, trading stamp, free goods, discount, rebate, or other allowance, or otherwise whatsoever, advertise, offer for sale or sell * * * any of Manufacturer's products * * * from whomsoever obtained, and wheresoever purchased by Retailer, at prices less than those set opposite the names of said commodities respectively." It is conceded that the defendants had knowledge of these contract provisions when they dealt, as hereinafter detailed, in the plaintiff's branded and trade-marked products.

[*Dividend Club*]

The defendants are members of an organization composed of fifteen retail merchants in Lynbrook, named "Lynbrook Dividend Club, Inc."—hereinafter called "Dividend Club." It was formed upon the initiative of one of the defendants. Each member is a retail dealer in goods which do not compete with those of any other member. Any new members who may be admitted must also deal in non-competitive goods. The merchandise retailed by its present members includes such articles as children's wear, curtains and draperies, drugs, fruits and vegetables, furniture and lamps, gifts, hardware, jewelry, ladies dresses and specialties, meats, men's haberdashery, rugs and linoleums, stockings and sports wear. Thus, under this plan of restricted membership the defendants are the only dealers in drugs and cosmetics in Lynbrook who belong to the Dividend Club, and who may receive the benefits thereof, although there are several other druggists in that community.

All of the members of the Dividend Club—including the defendants—give cash register receipts to their respective purchasing customers. These receipts are tokens which represent 2½ per cent of the amount of each purchase. A customer who has purchased $10 worth of merchandise from a member, may redeem them for 25 cents worth of merchandise at the store of any dealer-member of the Dividend Club.

A typical form of printed descriptive advertising matter circulated by the Dividend Club reads as follows: "2½% Is Your Dividend. All you have to do is to save the cash purchase receipts you receive from any member of the Lynbrook Dividend Club, Inc. They are worth 2½% of your pur-

chases. Bring them to any member of the Club and they will redeem them in merchandise. (25¢ merchandise for every $10.00 receipts) * * * Remember! The more you spend the more you save." On the reverse side the names and store addresses of all the members of the Dividend Club are printed together with a statement of the kind of merchandise dealt in by them respectively.

These cash register receipts—also sometimes referred to as cash purchase receipts—are accepted as cash at the rate of 2½ per cent of the amount of the purchases which are registered on them; but they can be redeemed only when they represent purchases aggregating $10 or a multiple thereof. Thus, as already stated, one purchasing drugs and cosmetics from the defendants upon accumulating cash register receipts of a total amount of $10 may obtain 25 cents worth of merchandise from defendants or from any other member of the Dividend Club upon the presentation of the receipts. In due course, each member pays every other member in cash for the full amount of merchandise given by such other member to customers of the first member in redemption of the cash register receipts issued by him.

[*Cash Register Receipts Used as a Subterfuge*]

By the foregoing plan the defendants sell the plaintiff's trade-marked products nominally at the minimum prices fixed in the plaintiff's fair-trade contracts. In that way they render lip service to the terms of the contracts, and to the statutory provisions which authorize such contracts. At the same time, however, it is obvious that defendants actually give to their purchasers a 2½ per cent discount or rebate from the minimum contract prices of such products. Any realistic view of the circumstances under which the cash register receipts are issued and redeemed, in my opinion, leads irresistibly to the conclusion that their use constitutes a scheme, device or subterfuge whereby defendants, willfully and knowingly, deal in plaintiff's trade-marked articles at prices which are 2½ per cent less than their minimum fair-trade contract prices.

As already noted, the basic authorities upon which defendants claim validity for their scheme are *Weco Products Co. v. Mid-City Cut Rate Drug Stores* (*supra*), and *Bristol-Myers Co. v. Lit Bros., Inc.* (*supra*), both of which were decided in other jurisdictions. The fact that those cases involved the use of trading stamps instead of cash register receipts does not, in my opinion, distinguish them in principle from the instant case.

[*Other Free Services Distinguished*]

I find it impossible to accept as persuasive the grounds advanced in those two cases for the conclusions arrived at therein. There, for instance, the issuance of trading stamps was held to be a proper means of attracting customers to the issuer's store, comparable to such methods as the giving of free concerts in the store; or the furnishing of free parking space; or the facility of free nursing service for the tending of babies brought to the store by shoppers; or the providing of free bus service to patrons to and from the store. None of those means, however, affects the prices paid by a customer, except perhaps remotely and indirectly. Those free services are offered to the public generally, and are not contingent upon the making of any purchase whatsoever by the shopper or customer obtaining their benefits.

They do not affect the prices paid by customers for trade-marked wares; nor can they impair in any way the value of the good will which the producer of such articles has created.

[*Direct Effect on Price*]

The scheme in the case at bar, on the other hand, relates directly to the prices actually paid by a customer, as well as to the amount of his purchases. Under it, when the purchases are of trademarked goods covered by fair trade minimum price contracts, the customer is deliberately and intentionally given a 2½ per cent discount from the purchase price, through the issuance of the cash register receipts, just as effectively as if he received a rebate of 2½ per cent in cash. No other inference is consistent with the factual elements in the situation.

So far as concerns ordinary articles—those not branded or trade-marked—the method here employed may not give rise to any valid legal objection. The competitors in such commodities may meet that form of competition in any way they see fit. They own that species of property without qualification, and may, if they desire, retaliate by reducing prices still more. This may, of course, precipitate a "price war." But the

consequences of such cut-throat competition in articles which are neither branded nor trade-marked will generally fall principally, if not entirely, upon the competitors.

That is not, however, the result where branded or trade-marked goods are the subject of such competition. In those cases it may well work injury to the manufacturer or the owner of the brand or trade mark, who is thus frequently made the innocent victim of price wars waged by retailers of his products. The good will which he has built up in the brand or trade mark may be seriously affected by such a price war. It was to prevent that kind of injury, among other things, that led our Legislature to permit the owner of a trade mark to fix the minimum prices at which retailers could sell the wares which are branded with it. That indubitably was the legislative intent in enacting our Fair Trade Law. That law may not, in my opinion, be evaded by any method or device which effectuates a diminution of the minimum contract price. The plan used by the defendants here directly accomplishes that result. Indeed, that fact is recognized by the authors of the plan; the advertising slogan which they use for it emphasizes that "the more you spend the more you save."

I cannot sympathize with the view that small discounts may be disregarded under the *maxim de minimis non curat lex*. Nothing in our statute gives any sanction to that view, and courts should not write any such exception into the statute. The Legislature itself has seen fit to enumerate several exceptions from the prohibition of the statute, but it has not included any such exception among them. If it had intended to condone discounts or rebates from fixed prices of 2, 3, 5 or any other per cent, small or large, the Legislature would undoubtedly have said so. Instead, it condemned as "unfair competition" and made "actionable" any sale "at less than the price stipulated" in the fair trade contract.

Neither can I look with favor upon the proposition that the use of these cash register receipts is a legal substitute for the extension of credit to a retail purchaser of trade-marked articles. Again, the answer is that the Legislature has failed to provide that as an exception to the statutory ban.

[*Practice Termed Price-Cutting*]

The same decent respect for the law as it is written serves also to dispel the contention of defendants that the cash register receipts are not objectionable, because the motive asserted for their use is to induce or attract customers to defendants' store. What could do that more effectively than direct price cuts? Doubtless many more customers would be drawn to their store if defendants sold plaintiff's trade-marked goods for half of their fixed contract price. But no one in such a case would seriously heed the plea that the purpose thereof was merely to attract the public to defendants' store. Many things may legitimately be done to that end, such as advertising, elaborate store spectacles or displays, Thanksgiving Day parades, Christmas pageants, musical entertainments, etc. But palpable price-cutting —whether or not done openly or by subterfuge—may not be resorted to in dealing with trade-marked merchandise covered by fixed price contracts. Such a practice would offend against the primary intent of the statute.

[*Constitutionality Not Ruled Upon*]

I do not deem it necessary to discuss in detail the argument of the defendants that the Fair Trade Law, construed as aforesaid, is unconstitutional. In my opinion no substance remains in that contention under the decisions in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp'n* (299 U. S. 183), and *Bourjois Sales Corp'n v. Dorfman* (273 N. Y. 167).

[*Finding and Conclusion*]

It is my finding and conclusion (1) that the defendants are not entitled to issue the cash register receipts in the sale of the plaintiff's branded and trade-marked products unless they sell them at such prices as shall be at least 2½ per cent above the fixed minimum contract prices; and (2) that the defendants are free to sell other merchandise as they please in this regard. An injunction is awarded accordingly; and if the plaintiff desires to recover its damages, a referee will be appointed to assess the same. The plaintiff is granted costs.

The foregoing will constitute the decision of the court (sec. 440, C. P. A.).

Settle judgment.

[¶ 62,427] Ditchek v. Weiss.

In the New York Supreme Court, Kings County. Special Term, Part 1. 121 N. Y. L. J. 1892, May 26, 1949.

New York Fair Trade Act

Violations Admitted—Failure to Prove Damage—Temporary Injunction Denied.—A motion for a temporary injunction to enjoin price cutting was denied in the absence of clear proof of damage.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.73.

MR. JUSTICE WALSH: Plaintiffs move to restrain the defendants who are selling at prices below those stipulated in Fair Trade contracts in violation of General Business Law, sections 369A and 369B. Defendants, in substance, admit, for the purposes of this motion, that they are violating the law but contend that the plaintiffs herein do not show damage, that the defendant Cohen is engaged in similar practices, and, further, that the violation of the Fair Trade contracts is the rule rather than the exception in the vicinity. It is not possible to pass upon the disputed facts on this motion. Upon the admission of the defendant, the plaintiffs would appear to be entitled to a remedy but in the absence of clear proof of damage and the alleged conduct of one of the plaintiffs, the motion for a temporary injunction is denied. The parties should be interested in removing the undesirable trade conditions and should stipulate to try this case as soon as possible. Submit order.

[¶ 62,428] Grubb Oil Co. v. Ralph Garner, et al.

In the Supreme Court of North Carolina, Spring Term, 1949, No. 669. May 18, 1949.

Appeal by plaintiff from GWYN, J., in chambers at Greensboro, 10 February, 1949, from Davidson.

Civil action to restrain sale of petroleum products, other than "Atlantic", from demised premises as per covenant in lease.

North Carolina General Statutory Provisions

Restraint of Trade Illegal—Covenants Not to Deal in Competitor's Products—Permissible Restriction in Lease.—A covenant not to handle or sell any petroleum products, other than those of the lessee, from the demised premises or other premises within a radius of 2000 feet is held to be a permissible restriction in a lease rather than a forbidden condition in a sales contract. The covenant therefore did not violate the statute making it unlawful to sell wares upon the condition that the purchaser refrain from dealing in the goods of a competitor.

See the North Carolina General Statutes annotations, Vol. 2, ¶ 8635.20.

For appellant: D. L. Pickard and Charles W. Mauze.

For appellees: Don A. Walser, all of Lexington, North Carolina.

[*Statement of Facts*]

The complaint alleges:

1. That on 6 December, 1941, the plaintiff leased from Wade and Pearl Tysinger a filling station on Highway 64 in Davidson County for a period of seven years and thereafter from year to year for a period not exceeding seven years at a rental of one cent per gallon of lessee's gasoline or motor fuel sold from said premises. Among other things, the lease provides:

"10. Lessor covenants and agrees that he will not, at any time during the continuance hereof, engage directly or indirectly in the business of handling and/or selling from the demised premises, or any other premises within a radius of 2000 feet therefrom, any petroleum products other than the products of Lessee, * * * ."

2. That two days later, on 8 December, 1941, Wade Tysinger agreed with the plaintiff, "In order not to complicate in any way

the rental, since the service station has been sublet to me, it is agreeable and I prefer that 1¢ per gallon on all gasoline purchased by me not be added to the purchase price", this in full satisfaction of the stipulated rent.

3. That on 27 March, 1945, Wade and Pearl Tysinger sold and conveyed the filling station to Ralph and Margie Garner, and shortly thereafter, Ralph Garner executed the following endorsement on the bottom of agreement of 8 December, 1941, set out in paragraph next above: "I purchased the above described property from Wade Tysinger and agreed to a payment of rent as set out in above letter. I agree to assume the lease between Grubb Oil Co. and Wade and Pearl Tysinger and to comply with all its terms and conditions as if I had executed it."

4. That on 20 December, 1948, Ralph and Margie Garner entered into an agreement with B. C. and Isobel Young, t/a Buck Young Oil Company, purporting to lease to them the premises in question, from year to year for a term of ten years, and agreeing that only petroleum products of "Sinclair" should be sold on said premises. That notwithstanding notice from the plaintiff, the defendants have entered upon the premises, taken possession of plaintiff's equipment, and are undertaking to sell "Sinclair" products through plaintiff's pumps, etc., in violation of their agreement.

Wherefore plaintiff asks for injunctive relief.

A temporary restraining order was issued in the cause, and upon the return thereof, the same was dissolved and demurrer interposed by the defendant sustained on the ground that the covenant set out in paragraph 10 of the lease violates G. S. 75-5, sub. sec. 2, being in restraint of trade.

From judgment dissolving the injunction and sustaining the demurrer, the plaintiff appeals, assigning error. The defendants have renewed their demurrer here.

[*Decision*]

STACY, C. J.: The question for decision is whether the covenant in suit runs counter to the anti-monopoly or anti-trust laws.

It is not surprising that the parties are in disagreement as to their rights under the instruments in suit. A lessor who has nothing but a filling station to lease covenants, *in medias res,* with his lessee not to handle or sell from the demised premises, or other premises within a radius of 2000 feet, any petroleum products other than those of the lessee. It is quite understandable that the lessee might not want the lessor to handle competing products within a radius of 2000 feet, and such a covenant seems legally permissible, *Sea Food Co. v. Way,* 169 N. C. 679, 86 S. E. 603, but why the lessor should be asked to stipulate and agree in his lease not to handle competing products "from the demised premises" is not so readily perceived. He apparently has no right to handle anything from the premises while under demise.

However this may be, there is no allegation that the lessor has agreed to purchase petroleum products from anyone—a necessary averment to attract the provisions of G. S. 75-5, sub. sec. 2. This statute makes it unlawful, *inter alia,* to sell any goods, wares, merchandise, or things of value upon condition that the purchaser will not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in business. *Shoe Co. v. Dept. Store,* 212 N. C. 75, 193 S. E. 9; *Fashion Co. v. Grant,* 165 N. C. 453, 81 S. E. 606.

It is true there is here in a letter written by the lessor to the lessee, two days after the lease was signed, the statement, "since the service station has been sublet to me", but this is all that appears on the subject of a sublease. It falls short of an allegation that the lessor agreed to purchase petroleum products from the lessee on the condition denounced by the statute. *Lewis v. Archbell,* 199 N. C. 205, 154 S. E. 11; *Wooten v. Harris,* 153 N. C. 43, 68 S. E. 898. The only challenged agreement appearing on the face of the complaint is the lessor's covenant not to handle or sell from the demised premises, or other premises within a radius of 2000 feet, any petroleum products other than the products of the lessee. This agreement apparently runs afoul of no statute, *Hill v. Davenport,* 195 N. C. 271, 141 S. E. 752, and hence it is not subject to successful challenge in the manner and form here presented. A demurrer admits the truth of factual averments and relevant inferences for the purpose of testing the sufficiency of a pleading. *Leonard v. Maxwell, Comr.,* 216 N. C. 89, 3 S. E. (2d) 316.

It would seem, therefore, that as presently presented, the plaintiff is seeking to enforce

a permissible restriction in a lease, rather than a forbidden condition in a sales contract. Anno. 83 A L R 1416; 126 A L R 1375; 24 Am. Jur. 716.

Of course, if it should appear on the hearing that the demise of the premises to the lessee and its immediate subletting to the lessor, for purposes of operation, were but parts of a single transaction, though separately stated, a different situation might arise from what is presently alleged. Nevertheless, on demurrer, we must take the pleading at its face value. Anno. 83 A L R 1418.

The demurrer was improvidently sustained. In the present state of the record, the injunction should have been continued to the hearing.

Error and reversed.

[¶ 62,429] United States v. National City Lines, Inc., et al.

In the Supreme Court of the United States, October Term, 1948. No. 269 Misc. May 31, 1949.

Motion for leave to file a petition for certiorari under 28 U. S. C. Section 1651.

Sherman Antitrust Act, Clayton Act

Suit Alleging Transportation Monopoly—Balance of Conveniences in Antitrust Suits —Order Transferring Cause Upheld.—In denying a motion for leave to file a petition for certiorari, the Supreme Court refused to alter an order of the District Court of California which, upon a consideration of the balance of the conveniences, transferred the cause to the District Court of Illinois. The 1948 revision of the Judicial Code enabling a district court to transfer any civil action to another district to further the convenience of the parties and the interests of justice was held to apply to antitrust suits.

See the Sherman Act annotations, Vol. 1, ¶ 1610.101, and the Clayton Act annotations, Vol. 1, ¶ 2032.10.

Motion for leave to file a petition for certiorari to the District Court for the Southern District of California denied.

For petitioner: George T. Washington, Acting Solicitor General; Herbert A. Bergson, Assistant Attorney General; Charles H. Weston, Philip Elman, Special Assistants to the Attorney General.

For the respondent: C. Frank Reavis, Martin D. Jacobs, Marland Gale.

[Opinion]

VINSON, Ch. J.: The issue here is whether the 1948 revision of the Judicial Code (Title 28, United States Code) extends the doctrine of *forum non conveniens* to antitrust suits. The Government's complaint in this civil suit alleged that respondent corporations have conspired to obtain control of local transportation companies in at least 44 cities in 16 states in different sections of the country, in order to restrain and monopolize interstate commerce in busses and the petroleum and other supplies incident thereto, in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2.

This is the second time that an order of the court below, the United States District Court for the Southern District of California, attempting to effectuate a transfer of the case from Los Angeles to Chicago, has been before this Court. When respondents' motion was first granted, the District Court dismissed the action, 7 F. R. D. 456 (1947), inasmuch as the federal courts then lacked statutory power to transfer cases. We reversed, holding that *forum non conveniens* was not applicable in antitrust suits. *United States v National City Lines,* 334 U. S. 537 (June 7, 1948). After September 1, 1948, the effective date of the present Judicial Code,[1] respondents filed a new motion

[1] Pub. L. No. 773, 80th Cong., 2d Sess., § 38 (June 25, 1948).

There has been apparently but one other reported case dealing with the instant issue. It is in accord with the holding below. *United States v. E. I. Du Pont de Nemours & Co.,* 83 F. Supp. 233 (1949).

See, generally, Note, *Venue in Antitrust Cases: Applicability of the New Discretionary Transfer Provision,* 58 Yale L. J. 482 (1949).

under the doctrine of *forum non conveniens*, citing § 1404 (a), which reads as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Again the District Court below granted the motion. It ordered the case transferred. 80 F. Supp. 734 (1948). The Government thereupon submitted in this Court a motion for leave to file petition for writ of certiorari. We assigned the case for hearing on this motion. 335 U. S. 897 (1948).

In taking the position that the District Court lacked authority to enter its order of transfer, the Government has advanced many of the arguments which we have already considered today—and rejected—in *Ex parte Collet, ante,* p. —, and *Kilpatrick v. Texas and Pacific R. Co., ante,* p. —, in which we held that actions under the Federal Employers' Liability Act were now subject to the doctrine of *forum non conveniens*. The Government contends, for example, that Congress intended § 1404 (a) to apply only to actions the venue provisions of which were formerly contained in Title 28, rather than to "any civil action" (the venue requirements in antitrust cases are defined in 15 U. S. C. § 22; in Liability Act cases, 45 U. S. C. § 56); and that the legislative history establishes very clearly that Congress had no desire substantially to change the law—indeed, the Government urges us to disregard to reviser's notes which were printed in the House Reports.[2] We cannot accept this position for the reasons discussed in our previous decisions today. The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the Government itself, in discussing a section other than § 1404 (a), refers to them in its brief in this case. And we have already had occasion to look to the reviser's notes. *Stainback v. Mo. Hock Ke Lok Po*, 336 U. S. 368, 376, n. 12 (1949).

It is true that the reviser's notes to § 1404 (a), although citing a Federal Employers' Liability Act decision, make no reference to the antitrust laws or to our previous decision in this litigation. The Government therefore urges that our disposition of the Liability Act cases is not conclusive. We disagree. The notes cite the Liability Act decision "As an example of the need of such a provision." Obviously, an example is not a complete catalogue. The use of an example implies no purpose to restrict the meaning of the statutory phrase "any civil action" precisely to the illustration selected. Quite the contrary, the particular example noted demonstrates that Congress intended to effectuate changes in the law, in order to expand the transferability of cases. And the change in antitrust practice seems no more radical than the change in Federal Employers' Liability Act practice; *Baltimore & O. R. Co. v. Kepner*, 314 U. S. 44 (1941), cited in the reviser's note, was decided over six years before our initial decision in this case, 334 U. S. 573 (1948), which was the first ruling by this Court that *forum non conveniens* was inapplicable in antitrust suits.

Although no explanation is needed for the lack of Congressional reference to our former decision, simple chronology may be consulted. The reviser's notes appeared in House Report No. 308, 80th Congress, 1st Sess., which was published in April, 1947. The Code revision was initially passed by the House in July, 1947.[3] With amendments, the revision was passed by the Senate on June 12, 1948,[4] and by the House on June 16, 1948.[5] Our decision in the first *National City Lines* case, 334 U. S. 573, was handed down on June 7, 1948. Clearly, the failure of Congress expressly to consider this decision proves nothing.

Nor was there anything in our decision which required unique Congressional discussion, in the face of the unmistakable statutory language and reviser's notes. We expressly held that "Congress' mandate re-

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[2] The note to § 1404 (a) appears at H. R. Rep. No. 308, 80th Cong., 1st Sess. A. 132 (1947) and H. R. Rep. No. 2646, 79th Cong., 2d Sess. A. 127 (1946). It reads as follows: "Section (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

[3] 93 Cong. Rec. 8392 (1947).

[4] 94 Cong. Rec. 7930 (1948).

[5] 94 Cong. Rec. 8501 (1948).

garding venue and the exercise of jurisdiction is binding on the federal courts," 334 U. S. at 588-89, and that decision in this field must rest on "the legislative purposes and the effect of the language used . . .," *supra,* at 597. Nothing in our previous opinion intimates that we could fail to respect whatever modification of the law Congress might enact.

Moreover, this change in the law must have been known to the Government in time for it to have addressed the protests which we have heard to the Congress. This was admitted on the oral argument; it could not possibly have been denied. When this litigation was previously before us, National City's brief, at pp. 25-26 and 45, expressly called attention to the imminent probability that § 1404 (a) would be enacted and would be held applicable to antitrust suits. This brief was filed here on April 26, 1948. Not until June 7, 1948, was the final hearing on the Judicial Code revision held before the Senate Judiciary Subcommittee. Furthermore, the Code proposals were extensively publicized. See *Ex parte Collet, ante,* at p. —. The Department of Justice in particular was informed: each United States Attorney received a copy of the drafts;[6] a Department spokesman testified at the House hearing;[7] the Attorney General was asked for an opinion by the Congressional Committee.[8] The plain inference is either that the Government took no action with respect to the forthcoming alteration of the rule that *forum non conveniens* was inapplicable to antitrust suits, or that a protest was made which Congress disregarded. Neither alternative would offer the slightest justification for overriding the unequivocal words of § 1404 (a) and the legislative history which establishes that Congress indeed meant what it said.

For these reasons, we can find no distinction between this case and the others decided today. We hold that § 1404 (a) is applicable here. The motion is

Denied.

[Dissenting Opinion]

DOUGLAS. J.: There are difficulties for me however the case is decided. But I have concluded that the fairer result is reached if the ambiguities and doubts, fully canvassed and disclosed in the Court's opinions in this case and in *Ex parte Collett,* decided this day, are resolved by reading § 1404 (a) as making the doctrine of *forum non conveniens* applicable to any civil action as to which the venue provisions are codified in revised Title 28. That gives full effect to the words "any civil action" in the field in which Congress was legislating. And it authorizes, as respects that group of cases, a transfer to another district in lieu of outright dismissal as had previously obtained. That construction saves § 1404 (a), the venue provisions of the Clayton Act and our decision in *United States v. National City Lines, Inc.,* 334 U. S. 573, from mutilation. I am reluctant to conclude that Congress took the more drastic course in a mere revision of the code. So to hold would make a basic change not only in the two statutes involved in these cases but in the Sherman Act, 15 U. S. C. §§ 4, 5; the Jones Act, 46 U. S. C. § 688; the Suits in Admiralty Act, 46 U. S. C. § 782; Merchant Marine Act of 1936, 46 U. S. C. § 1128d; the Securities Act, 15 U. S. C. §§ 77a, 77v; the Securities Exchange Act, 15 U. S. C. §§ 78a, 78aa; the Public Utility Holding Company Act, 15 U. S. C. §§ 79, 79y; The Investment Company Act, 15 U. S. C. §§ 80a, 80a-43; and perhaps in other statutes too.

Mr. Justice BLACK concurs.

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[6] Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 8 (1947).

[7] Statement of Special Assistant to the Attorney General Baynton, *Ibid.,* 33-34. "With respect to the bill to codify title 28, the Department has been gathering memoranda from *all its various divisions* and from United States attorneys with the hope of making a comprehensible report on that bill. We have that material." (Italics added.) *Id.,* 34.

[8] Letter from Attorney General Tom C. Clark to Congressman Michener, Chairman of the Committee on the Judiciary, April 17, 1947, H. R. Rep. No. 308, 80th Cong., 1st Sess. 8 (1947). The letter declares that the objectives of the revision are "commendable and desirable," and continues as follows: "You will remember the discussions between members of the staff of the committee and of the Department last month at which the Department made some suggestions with reference to minor corrections of errors and omissions then in the draft of the bill being considered by your committee.

"I am advised that this conference agreed upon a number of corrections and changes and that these corrections and changes have now been incorporated in the bill with the one exception of the [Tax Court] portion. . . ." See 93 Cong. Rec. 8385 (1947).

[Concurring Opinion]

RUTLEDGE, J. [concurring in No. 206, Misc. *Ex Parte Joseph Collett*, No. 233, Misc. *Jessie A. Kilpatrick v. The Texas and Pacific Railway Co.* as well as No. 269, Misc. *The United States of America v. National City Lines, Inc., et al.*]: I concur in the result. But in doing so I feel impelled to say two things.

One is that in my view § 1404 (a), taken broadly to include "any civil action," does effect a partial repeal of § 6 of the Federal Employers' Liability Act and of the other statutes mentioned by Mr. Justice Douglas, including the venue provisions (§ 12) of the Clayton Act involved in our decision in *United States v. National City Lines*, 334 U. S. 573.

The legislative history, for example, of the Clayton Act venue provisions demonstrates that the change § 1404 (a) is said to have made was more than the mere removal of a judicial gloss. I think we should not now impugn the validity of our decisions in *National City Lines, supra*, and in *Kepner* and *Miles* [1] by characterizing each as a mere "judicial gloss" upon the pertinent statute. Those decisions in my opinion were true reflections of congressional intent as stated in the respective statutes and, accordingly, the changes made in them by § 1404 (a) were in the nature of repeals, to the extent that the plaintiffs were deprived of their rights under the pre-existing statutes to have their causes of action tried in the forums where they were properly brought.

In the second place, those changes, although entirely within Congress' power to make, were neither insubstantial nor noncontroversial, in view of the legislative history of the original provisions, for example, the venue provisions of the Clayton Act. Nor do I think the legislative history of § 1404 (a) demonstrates either the insubstantial or the noncontroversial nature of the changes in § 1404 (a), although they seem to have been so treated by those in charge of the bill.[2] It is to be noted, moreover, that specific attention was drawn to the effect of § 1404 (a) upon § 6 of the Employers' Liability Act through reference to the *Kepner* and *Miles* decisions, but no like specific reference was made to the venue provisions of the Clayton Act and the *National City Lines* decision.

These matters make it impossible for me to concur in the view that Congress was in fact "fully informed as to the significance of § 1404 (a)." This, however, is a matter affecting congressional procedure and the manner of conducting legislative business. Accordingly, notwithstanding my doubts that Congress intended to go so far, I acquiesce in the Court's decisions.

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[1] *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44; *Miles v. Illinois Central R. Co.*, 315 U. S. 698.

[2] "At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess. 2. ". . . I may say that the purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the [Senate Judiciary] committee to be of substantial and noncontroversial nature." 94 Cong. Rec. 7928. For similar expressions by members of the House of Representatives, see Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., 6, 11. A member of the House Judiciary Committee told the House that the only "controversial aspects" of the 1947 draft of the code were certain subsequently deleted provisions concerning the Tax Court. 93 Cong. Rec. 8390. But cf. the legislative history of the contemporaneously pending Jennings Bill, citations to which are made in the Court's opinion.

[¶ 62,430] Carl E. Ring v. Harold Spina, Edward Heyman, Walter Hannan, Edmund Pauker, and The Dramatists Guild of the Authors League of America, Inc.

In the United States District Court for the Southern District of New York. Civ. 26-187. May 17, 1949.

Sherman Antitrust Act

Treble Damage Action—Guild Conspiracy—Future Interference Enjoined.—In an action taken by a producer against authors of a musical play and the guild to which they belonged claiming treble damages for antitrust violations, it was held that, although he had not suffered any measurable damage as a result of the conspiracy of guild members and illegal conditions in contracts and agreements having a restraining effect on the production of the play, his right to freedom from unlawful interference with his commerce can be protected by enjoining authors and the guild from conspiring to interfere with his acquisition of any and all rights in the play.

See the Sherman Act annotations, Vol. ¶ 1640.253, 1640.351, 1640.634, 1650.175.

For the plaintiff: Alfred S. Julien, New York, New York.

For the defendants Spina, Heyman and Pauker: Wittenberg, Carrington & Farnsworth (Philip Wittenberg of counsel), all of New York, New York.

For the defendant Dramatists Guild of Authors League of America, Inc.: Greenbaum, Wolff & Ernst (Edward S. Greenbaum, Alexander Lindey, Milton Ross, Mervin Roseman of counsel), all of New York, New York.

RIFKIND, District Judge: The plaintiff brought this action against the defendants Spina, Heyman and Hannan and the Dramatists' Guild of the Authors' League of America, Inc., (hereinafter, Guild) for treble damages and equitable relief under the anti-trust laws. 15 U. S. C. A. §§ 15, 26. A temporary injunction was granted by the Court of Appeals at the instance of the plaintiff.

Ring v. Spina, C. C. A. 2, 1945, 148 F. 2d 647. Its terms are set out hereafter. Pursuant to the direction of the Court of Appeals, 166 F. 2d 546, the claim for damages was tried to a jury. The jury found a special verdict that the defendants had violated the anti-trust laws but had not thereby damaged the plaintiff. Plaintiff's claims for equitable relief were tried to the court and are now to be determined. In addition, the reasons for my withdrawal of one certain claim for damages from the jury should be stated. But first the facts, as revealed by the evidence, deserve brief recitation.

Defendants Spina, Heyman and Hannan are the authors of "Stovepipe Hat", a musical play. One Gaumont, a producer, contracted with them on February 7, 1944, to produce "Stovepipe Hat". Defendant authors were and are members of the defendant Guild. Gaumont was a signatory of the Minimum Basic Agreement (hereinafter, M. B. A.) promulgated by the Guild. The M. B. A. is a comprehensive private "statute" governing the production of plays in the United States and elsewhere, the disposition of motion picture and other rights to reproduction, and the rights and duties of authors and producers. Among other things, it establishes the author's and producer's right to veto any proposed changes in the play, the minimum royalties to be paid by producers, and compulsory arbitration of any disputes arising between authors and producers. Substantially all authors of repute are members of the Guild, and substantially all producers of note are signatories of the M. B. A. The M. B. A. forbids members and signatories to deal with non-members and non-signatories.

The Spina-Gaumont production contract for "Stovepipe Hat" (Spina acted throughout as agent for the other author-defendants) specifically encorporated the M. B. A. in its entirety, spelled out in detail the royalties to be awarded with respect to stage and film rights here and abroad, and obligated Gaumont to produce the play on or before May 7, 1944 or to pay $1500 to the Guild, for the authors' account, for the privilege

of postponing the opening to October 7, 1944. This contract was made on the standard form supplied by the Guild and was countersigned by the Guild, as required by the M. B. A. Simultaneously were executed two letters by which Gaumont contracted to hire Spina as General Supervisor of the artistic and musical phases of the production. By the terms of these letter-agreements, Spina had a veto over the selection of cast, production staff, theaters, changes in the play, lighting and sets.

The plaintiff, Ring, had become a partner of Gaumont and had invested about $50,000 in the proposed production of "Stovepipe Hat" when, on May 4, 1944, Gaumont appeared to be unable to complete the necessary financing. Ring, not yet a signatory to the M. B. A., then attempted to negotiate an arrangement with Spina whereby Spina would cooperate with Ring in terminating Gaumont's participation in the venture and Ring might replace Gaumont as producer on the same terms an conditions as existed under the Spina-Gaumont production and supervision contracts, except that one Samrock was to be the sole arbitrator of differences which might arise between them, instead of the arbitrators provided for under the Spina-Gaumont contracts. Spina's attorney disapproved the proposed arrangement, thereupon Ring signed the M. B. A., making him eligible to deal with Guild authors, and promptly brought an action against Gaumont in this court which was settled on May 12, 1944 by a stipulation whereunder Gaumont assigned to Ring all his rights of every kind against all persons in connection with the play.

The play was produced by Ring in New Haven on May 18, 1944, and subsequently in Boston. Disputes developed between Ring and Spina concerning changes in the play. Spina refused to consent to changes desired by Ring, and Ring, who by that time had invested over $100,000, closed the play on May 27, 1944. On June 7, 1944, Spina demanded that arbitration be had pursuant to the M. B. A. On June 14, 1944 Ring instituted this suit against the authors and the Guild, alleging violation of the anti-trust laws and asking treble damages, temporary and permanent injunctions against arbitration under the M. B. A. and against the enforcement of M. B. A., a declaratory judgment of plaintiff's rights in the play, an injunction prohibiting defendant authors from enforcing their copyrights (in fact only a small portion of the play is copyrighted), and an injunction prohibiting defendant authors from interfering with plaintiff's production of the play. The vacation by the district court of a temporary restraining order was reversed by the court of appeals, which issued a temporary injunction restraining arbitration, restraining defendants from enforcing the M. B. A., and restraining defendant authors from selling or claiming the right to sell the play.

That the M. B. A. constitutes an illegal agreement in restraint of interstate trade and commerce was held by the Court of Appeals in *Ring v. Spina,* C. C. A. 2, 1945, 138 F. 2d 647, based upon an analysis of alleged facts there set forth. Since those allegations have been amply established it follows that the M. B. A. is illegal. And so I charged the jury, leaving it to them, however, to decide whether the Guild was a labor organization exempt from the anti-trust laws under 15 U. S. C. A. § 17. They decided that the Guild was not a labor organization and I see no reason for rejecting their finding.

Plaintiff's demands for equitable relief are interpreted by him to mean that defendants be enjoined from attempting to enforce any rights under the M. B. A. or contracts subsidiary thereto, and from interfering in any way with plaintiff's production of "Stovepipe Hat" for a reasonable time after the final disposition of this suit. Plaintiff disavows any desire for a final adjudication of the parties' rights to the play, the scale of royalties, or reproduction rights. He prefers to leave those questions to be determined when and if defendant authors should seek to enforce any rights they assert. Such a disposition of this case cannot be tolerated. It amounts to an open invitation to litigation and seriously and adversely affects the marketability of the play and any subsidiary rights therein. The rights and duties of the parties should be set forth with sufficient precision to afford them guidance, and the controversy should, if possible, be finally disposed of so as to secure an end to litigation.

Plaintiff is entitled to injunctive relief which would protect him agaist prospective damage. 15 U. S. C. A. § 26. Such damage arises when there is danger of interference with rights or privileges he now enjoys, not merely as a member of the general public, but as one engaging in the commerce which is being restrained. See *Minnesota v. Northern Securities Co.*, 1904, 194 U. S. 48, 70-1; Cf. *Ketchum v. Denver & Rio Grande R. Co.*, C. C. A. 8, 1917, 248 Fed. 106. The United States is the proper party to protect the interests of the general public under the anti-trust laws. *Union Pac. R. Co. v. Frank*, C. C. A. 8, 1915, 226 Fed. 906.

The rights Ring asserts are rights with respect to the play "Stovepipe Hat", for that is his only present or prospective connection with play production. What those rights are it is difficult to determine. Whether by virtue of the stipulation entered into by Ring and Gaumont or by subsequent implicit agreement between Ring and Spina, the relations of Ring and Spina were at least tacitly assumed by both to be governed by the Spina-Gaumont contracts. The Spina-Gaumont production contract embodied the M. B. A. The latter is illegal and the former, inseparable as it is from the latter, is also illegal. It would seem to follow that there is no production contract between Ring and Spina, and therefore that Ring has no contractual rights in the play. The Spina-Gaumont supervision contracts then become meaningless and fall with the principal contract. It can hardly be said that Ring is entitled to unlimited rights to the play simply because it has become an article of commerce under the provisions of an agreement responsive to the forces generated by an unlawful combination. Cf. *Bruce's Juices v. Am. Can Co.*, 1947, 330 U. S. 743; See *Alden-Rochelle, Inc. v. American Soc. of C., A. and P.*, S. D. N. Y., 1948, 80 F. Supp. 888, 899. Nor is the situation analogous to *Morton Salt Co. v. G. S. Suppiger Co.*, 1942, 314 U. S. 488, as it might conceivably be were this a suit by defendant authors to enforce a copyright in the play. The Court of Appeals suggested, however, that it might be possible for the trial court "to separate the rights and duties under the specific production contract assigned to plaintiff from the more farreaching provisions of the Basic Agreement incorporated therein by a general reference." 148 F. 2d 647, 653.

If all references to the M. B. A. are excised, then what remains of the production contract gives the producer the sole and exclusive right to produce the play on the speaking stage of the United States and Canada, fixes the total and advance royalties to be paid the authors, provides for the authors' agents' commissions and their appointment as agents for the disposition of subsidiary rights (but refers to the M. B. A. for the producer's interests in such rights), provides for arbitration of disputes among authors as to the disposition of subsidiary rights, and requires the producer to produce the play on or before May 7, 1944 or, if he pays $1500 for the privilege, to postpone production until October 7, 1944. The production contract does not, except by reference to the M. B. A., provide for the consequences of failure to produce on time; interruption of the run of the play; the producer's interest in foreign production, foreign rights, or subsidiary rights; rights and duties with regard to changes in the play, cast, or production; authorship credit; and other items too numerous to detail. To determine the entire contract between the parties from the production contract alone, is impossible. What is left is a truncated fragment of the understanding of the parties.

Moreover, apart from the M. B. A., the production contract is itself an agreement imposed by the force of the illegal conspiracy. Agreements molded by the forces generated by an unlawful combination are invalid whether they are multilateral like the M. B. A. or trilateral, like the production contract. Thus, no matter how viewed, the production contract can hardly survive.

It does not follow that the plaintiff is entitled to no relief. The M. B. A. is an agreement, illegal under the anti-trust laws, which restrains commerce in dramatic productions generally, and which imposed retraints on commerce in connection with the production of "Stovepipe Hat". The defendant authors are members of the Guild, which is a conspiracy in restraint of trade, and they have applied the force of that conspiracy in connection with "Stovepipe Hat".

That the plaintiff has not yet suffered measurable damage therefrom does not establish that he is unlikely to do so in the future. There is nothing to indicate that in the absence of an injunction the defendants will not continue to enforce the M. B. A. and to employ the power of the conspiracy with respect to "Stovepipe Hat".

I can not write a contract for the parties, but the plaintiff's statutory right to freedom from unlawful interference with his commerce can be protected by declaring the M. B. A. to be illegal, the production contract between plaintiff and individual defendants subsidiary thereto to be illegal, and the enforcement of either to be illegal and prohibited. Arbitration should be enjoined. Although this leaves plaintiff without contractual rights to "Stovepipe Hat", his right to freedom from illegal restraint can be protected by enjoining the defendant authors on the one hand, and the defendant Guild on the other, from conspiring to interfere or jointly interfering with plaintiff's acquisition of any and all rights in plays, including "Stovepipe Hat". The defendant authors are not thereby to be compelled to sell or license "Stovepipe Hat" to the plaintiff, or enjoined from agreeing among themselves on the terms under which they may choose to sell or license the play; but they may not offer the plaintiff terms less favorable than those offered any other producer; nor require him to subscribe to the M. B. A.; nor associate the Guild in any illegal way with the transaction; nor conspire or agree with the Guild or with any other members of the Guild to exact particular terms or conditions from him.

The claim for damages which I withdrew from the jury concerned a $1500 check which Gaumont delivered to the Guild for the account of the authors in order to procure a postponement of the production date to October 7, 1944 under the Spina-Gaumont production contract. When Gaumont assigned his rights thereunder to the plaintiff in consideration of $6659 it was stipulated that "[I]t is understood that the balance of $1500 will be paid by the defendant [Gaumont] obtaining the return of said check or stopping payment thereof, all of which has been agreed to by the author". Spina had notice of this stipulation and consented thereto,. Spina executed a letter dated May 16, 1944 which was delivered to the Guild, requesting the Guild to return the $1500 to Gaumont. By letter of May 12, 1944 to Gaumont's attorney, Ring agreed to pay the $1500 to Gaumont if the Guild did not repay it. On May 29, 1944 the Guild wrote to Spina, enclosing for his and Ring's signatures a form of proposed agreement whereby "The Dramatist's Guild is hereby instructed to refund said $1500 to Irving Gaumont". The record is bare of any evidence of further action in this connection. Neither Gaumont nor Ring made demand upon the Guild for this money.

Ring claims that the Guild refused to return the $1500 to Gaumont because its M. B. A. provided that "No part of such advances shall in any event be returnable by the Author to the Manager"; that the M. B. A. is an agreement illegal under the anti-trust laws; that the Guild refused to pay by reason of that illegal agreement; and that, therefore, plaintiff was damaged to the extent of the $1500 by the defendant Guild's violation of the anti-trust laws, for which he is entitled to treble damages, amounting to $4500.

Patently the Guild was under no duty to give Ring the money before it had notice of the stipulation between Ring and Gaumont concerning the money. Even after it had notice that Ring had supplanted

Gaumont as producer, it would not have been justified, much less under any duty, to pay Ring, since both the stipulation and Spina's letter envisaged payment (or cancellation of the check) to Gaumont, not to Ring. Whatever the Guild's duty to pay Gaumont upon demand, or to surrender the check, the evidence is uncontroverted that it was quite prepared to do so upon receipt of formal authorization from all interested parties, including Ring and Spina. That it never got. To find that Ring was damaged by virtue of the above-quoted provision of the M. B. A. would be incorrect as a matter of law, for there is no evidence that the Guild refused to pay over the $1500 to either Gaumont or Ring. Not having refused, there can arise no question of fact whether its (non-existent) refusal was motivated by anything in the M. B. A. or any other illegal agreement.

I did not leave to the jury the question whether plaintiff may be entitled to a judgment for $1500 on an ordinary claim for money had and received and do not now decide, because, at the beginning of this trial, it was expressly stipulated that every aspect of this case was withdrawn except the claim for treble damages for violation of the anti-trust laws, and for equitable relief against continued violation. Under the circumstances a claim for money had and received was expressly excluded.

Neither damages nor attorney's fees are recoverable as an incident to equitable relief under the anti-trust laws, *Decorative Stone Co. v. Building Trades Council,* C. C. A. 2, 1928, 23 F. 2d 426; *Alden-Rochelle, Inc. v. American Soc. of C., A. and P.,* S. D. N. Y., 1948, 80 F. Supp. 888, but costs may, and in this case should, be awarded plaintiff where his action is both at law for treble damages and in equity for an injunction, and he obtains equitable, though not legal, relief. *Midwest Theatres Co. v. Co-operative Theaters,* E. D. Mich. 1941, 43 F. Supp. 216.

Submit findings, conclusions and decree in accordance with this opinion.

[¶ 62,431] **Ammiel F. Decker and Mabel P. Decker, individuals trading and doing business as Decker Products Co. v. Federal Trade Commission.**

In the United States Court of Appeals for the District of Columbia Circuit. No. 9625. Decided June 6, 1949.

Petition for Review of Order of the Federal Trade Commission.

Federal Trade Commission Act

False Advertising—Coverage Under General Law.—The Court has affirmed the Commission's order prohibiting a company engaged in the sale of a patented exhaust pipe attachment from falsely advertising that its device, when attached to the exhaust mechanism of automobiles, saved gasoline and oil, increased the power of the motor, caused it to give better performance, drew carbon, oil and moisture from the muffler, eliminated or reduced back pressure, reduced vibration of the motor, gave the motor greater acceleration, caused the motor to run more smoothly, and saved tires. Such representations, although included in the patent application, do not come within the limited coverage of the patent grant. They fall under the prohibitions of general law, applicable to all who put their products for sale into the channels of commerce and trade. When they do so they can claim no immunity by reason of a patent. It cannot be made a cover for violation of law.

See Federal Trade Commission Act annotations, Vol. 2, ¶ 6125.255, 6125.427, 6620.030.

Affirming the Federal Trade Commission cease and desist order in Dkt. 5097.

Harry S. Hall, with whom Josephus C. Trimble, was on the brief, for petitioners.

Donovan R. Divet, Special Attorney, Federal Trade Commission, with whom William T. Kelley, General Counsel, Walter B. Wooden, Associate General Counsel and James W. Cassedy, Assistant General Counsel, Federal Trade Commission, were on the brief, for respondent.

Before Stephens, C. J., and Wilbur K. Miller and Proctor, JJ.

[*Nature of Action*]

Proctor, J.: This case is here for review of a proceeding before the Federal Trade Commission, resulting in a cease and desist order against petitioners, who were charged with unfair and deceptive acts and practices in commerce, in violation of Section 45 of Title 15, United States Code.

[*Advertising Representations*]

Petitioners hold a patent to a device bearing the trade name Vacudex, which they were selling in interstate commerce. In their advertising they represented that Vacudex, when attached to the exhaust mechanism of automobiles, saved gasoline and oil; increased the power of the motor; caused it to give better performance; drew carbon, oil and moisture from the muffler; eliminated or reduced back pressure; reduced vibration of the motor; gave the motor greater acceleration; caused the motor to run more smoothly, and saved tires. These representations, with others, formed the basis of the detailed charges against petitioners in the complaint before the Commission, and are similar to those proscribed by the order to cease and desist. They are also substantially like statements included in the patent application, a copy of which was carried into the letters-patent. Petitioners here renew the several contentions made before the Commission.

[*Petitioners' Contention*]

The jurisdiction of the Commission is attacked upon the broad ground that the proceedings were, in effect, an attack upon the patent itself, only tenable in appropriate proceedings before a federal district court (Title 28, United States Code, Section 41). Their contention is that the peculiar facts of this case exclude it from the Commission's powers. They point out that representations in their advertising of the beneficial effects of Vacudex, charged as unfair and deceptive in the complaint, are similar in nature to representations in the letters-patent. Hence, they say that their advertising came within the "scope of the patent."

From this premise they argue that issuance of the patent imported findings by the Patent Office that the invention possessed the useful advantages stated in the application. Therefore they contend that the effect of the proceedings before the Commission is to challenge the utility of the invention and thus the validity of the patent. This, they insist, is beyond the lawful powers of the Commission. We cannot agree with these contentions. They are predicated upon a misconception of the nature and extent of the patent grant, as we shall point out.

[*Scope of Patent Limited*]

In speaking of their advertising as within the "scope of the patent," petitioners mean, as we understand, that the advertising of the useful benefits of Vacudex stems from statements contained in the patent application which were carried into the letters-patent. But, they are mistaken in assuming that this circumstance brings the advertising within the scope of the patent. In legal contemplation the *scope of a patent* is limited to the invention described in the *claims* of the patent, read in the light of the specification. *Motion Picture Patents Co. v. Universal Film Manufacturing Co.,* 243 U. S. 502, 510, 61 L. Ed. 871 (1917). While the claim may be illustrated it cannot be enlarged by language used in other parts of the letters-patent than the *claim* itself. *Yale Lock Manufacturing Co. v. Greenleaf,* 117 U. S. 554, 559, 29 L. Ed. 952 (1886). Otherwise stated, the scope of letters-patent is limited to the invention covered by the claim, and though the claim may be illustrated, it cannot be enlarged by the language of the specification. *Railroad Co. v. Mellon,* 104 U. S. 112, 118, 26 L. Ed. 639 (1881); *McClain v. Ortmayer,* 141 U. S. 419, 424, 35 L. Ed. 800 (1891).

A claim, in the patent law, has a technical meaning, derived from the statutory provision that a patent applicant "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. . . ." (Title 35, United States Code, Section 33.) It seems clear, therefore, that the scope of a patent is limited to the device particularly *pointed out* in the specification and *distinctly claimed* by the applicant, as set forth in the letters-patent. The device, made in accordance with the specification and claims, visually illustrates the scope of a patent. So we conclude that the patent covered the device alone. It cannot be understood to embrace the methods employed in advertising or selling the patented product.

[*Validity of Patent Grant Disregarded*]

It has long been settled that a patentee receives nothing from the law he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. *Motion Picture Patents Co. v. Universal Film Manufacturing Co., supra,* and cases cited. Before the patent grant the inventor had the right to sell the product of his invention, and *to advertise the same,* but not the right to misrepresent it. Now, after the patent grant, petitioners, the present owners of the patent, have the right to sell the article and *to advertise it,* but not the right to misrepresent it. In short, the letters-patent do not cover advertising. The proceedings before the Federal Trade Commission related only to advertising. They did not draw into question the validity of the patent grant. Hence the case is not one arising under the patent laws, cognizable only in a federal district court.

We think petitioners also make a mistake in assuming that their patent covers the functions of the invention as set forth in the letters-patent. The law is settled that the patent does not cover functions, i. e., the operative effects or results of a patented process or device. *Westinghouse v. Boyden Power Brake Co.,* 170 U. S. 537, 556, 557, 42 L. Ed. 1136 (1898); *General Electric Co. v. Wabash Appliance Corp.,* 304 U. S. 364, 371, 82 L. Ed. 1402 (1938). Indeed a patent claim *stated solely in terms of function is void, Expanded Metal Co. v. Bradford,* 214 U. S. 366, 384, 53 L. Ed. 1034 (1909), for the obvious reason that if functions or results are patentable the patent monopoly would be extended beyond the discovery and discourage rather than promote invention. *The Incandescent Lamp Patent,* 159 U. S. 465, 476, 40 L. Ed. 221 (1895); *Holland Furniture Co. v. Perkins Glue Co.,* 277 U. S. 245, 257, 72 L. Ed. 868 (1928).

[*Advertising Representations Covered by General Law*]

Applying the foregoing rule to the facts of this case, we observe that the complaint before the Commission and the order to cease and desist relate only to statements concerning the *functioning* of Vacudex. It follows that such representations, which in

one form or another found their way into the advertising of petitioners, do not come within the limited coverage of the patent grant. Rather do they fall under the prohibitions of general law, applicable to all who put their products for sale into the channels of commerce and trade. When they do so they can claim no immunity by reason of a patent. It cannot be made a cover for violation of law. *Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20, 49, 57 L. Ed. 107 (1912); *Virtue v. Creamery Package Co.*, 227 U. S. 8, 32, 57 L. Ed. 393 (1913). "Beyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to general law." *U. S. v. Masonite Corporation*, 316 U. S. 265, 277, 86 L. Ed. 1461 (1942). Nor does the grant "limit the right of Congress to enact legislation not interfering with the legitimate rights secured by the patent." *United Shoe Machinery Corp. v. U. S.*, 258 U. S. 451, 464, 66 L. Ed. 708 (1922). Likewise, patent rights are subject to the prohibitions and controls imposed by the states in the legitimate exercise of their powers over purely domestic affairs, whether of internal commerce or of police. *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115 (1878); *Allen v. Riley*, 203 U. S. 347, 356, 51 L. Ed. 216 (1906).

[*Utility of Invention Discussed*]

Next, petitioners contend that the Commission's proceedings attack the utility of the invention. It is true, as they argue, that a patent does raise a presumption that the invention possesses utility. *Remington Cash Register Co. v. National Cash Register Co.*, 6 F. 2d 585, 629 (D. C., D. Conn., 1925). However, the presumption is not conclusive, but only prima facie. *Cleveland Automatic Mach. Co. v. National Acme Co.*, 52 F. 2d 769, 770 (C. C. A. 6th 1931); *Callison v. Dean*, 70 F. 2d 55, 58 (C. C. A. 10th 1934). It is also important to note than an invention need not be capable of performing all the functions declared by the inventor. The statutory requirement of utility is met if it can accomplish one. *Scovill Mfg. Co. v. Satler*, 21 F. 2d 630, 634 (D. C., D. Conn., 1927); *In re Oberweger*, 115 F. 2d 826, 828 (C. C. P. A. 1940); *Walker on Patents*, Deller's Edition, Vol. 1, page 312, section 65. So, although we must assume that the Patent Office did find that Vacudex had some utility, it does not follow that it possessed all the useful qualities asserted for it by the inventor. With this in mind we point out that in the cease and desist order the Commission omitted two specifications laid in the complaint, those relating to saving of the muffler and tail pipe of an automobile by retarding them from rusting. In addition, the patent application reveals several other statements as to the utility of the invention not referred to in proceedings before the Commission. These useful qualities, if found to exist, would, without more, have sufficed to justify the granting of the patent. Therefore, proscription by the Commission of certain representations of utility does not constitute an attack upon the finding of the Patent Office that the invention did possess some utility. That finding can be accepted without rejecting the findings of the Federal Trade Commission that in certain particulars the advertising of petitions did misrepresent the beneficial qualities of Vacudex.

[*Representations Not Within Scope of Patent*]

In view of the foregoing considerations we are convinced that the representations concerning Vacudex forming the bases of the proceedings before the Federal Trade Commission did not come within the scope of the patent, and that said proceedings and the order to cease and desist did not constitute an attack upon the validity of the patent.

[*Order Affirmed*]

Several objections to the manner in which the hearings were conducted by the Commission have been raised. They are directed chiefly to the admission of evidence; the reopening of the case for additional testimony, and the sufficiency of the evidence to support the findings and order. In our opinion the objections are without merit. We think the proceedings were fairly conducted and that the action of the Commission in issuing the cease and desist order was supported by reliable and substantial evidence. Accordingly the order will stand affirmed. In conformity with the statute, Title 15, United States Code, Section 45 (c), this court, by its order, will command obedience to the terms of the order of the Commission.

Affirmed and so ordered.

[*Dissenting Opinion*]

STEPHENS, C. J., *dissenting:* I am unable to agree with the disposition of this case made by the majority. It is conceded in the case

that the representations made by the petitioners in their advertisements are a substantially accurate description of the utility of the patented device, Vacudex, as portrayed in the specification of the petitioners' patent.[1] In granting a patent the Commissioner of Patents in effect finds to be true the portrayal in the specification, that is to say, the assertions therein concerning the nature and method of operation and effect of the claimed invention. The Letters Patent incorporate and make a part thereof a copy of the specification in which the invention in described. Nevertheless the Federal Trade Commission contends that it has power, upon evidence considered by it, to find that the representations in the petitioners' advertisements are misleading and deceptive to the purchasing public, and power, therefore, to order the petitioners to cease and desist from making such representations.[2] Its cease and desist order, if valid, will render the grant of the patent in substantial part of no effect. The patent grants for the term of seventeen years the exclusive right "to make, use, and vend the said invention . . ." If the utility of the invention as portrayed in the specification which is made a part of the Letters Patent cannot be advertised, then the invention, as a practical matter, cannot be sold. In effect, therefore, the Trade Commission, in issuing its cease and desist order, is asserting power to review and render in part nugatory the action of the Commissioner of Patents in granting the patent to the device in question. If the Trade Commission has such power in this case, it has it in all cases in which it may, upon evidence considered by it, reach a conclusion contrary to that of the Commissioner of Patents as to the correctness of the representations in the specification of a patent application. Thus the Trade Commission may assume to review and in practical effect to set side, so far as the right of a patentee to vend an invention is concerned, the action of the Commissioner of Patents in respect of any or all outstanding patents. I think the Trade Commission has no such power.

The rule for infringement cases that an issued patent has but "prima facie" or "presumptive" validity (*cf. Gebhard v. General Motors Sales Corp.*, 77 U. S. App. D. C. 331, 332, 135 F. (2d) 248, 249 (1943); *Allison Coupon Co. v. Bank of Commerce & Savings*, 72 App. D. C. 82, 111 F. (2d) 664 (1940); *Callison v. Dean*, 70 F. (2d) 55, 58 (C. C. A. 10th 1934); *Cleveland Automatic Mach. Co. v. National Acme Co.*, 52 F. (2d) 769, 770 (C. C. A. 6th 1931)) lends, I think, no support to the position of the majority and the Trade Commission. The power of a United States court to determine the validity of a patent in an infringement suit arises from the statutory right of one accused of infringement to assert as a defense the invalidity of the patent which is the predicate of the action. 35 U. S. C. § 69 (1946). The justification for this statutory right is that, as to the accused in an infringement case, the patent has been issued *ex parte;* he has never had a hearing in respect of its validity. But the determination by the Commissioner of Patents that a claimed invention is patentable is not *ex parte* as to the United States. It is the action of the United States, *i. e.*, of the Commissioner of Patents, that is in practical effect—as said above—called into question by the Trade Commission, also an agency of the United States, in the instant proceeding.

[*Cases Cited*]

I am aware of the ruling in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173 (1942), that since the price-fixing provisions of a patent license agreement are, if not within the protection of a lawfully granted patent monopoly, violations of the Sherman Act, a patent licensee sued for royalties may offer evidence of invalidity of the patents upon which the license agreement is founded, notwithstanding rules of estoppel, whether local or federal, which would otherwise forbid him, because of his license agreement,

[1] The Federal Trade Commission states the question thus: "Does the Federal Trade Commission as a matter of law lack jurisdiction to ban false and misleading advertising if the misleading representations concern a patented device and *are within the scope of representations made to the Patent Office in connection with the application for the patent.*" [Italics supplied.]

[2] Specifically, the order of the Trade Commission requires the petitioners to cease and desist from representing that the device, or any substantially similar device, will:

1. Eliminate or reduce back pressure.
2. Save gasoline or oil.
3. Increase the power of the motor or cause it to give better performance.
4. Draw carbon, oil, or moisture from the muffler.
5. Reduce the vibration of the motor.
6. Give the motor greater acceleration or cause it to run more smoothly or more quietly.
7. Save tires.

to do so. But this ruling is of no force in the instant case because, again, the patent licensee, like the accused in an infringement case, was a private person and not a party to the issuance of the patent as was the United States herein.

Neither *United States v. Masonite Corp.*, 316 U. S. 265 (1942), nor *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20 (1912), which are relied upon in the majority opinion, appears to me to lend any force to the contention of the Trade Commission and the decision of the majority in the instant case. In respect of the *Masonite* case: The Masonite Corporation owned patents on a product known as "hardboard" and itself manufactured and sold the same. It constituted competing manufacturers of building materials its *del credere* "agents" for the vending of hardboard, through their respective sales organizations, at prices and under terms and conditions fixed by Masonite and to be followed by it. Masonite also agreed to issue to the "agents" at their request "a license to manufacture and sell hard boards" under its patents upon specified terms and conditions and for a cash consideration, but this option was not exercised by the "agents." The Court, treating the "agencies" for the purpose of the decision as bona fide *del credere* agencies, nevertheless held that the form in which the parties chose to cast the transaction was not to govern and that the "agency" arrangements in reality presented a *Bloomer v. McQuewan,*[3] *Adams v. Burke,*[4] *Hobbie v. Jennison*[5] pattern wherein when a patented product "'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'" (316 U. S. at 278, quoting from *Bloomer v. McQuewan,* 14 How. at 549) The Court said:

> . . . Doubtless there is a proper area for utilization by a patentee of a *del credere* agent in the sale or disposition of the patented article. A patentee who employs such an agent to distribute his product certainly is not enlarging the scope of his patent privilege if it may fairly be said that that distribution is part of the patentee's own business and operates only to secure to him the reward for his invention which Congress has provided. But where he utilizes the sales organization of another business—a business with which he has no intimate relationship—quite different problems are posed since such a regimentation of a marketing system is peculiarly susceptible to the restraints of trade which the Sherman Act condemns. And when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee, and that the purpose is to fix prices at which the competitors may market the product, the device is, without more, an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the *del credere* agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity would have. *Dr. Miles Medical Co. v. John D. Parks & Sons Co.,* 220 U. S. 373. [316 U. S. at 279-280.]

In the *Standard Sanitary* case, one Wayman, a defendant, but not himself a manufacturer, on condition of the elimination of unpatented hard enameled "seconds," secured from Standard Sanitary and other manufacturers options upon process patents for enameling iron sanitary utensils. A committee of six, including Wayman and five manufacturers' representatives, worked out, to be incorporated in license contracts, a plan for manufacturers' prices and jobbers' and dealers' resale prices. Under the plan the manufacturers were not to sell to jobbers who did not also take a license and submit to a price schedule. Royalties were a given sum per day for furnace use, but 80% was returnable as "cash bail" if a licensee abided by all of the provisions of its license. Having obtained approval of this plan by a sufficient number in the industry, Wayman exercised his options, became the owner of the patents, and issued the licenses as planned. Eighty-five per cent of the manufacturers and ninety per cent of the jobbers were parties to the arrangements. In answer to a charge that these arrangements were in violation of the Sherman Act, it was sought to justify them under *Bement v. National Harrow Co.,* 186 U. S. 70 (1902), and upon the ground that an undue number of the (unpatented) seconds were being produced, with consequent harm to the reputation of the superior patented product and to the consumer—since the seconds were "palmed off" as not defective. The seconds

[3] 14 How. 539 (U. S. 1852).
[4] 17 Wall. 453 (U. S. 1873).
[5] 149 U. S. 355 (1893).

were said to be "'discrediting the ware and demoralizing the market and business.'" (226 U. S. at 42.) The Court held that the licensing arrangements were illegal. Quoting from the *Bement* case, it recognized that the Sherman Act "'clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.'" (226 U. S. at 40.) But the Court held that the Wayman license agreements "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. . . ." (226 U. S. at 48)

This statement of the *Masonite* and *Standard Sanitary* cases shows, I think, that they are irrelevant to the question in the instant case. They stand only for the general rule that a patentee's contractual arrangements must be limited in operation to the proper field of trade belonging to the patentee; or, otherwise stated, that the contractual arrangements may include any condition the performance of which is reasonably within the reward which the patentee by the grant of a patent is entitled to secure, but no other. Putting it still otherwise, these cases hold that if the subject matter of a contract which otherwise would be illegal because in restraint of trade is a patented article, this takes away the illegality only to the extent to which the field of trade controlled through the contract is coextensive with the field within which exclusive control has been granted by the patent law. This is well established, but it is not relevant to the question in the instant case as to the power of the Trade Commission to review collaterally the correctness of the decision of the Commissioner of Patents in respect of the utility of Vacudex as described in the petitioners' patent specification. There is no charge in the instant case that the petitioners were by contract or otherwise operating beyond the field of trade defined in the Letters Patent.

I am aware of the dictum of the Supreme Court in *United States v. United States Gypsum Co.,* 333 U. S. 364, 386-8 (1948), to the effect that in an action brought by the United States to restrain alleged violation of the Sherman Act through patent licensing arrangements which included price-fixing provisions, the United States may attack and the court determine the validity of the patents upon which the licensing arrangements were predicated. But this has only the force of a dictum. In addition, the dictum is limited by the nature of the action and of the tribunal in which the action is brought. It warrants inquiry into the validity of patents by a United States court sitting in an equity proceeding to restrain an alleged violation of the Sherman Act through price-fixing provisions in patent license agreements. The ambit of this dictum is not so broad as to permit an indirect attack by the Trade Commission, an executive agency, upon the correctness of the action of the Commissioner of Patents in determining the utility of a claimed invention.

It is true that where a patent has been obtained by fraud imposed upon the issuing officer, or where such officer may have erred as to his power or made a mistake in the patent instrument itself, the United States may obtain cancellation of the patent in a judicial proceeding against the patentee. *United States v. American Bell Telephone Co.,* 128 U. S. 315 (1888). But the reach of this case is not so broad as to permit collateral attack by an executive agency such as the Trade Commission upon the correctness of the action of the Commissioner of Patents. Moreover, there is no assertion in the instant case that the representations in the specification of the patent with respect to the utility of Vacudex were fraudulently made and the patent thereby fraudulently obtained, and there is no allegation that the Commissioner of Patents exceeded his power in issuing the Letters Patent or that there is a mistake in the patent instrument itself.

[*Statutory Provision Upholds Invalidity as Defense in Infringement Suit*]

It is to be noted that in the instances in which Congress has authorized a court to review, either collaterally or directly, the action of the Patent Office in granting or denying a patent, it has done so explicitly. Thus it has given the Court of Customs and Patent Appeals jurisdiction of appeals from decisions of the Board of Appeals and the Board of Interference Examiners of the Patent Office as to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference. 28 U. S. C. § 1542 (1948). Again, Congress has provided that whenever a

patent on application is refused by the Board of Appeals of the Patent Office, or whenever any applicant is dissatisfied with the decision of the Board of Interference Examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals and such appeal is pending or has been decided, may have remedy by a bill in equity in a United States District Court. Rev. Stat. § 4915 (1878), 35 U. S. C. § 63 (1946). In the infringement cases in which the courts collaterally review the action of the Patent Office in issuing a patent, the right of the accused to set up invalidity as a defense is conferred by the statutory provision explicitly providing that the accused may plead the general issue. 35 U. S. C. § 69 (1946). See also 28 U. S. C. § 1498 (1948).

[*Extent of Commission's Power Questioned*]

It is to be supposed that Congress recognizes that one of the first objectives in the essentials of good government is order and certainty in relations between government and citizen, and that this cannot be secured if the government itself is not to be depended upon to abide by its grants. The grant of a patent is a formal and solemn governmental act, reciting that "Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law. Now therefore these Letters Patent are to grant unto the said [claimant], its successors or assigns for the term of Seventeen years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof." It must be presumed, I think, that the Congress did not intend that the Government itself, through an executive agency other than the Patent Office, might attack the Government's own grant except in the instances explicitly provided for by statute as above recited. I find nothing in the Federal Trade Commission Act, 15 U. S. C. §§ 41 *et seq.* (1946), which indicates that Congress contemplated that the Trade Commission, in exercising its power to restrain dissemination of false advertising, should make a redetermination of a factual finding of the Commissioner of Patents.

It is pointed out by the majority that although the complaint of the Trade Commission attacked as false, among other advertised assertions as to the utility of Vacudex, those that Vacudex "saves mufflers" and "saves tail pipes," nevertheless in its cease and desist order, which listed the assertions of utility which the petitioners are to be restrained from making, the Trade Commission omitted the assertions "saves mufflers" and "saves tail pipes." This, it is contended, means that the Trade Commission in effect found that Vacudex "saves mufflers" and "saves tail pipes." It is then said that since the Commissioner of Patents in order properly to issue Letters Patent for the petitioners' claimed invention need not have found correct all of the assertions of utility made in the specification, it can be assumed that he issued the patent after finding to be correct the very assertions found to be correct by the Trade Commission, *i. e.*, that Vacudex "saves mufflers" and "saves tail pipes," and that he did this without determining the correctness of the other assertions of utility in the specification. It is concluded that the Trade Commission, in passing upon other assertions of utility and finding them to be not correct, is not necessarily collaterally attacking a finding of the Commissioner of Patents.

But this argument is based upon a mere assumption as to what the Commissioner of Patents, in considering the application and issuing the Letters Patent, determined in respect of the utility of Vacudex. It is no less logical to assume that the Commissioner of Patents found correct the very assertions of utility found to be incorrect by the Trade Commission, and that the latter, therefore, is collaterally attacking the finding of the Commissioner of Patents. Either assumption is speculative. The record of the Patent Office proceeding is not before the court. Speculation is hardly a sound support for the claimed power of the Trade Commission to determine the correctness of the assertions of utility as made in the petitioners' patent specification and advertising. It is to be noted, moreover, that even if the assumption made by the majority—that the Commissioner of Patents determined and found to be correct only the assertions of utility which the Trade Commission itself found to be correct—is true, nevertheless the Trade Commission, in sustaining that finding of the Commissioner of Patents, is assuming to review it. It is the question of the power of the Trade Commission to review the action of the Commissioner of Patents that is the paramount issue in this case. For the reasons set forth above, I think the Trade Commission has no such power.

[¶ 62,432] Standard Oil Company of California and Standard Stations, Inc., v. United States.

In the Supreme Court of the United States. October Term, 1948. No. 279. June 13, 1949. As amended October 10, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Petroleum Products Industry—Exclusive Supply Contracts—Substantial Lessening of Competition.—A decree enjoining an oil company and its wholly owned subsidiary from enforcing or entering into exclusive supply contracts with independent dealers in petroleum products and automobile accessories was affirmed by a majority opinion of the Supreme Court. It held that observance of requirements contracts by operators of independent service stations whose retail sales amounted to $58,000,000, comprising 6.7 per cent of the total in the area, precluded access by possible competing suppliers to a substantial portion of the market. The use of the contract was held to create just such a potential clog on competition as it was the purpose of Section 3 of the Clayton Act to remove, wherever were it to become actual, it would impede a substantial amount of competitive activity. No ruling was made as to the validity of the agreements under Section 1 of the Sherman Act.

A dissenting justice held that the requirements contracts, on the facts of the case, were relatively innocuous as compared with an agency system or outright acquisition of filling stations as suggested by the Court. Three judges in their minority opinion held that the Government failed to show that the actual or probable effect of the requirement contracts was to substantially lessen competition or tend to create a monopoly.

See the Sherman Act annotations, Vol. 1, ¶ 1220.521, and the Clayton Act annotations, Vol. 1, ¶ 2023.36.

Affirming the decision of the United States District Court for the Southern District of California, reported at ¶ 62,261.

For the appellants: Marshall P. Madison, John M. Hall.

For the appellees: Philip B. Perlman, Solicitor General; Herbert A. Bergson, Assistant Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

[*Nature of Appeal*]

This is an appeal to review a decree enjoining the Standard Oil Company of California and its wholly-owned subsidiary, Standard Stations, Inc.,[1] from enforcing or entering exclusive supply contracts with any independent dealer in petroleum products and automobile accessories. The use of such contracts was successfully assailed by the United States as violative of § 1 of the Sherman Act[2] and § 3 of the Clayton Act.[3]

[*Facts of Case*]

The Standard Oil Company of California, a Delaware corporation, owns petroleum-producing resources and refining plants in California and sells petroleum products in what has been termed in these proceedings the "Western area"—Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. It sells through its own service stations, to the operators of independent service stations, and to industrial users. It is the largest seller of gasoline in the area. In 1946 its combined sales amounted to 23% of the total taxable gallonage sold there in that

[1] Standard Stations, Inc., has no independent status in these proceedings; since 1944 its activities have been confined to managing service stations owned by the Standard Oil Co. of California.

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . ." 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. § 1.

[3] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731, 15 U. S. C. § 14.

year: sales by company-owned service stations constituted 6.8% of the total, sales under exclusive dealing contracts with independent service stations, 6.7% of the total; the remainder were sales to industrial users. Retail service-station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage; the remaining retail sales were divided between more than seventy small companies. It is undisputed that Standard's major competitors employ similar exclusive dealing arrangements. In 1948 only 1.6% of retail outlets were what is known as "split-pump" stations, that is, sold the gasoline of more than one supplier.

Exclusive supply contracts with Standard had been entered, as of March 12, 1947, by the operators of 5,937 independent stations, or 16% of the retail gasoline outlets in the Western area, which purchased from Standard in 1947 $57,646,233 worth of gasoline and $8,200,089.21 worth of other products. Some outlets are covered by more than one contract so that in all about 8,000 exclusive supply contracts are here in issue. These are of several types, but a feature common to each is the dealer's undertaking to purchase from Standard all his requirements of one or more products. Two types, covering 2,777 outlets, bind the dealer to purchase of Standard all his requirements of gasoline and other petroleum products as well as tires, tubes, and batteries. The remaining written agreements, 4,368 in number, bind the dealer to purchase of Standard all his requirements of petroleum products only. It was also found that independent dealers had entered 742 oral contracts by which they agreed to sell only Standard's gasoline. In some instances dealers who contracted to purchase from Standard all their requirements of tires, tubes, and batteries, had also orally agreed to purchase of Standard their requirements of other automobile accessories. Of the written agreements, 2,712 were for varying specified terms; the rest were effective from year to year but terminable "at the end of the first 6 months of any contract year, or at the end of any such year, by giving to the other at least 30 days prior thereto written notice. . . ." Before 1934 Standard's sales of petroleum products through independent service stations were made pursuant to agency agreements, but in that year Standard adopted the first of its several requirements-purchase contract forms, and by 1938 requirements contracts had wholly superseded the agency method of distribution.

Between 1936 and 1946 Standard's sales of gasoline through independent dealers remained at a practically constant proportion of the area's total sales; its sales of lubricating oil declined slightly during that period from 6.2% to 5% of the total. Its proportionate sales of tires and batteries for 1946 were slightly higher than they were in 1936, though somewhat lower than for some intervening years; they have never, as to either of these products, exceeded 2% of the total sales in the Western area.

[*Qualifying Clause in Section 3 of Clayton Act*]

Since § 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act,[4] it is appropriate to consider first whether the enjoined contracts fall within the prohibition of the narrower Act. The relevant provisions of § 3 are:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Obviously the contracts here at issue would be proscribed if § 3 stopped short of the qualifying clause beginning, "where the effect of such lease, sale, or contract for sale . . . ." If effect is to be given

[4] After the Clayton Bill, H. R. 15657, had passed the House, the Senate struck § 4, the section prohibiting tying clauses and requirements contracts, on the ground that such practices were subject to condemnation by the Federal Trade Commission under the then pending Trade Commission Bill. In support of a motion to reconsider this vote, Senator Reed of Missouri argued that the Trade Commission would be unlikely to outlaw agreements of a type held by this Court, in *Henry v. A. B. Dick Co.*, 224 U. S. 1, not to be in violation of the Sherman Act. See 51 Cong. Rec. 14088, 14090-92. The motion was agreed to. *Id.* at 14223.

that clause, however, it is by no means obvious, in view of Standard's minority share of the "line of commerce" involved, of the fact that that share has not recently increased, and of the claims of these contracts to economic utility, that the effect of the contracts may be to lessen competition or tend to create a monopoly. It is the qualifying clause, therefore, which must be construed.

[*Holding of District Court*]

The District Court held that the requirement of showing an actual or potential lessening of competition or a tendency to establish monopoly was adequately met by proof that the contracts covered "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not." Given such quantitative substantiality, the substantial lessening of competition—so the court reasoned—is an automatic result, for the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers. Having adopted this standard of proof, the court excluded as immaterial testimony bearing on "the commercial merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and which would prevail if the court declared the present arrangement [invalid]." The court likewise deemed it unnecessary to make findings, on the basis of evidence that was admitted, whether the number of Standard's competitors had increased or decreased since the inauguration of the requirements-contract system, whether the number of their dealers had increased or decreased, and as to other matters which would have shed light on the comparative status of Standard and its competitors before and after the adoption of that system. The court concluded:

"Grant that, on a comparative basis, and in relation to the entire trade in these products in the area, the restraint is not integral. Admit also that control of distribution results in lessening of costs and that its abandonment might increase costs. . . . Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of represenation were economically beneficial to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested by the Government, and have been practised by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practises here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase—'an appreciable segment' of interstate commerce."

[*Issue Defined*]

The issue before us, therefore, is whether the requirement of showing that the effect of the agreements "may be to substantially lessen competition" may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.[6]

[*Decisions under Section 3 Discussed*]

Since the Clayton Act became effective, this Court has passed on the applicability of § 3 in eight cases, in five of which it upheld determinations that the challenged agreement was violative of that Section. Three of these—*United Shoe Machinery Corp. v. United States*, 258 U. S. 451; *International Business Machines Corp. v. United States*, 298 U. S. 131; *International Salt Co. v. United States*, 332 U. S. 392—involved contracts tying to the use of a patented

[6] It is clear, of course, that the "line of commerce" affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition. Cf. *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268, 279; *United States v. Yellow Cab Co.*, 332 U. S. 218, 226. The criteria of substantiality deemed relevant in cases involving a nation-wide market are thus also relevant in measuring the effect of Standard's requirements contracts in the seven-state Western area.

article all purchases of an unpatented product used in connection with the patented article. The other two cases—*Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346; *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457—involved requirements contracts not unlike those here in issue.

The *Standard Fashion* case, the first of the five holding that the Act had been violated, settled one question of interpretation of § 3. The Court said:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. . . . But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly." 258 U. S. at 356-57. See also *Federal Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37, 46, n. 14.

The Court went on to add that the fact that the Section "was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial," but because it deemed the finding of two lower courts that the contracts in question did substantially lessen competition and tend to create monopoly amply supported by evidence that the defendant controlled two-fifths of the nation's pattern agencies, it did not pause to indicate where the line between a "remote" and a "substantial" lessening should be drawn.

All but one of the later cases also regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened. In the *United Shoe Machinery* case, referring, *inter alia,* to the clause incorporated in all United's leases of patented machinery requiring the use by the lessee of materials supplied by United, the Court observed:

> "That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, . . . apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his businesss." 258 U. S. at 457-58.

In the *International Business Machines* case, the defendants were the sole manufacturers of a patented tabulating machine requiring the use of unpatented cards. The lessees of the machines were bound by tying clauses to use in them only the cards supplied by the defendants, who, between them, divided the whole of the $3,000,000 annual gross of this business also. The Court concluded:

> "These facts, and others, which we do not stop to enumerate, can leave no doubt that the effect of the condition in appellant's leases 'may be to substantially lessen competition,' and that it tends to create monopoly, and has in fact been an important and effective step in the creation of monopoly." 298 U. S. at 136.

The *Fashion Originators' Guild* case involved an association of dress manufacturers which sold more than 60% of all but the cheapest women's garments. In rejecting the relevance of evidence that the Guild's use of requirements contracts was a "reasonable and necessary" measure of protection against "the devastating evils growing from the pirating of original designs," the Court again emphasized the presence and the consequences of economic power:

> "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." 312 U. S. at 467-68.

It is thus apparent that none of these cases controls the disposition of the present appeal, for Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find. The cases do indicate, however, that some sort of showing as to the actual or probable economic consequences of the agreements, if only the inferences to be drawn from the fact of dominant power, is important, and to that extent they tend to support appellant's position.

Two of the three cases decided by this Court which have held § 3 inapplicable also lend support to the view that such a showing is necessary. These are, *Federal Trade Comm'n v. Sinclair Co.*, 261 U. S. 463, and *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3. The third—*Federal Trade Comm'n v. Curtis Pub. Co.*, 260 U. S. 568—went off on the ground that the contract involved was one of agency and so is of no present relevance. The *Sinclair* case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks and evidently did not otherwise control their supply. Although the Trade Commission had found that few dealers needed more than one pump, the Court concluded that "the record does not show that the probable effect of the practise will be unduly to lessen competition." 261 U. S. at 475. The basis of this conclusion was thus summarized:

> "Many competitors seek to sell excellent brands of gasoline, and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes, and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs." *Id.* at 474.

The present case differs of course in the fact that a dealer who has entered a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has,[6] but the case is significant for the importance it attaches, in the absence of a showing that the supplier dominated the market, to the practical effect of the contracts. The same is true of the *Pick* case, in which this Court affirmed in a brief *per curiam* opinion the finding of the District Court, concurred in by the Court of Appeals, that the effect of contracts by which dealers agreed not to sell other automobile parts than those manufactured by General Motors "had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce." 299 U. S. at 4.

But then came *International Salt Co. v. United States*, 332 U. S. 392. That decision, at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences once it has been established that "the volume of business affected" is not "insignificant or insubstantial" and that the effect of the contracts is to "foreclose competitors from [a] substantial market." *Id.* at 396. Upon that basis we affirmed a summary judgment granting an injunction against the leasing of machines for the utilization of salt products on the condition that the lessee use in them only salt supplied by defendant. It was established by pleadings or admissions that defendant was the country's largest producer of salt for industrial purposes, that it owned patents on the leased machines, that about 900 leases were outstanding, and that in 1944 defendant sold about $500,000 worth of salt for use in these machines. It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.[7] It is clear, therefore, that unless a distinction is to be drawn for

[6] Standard urges that the effect of its contracts is similarly confined in view of the fact that they apply not to all sales by a dealer but only to those made through a designated service station. Putting aside the fact that it does not appear that dealers commonly own more than one service station, there is marked difference between a contract which confines an entire retail outlet to the sale of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand: service-station sites, and therefore retail outlets, are limited in number; the number of pumps which a dealer may choose to set up is not, or so, at least, the Court assumed in the *Sinclair* case. It is reasonable to assume, therefore, that competition between suppliers is directed rather toward exclusive contracts with the maximum number of strategically located outlets than toward exclusive arrangements with dealers as such.

[7] The Court considered and found inadequate defendant's attempt to establish that the successful use of the machines depended upon a quality of salt which only it could supply, but the Court's willingness to consider such evidence does not weaken the holding that coverage of a more than insignificant volume of business by such tying clauses is an adequate basis for finding a lessening of competition or a tendency to monopoly.

purposes of the applicability of § 3 between requirements contracts and contracts tying the sale of a nonpatented to a patented product, the showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened.[8]

In favor of confining the standard laid down by the *International Salt* case to tying agreements, important economic differences may be noted. Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied. In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. See Miller, *Unfair Competition* 199 *et seq.* (1941); Note, 49 Col. L. Rev. 241, 246 (1949). The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also.

[*Economic Advantage of Requirements Contracts*]

Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs,[9] and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market. See Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. Rev. 412, 413-14 (1948). They may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched competitors. See *id.* at 424 *et seq.; Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc.,* 73 F. 2d 725, 728 (C. A. 7th Cir.); *General Talking Pictures Corp. v. American Tel. & Tel. Co.,* 18 F. Supp. 650, 666 (D. Del.).[10] Since these advantages of requirements contracts may often be sufficient to account for their use, the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses, especially where use of the latter is combined with market control of the tying device. A patent, moreover, although in fact there may be many competing substitutes for the patented article, is at least *prima facie* evidence of such control. And so we could not dispose of this case merely by citing *International Salt Co. v. United States,* 332 U. S. 392.

Thus, even though the qualifying clause of § 3 is appended without distinction of terms equally to the prohibition of tying clauses and of requirements contracts, pertinent considerations support, certainly as a

[8] It may be noted in passing that the exclusive supply provisions for tires, tubes, batteries, and other accessories which are a part of some of Standard's contracts with dealers who have also agreed to purchase their requirements of petroleum products should perhaps be considered, as a matter of classification, tying rather than requirements agreements.

[9] This advantage is not conferred by Standard's contracts, each of which provides that the price to be paid by the dealer is to be the "Company's posted price to its dealers generally at time and place of delivery."

[10] Some members of the House opposed § 4 of H. R. 15657 (the equivalent of what is now § 3) as denying this benefit to the newcomer, see 51 Cong. Rec. 9267, and Representative McCoy of New Jersey offered an amendment, *id.* at 9398, to make the agreements in question illegal only when entered "with the intent of obtaining or establishing a monopoly or of destroying the business of a competitor," which he and others supported on this ground. See *id.* at 9400-02, 9409. The amendment was rejected. *Id.* at 9410.

matter of economic reasoning, varying standards as to each for the proof necessary to fulfill the conditions of that clause. If this distinction were accepted, various tests of the economic usefulness or restrictive effect of requirements contracts would become relevant. Among them would be evidence that competition has flourished despite use of the contracts, and under this test much of the evidence tendered by appellant in this case would be important. See, as examples of the consideration of such evidence, *B. S. Pearsall Butter Co. v. Federal Trade Comm'n*, 292 F. 720 (C. A. 7th Cir.); *Pick Mfg. Co. v. General Motors Corp.*, 80 F. 2d 641, 644 (C. A. 7th Cir.), aff'd 299 U. S. 3. Likewise bearing on whether or not the contracts were being used to suppress competition, would be the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used. See *Corn Products Refining Co. v. Federal Trade Comm'n*, 144 F. 2d 211, 220 (C. A. 7th Cir.), aff'd, 324 U. S. 726; *United States v. Pullman Co.*, 50 F. Supp. 123, 127-29 (E. D. Pa.). Still another test would be the status of the defendant as a struggling newcomer or an established competitor. Perhaps most important, however, would be the defendant's degree of market control, for the greater the dominance of his position, the stronger the inference that an important factor in attaining and maintaining that position has been the use of requirements contracts to stifle competition rather than to serve legitimate economic needs. See *Standard Fashion Co. v. Magrane-Houston Co., supra*, 258 U. S. 346; *Fashion Originators' Guild v. Federal Trade Comm'n, supra*, 312 U. S. 457.[11]

[*Difficulties in Applying Economic Tests*]

Yet serious difficulties would attend the attempt to apply these tests. We may assume, as did the court below, that no improvement of Standard's competitive position has coincided with the period during which the requirments-contract system of distribution has been in effect. We may assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market. But Standard was a major competitor when the present system was adopted, and it is possible that its position would have deteriorated but for the adoption of that system. When it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use,[12] it would not be far-fetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market. If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition. See *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457, 467-68; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427-29 (C. A. 2d Cir.).

Moreover, to demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.[13] Before the system of re-

[11] For an exposition of the considerations here summarized, see Stockhausen, *The Commercial and Anti-Trust Aspects of Term and Requirements Contracts*, 23 N. Y. U. L. Q. Rev. 412, 417-31 (1948).

[12] Upon the request of Standard, its six largest competitors filled out questionnaires showing the number of retail dealers who distributed their products during the years 1937 through 1946. Though their position relative to each other has fluctuated, the figures show that as a group they have maintained or improved their control of the market. Together with Standard, these six companies distributed, as of 1946, through 26,439 of approximately 35,000 independent service stations in the Western area.

[13] The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. See 38 Stat. 734, 736, as amended, 15 U. S. C. §§ 21, 25. Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance.

quirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course insofar as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act. See *United States v. Aluminum Co. of America,* 148 F. 2d 416 (C. A. 2d Cir.). As appellant points out, dealers might order petroleum products in quantities sufficient to meet their estimated needs for the period during which requirements contracts are now effective, and even that would foreclose competition to some degree. So long as these diverse ways of restricting competition remain open, therefore, there can be no conclusive proof that the use of requirements contracts has actually reduced competition below the level which it would otherwise have reached or maintained.

[*Proof that Competition Has Actually Diminished Unnecessary*]

We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental when their effect may be to lessen competition. It has not left at large for determination in each case the ultimate demands of the "public interest," as the English lawmakers, considering and finding inapplicable to their own situation our experience with the specific prohibition of trade practices legislatively determined to be undesirable, have recently chosen to do.[14] Though it may be that such an alternative to the present system as buying out independent dealers and making them dependent employees of Standard Stations, Inc., would be a greater detriment to the public interest than perpetuation of the system, this is an issue, like the choice between greater efficiency and freer competition, that has not been submitted to our decision. We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision.

[*Qualifying Clause of Section 3 Interpreted*]

In this connection it is significant that the qualifying language was not added until after the House and Senate bills reached conference. The conferees responsible for adding that language were at pains, in answering protestations that the qualifying clause seriously weakened the Section, to disclaim any intention seriously to augment the burden of proof to be sustained in establishing violation of it.[15] It seems hardly likely that, having with one hand set up an

[14] The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, adopted July 30, 1948, provides, as one mode of procedure, for reference of restrictive trade practices by the Board of Trade to a permanent Commission for investigation in order to determine "whether any such things as are specified in the reference . . . operate or may be expected to operate against the public interest." 11 & 12 Geo. VI, c. 66, § 6 (2). The Act does not define what is meant by "the public interest," although in § 14 it sets up broad criteria to be taken into account. It is noteworthy, however, that, having established so broad a basis for investigation, the Act entrusts the task to an expert body without provision for judicial review. This approach was repeatedly contrasted in debate with that of the United States. See 449 H. C. Deb. 2046-47, 2058, 2063 (5th ser. 1948); 157 H. L. Deb. 350 (5th ser. 1948). Compare § 5 (2) of the Interstate Commerce Act, as amended, 41 Stat. 480, 49 U. S. C. § 5 (2), referring to the Interstate Commerce Commission determination of the more defined issues of "public interest" under review in *New York Central Securities Corp. v. United States,* 287 U. S. 12, 24; *United States v. Lowden,* 308 U. S. 225.

[15] Representative Floyd of Arkansas, one of the managers on the part of the House, explained the use of the word "substantially" as deriving from the opinion of this Court in *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, and quoted the passage from *id.* at 229 in which it is said that "the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting a citizen from entering into these private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States." 51 Cong. Rec. 16317-18. Senator Chilton, one of the managers on the part of the Senate, denying that the clause

express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring.[16] Yet the economic investigation which appellant would have us require is of the same broad scope as was adumbrated with reference to unreasonable restraints of trade in *Chicago Board of Trade v. United States,* 246 U. S. 231.[17] To insist upon such an investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect "may be" to substantially lessen competition. If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere.

We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

[*Sherman Act Not Considered*]

Since the decree below is sustained by our interpretation of § 3 of the Clayton Act, we need not go on to consider whether it might also be sustained by § 1 of the Sherman Act.

[*Effect on Interstate Commerce*]

One last point remains to be disposed of. Appellant contends that its requirements contracts with California dealers, because nearly all the products sold to them are produced in California, do not substantially affect interstate commerce and therefore should have been exempted from the decree. It finds support for this contention in *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 247. But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it that they would continue to purchase only products originating within the State. The *Addyston* case, on the other

weakened the bill, stated that the words "where the effect may be" mean "where it is possible for the effect to be." *Id.* at 16002. Senator Overman, also a Senate conferee, argued that even the elimination of competition in a single town would substantially lessen competition. *Id.* at 15935.

[16] See *United States v. American Tobacco Co.,* 221 U. S. 106, 179: "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." See also Handler, *A Study of the Construction and Enforcement of the Federal Anti-trust Laws* 3-9 (T. N. E. C. Monograph No. 38, 1941). Compare § 4 of the Australian Industries Preservation Act, 1906, which forbids combinations entered "with intent to restrain trade or commerce to the detriment of the public," construed in *Attorney General v. Adelaide S. S. Co.,* [1913] A. C. 781, as requiring proof of actual economic detriment.

[17] "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." 246 U. S. at 238.

hand, dealt not with the diminution of competition between suppliers brought about by the action of one at the expense of the rest, whether within or without the State, but a combination among them to restrain competition. Modification of the decree was required only to make clear that it did not reach a combination among the defendants doing business in a single State which was confined to transactions taking place within that same State.

[*Judgment Affirmed*]

The judgment below is

Affirmed.

[Dissenting Opinions]

MR. JUSTICE DOUGLAS: The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly. As a result of the big business philosophy underlying *United States v. United Shoe Machinery Co.*, 247 U. S. 32; *United States v. United States Steel Corp.*, 251 U. S. 417; *United States v. International Harvester Co.*, 274 U. S. 693, big business has become bigger and bigger. Monopoly has flourished. Cartels have increased their hold on the nation. The trusts wax strong.[1] There is less and less place for the independent.

The full force of the Anti-Trust Laws has not been felt on our economy. It has been deflected. Niggardly interpretations have robbed those laws of much of their efficacy. There are exceptions. Price fixing is illegal *per se*.[2] The use of patents to obtain monopolies on unpatented articles is condemned.[3] Monopoly that has been built as a result of unlawful tactics, *e. g.*, through practices that are restraints of trade, is broken up.[4]

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[1] See *Final Report and Recommendations of the Temporary National Economic Committee*, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941). For more detailed analyses, see *Competition and Monopoly in American Industry* (TNEC Monograph 21, 1940) pp. 299 *et seq.*; *The Structure of Industry* (TNEC Monograph 27, 1941) pp. 231 *et seq.*; *The Distribution of Ownership in the 200 Largest Nonfinancial Corporations* (TNEC Monograph 29, 1940); *Relative Efficiency of Large, Medium-Sized, and Small Business* (TNEC Monograph 13, 1941).

The merger and acquisition movement, which has been evident since the turn of the century and which contributed to the spiraling concentration of corporate wealth into the hands of the few, has not ended. We are presently in the midst of a similar movement. See the Federal Trade Commission report, *The Present Trend of Corporate Mergers and Acquisitions*, Sen. Doc. No. 17, 80th Cong., 1st Sess. (1947), p. 6, where it is shown that "the increase in the merger movement following V-J day parallels very closely the sharp upward movement which took place at the end of World War I." The causes which have recently contributed to the growing bigness of big corporations are varied. See Lynch, *The Concentration of Economic Power* (1946), pp. 3-4 where it is said:

"Even before the entrance of the United States into the war the placing of defense contracts served to augment the growth of bigness in industry and to intensify the struggle for survival by small concerns. By 1941 the pattern of defense contracts which, with modifications, was to remain for the duration of the war had been established. It is reported that in that year fifty-six firms, less than one-half of 1 percent of the manufacturing establishments of the country, were awarded 75 percent of all the contracts. Concentration was even more marked within this group, however, inasmuch as six corporations held 31 percent of the total. Between June, 1940, and March, 1943, more than 100 million dollars worth of prime war-supply contracts were awarded. Seventy percent of these were held by the leading 100 corporations; 10 corporations held 32 percent, and the leading 50 held 60 percent.

"Studies by the United States Department of Commerce during 1943-1944 throw additional light on this trend toward industrial concentration. After Pearl Harbor the total number of firms in business declined precipitously. Despite the wartime industrial boom, the number of firms which discontinued operations was greater than that replaced by new entries; it is estimated that the number in business in 1943 was nearly 17 percent less than in 1941. There are numerous indications that the relative importance of small business has declined during the war period and that the dominance of big business has become more marked. Between 1938 and 1942 it appears that the total number of workers employed by 95 percent of the nation's corporations (the smallest) declined 23 percent, whereas those employed by 5 percent of the corporations (the largest) increased 22 percent. A related study indicates that between January 1, 1941, and January 1, 1943, business firms employing fewer than 125 workers each experienced an increase in employment of 1 percent and an increase in the value of their products (attributable principally to price increases) of 16 percent; during the same period, however, the increase in employment by the large establishments employing more than 125 workers was 62 percent and the increase in the value of the product, 96 percent."

[2] See for example *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

[3] See for example *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661.

[4] See *United States v. Griffith*, 334 U. S. 100; *Schine Theatres v. United States*, 334 U. S. 110; *United States v. Paramount Pictures*, 334 U. S. 131, 172.

Those cases have largely expended the force of *Hartford Empire Co. v. United States*, 323 U. S. 386—an indefensible decision whereby the Court allowed those who had built one of the tightest monopolies in American history largely

But when it comes to monopolies built in gentlemanly ways—by mergers, purchases of assets or control and the like—the teeth have largely been drawn from the Act.

We announced that the existence of monoply power, coupled with the purpose or intent to monopolize, was unlawful.[5] But to date that principle has not shown bright promise in application.[6] Under the guise of increased efficiency big business has received approval for easy growth. *United States v. Columbia Steel Co.,* 334 U. S. 495, represents the current attitude of the Court on this problem. In that case United States Steel—the giant of the industry—was allowed to fasten its tentacles tighter on the economy by acquiring the assets of a steel company in the Far West where competition was beginning to develop.

The increased concentration of industrial power in the hands of a few has changed habits of thought. A new age has been introduced. It is more and more an age of "monopoly competition." Monopoly competition is a regime of friendly alliances, of quick and easy accommodation of prices even without the benefit of trade associations, of what Brandeis said was euphemistically called "cooperation."[7] While this is not true in all fields, it has become alarmingly apparent in many.

The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. Price control is allowed to escape the influences of the competitive market and to gravitate into the hands of the few. But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

These problems may not appear on the surface to have relationship to the case before us. But they go to the very heart of the problem.

It is common knowledge that a host of filling stations in the country are locally owned and operated. Others are owned and operated by the big oil companies. This case involves directly only the former. It pertains to requirements contracts that the oil companies make with these independents. It is plain that a filling station owner who is tied to an oil company for his supply of products is not an available customer for the products of other suppliers. The same is true of a filling station owner who purchases his inventory a year in advance. His demand is withdrawn from the market for the duration of the contract in the one case and for a year in the other. The result in each case is to lessen competition if the standard is day-to-day purchases. Whether it is a substantial lessening of competition within the meaning of the Anti-Trust Laws is a question of degree and may vary from industry to industry.

The Court answers the question for the oil industry by a formula which under our decisions promises to wipe out large segments of independent filling station operators. The method of doing business under requirements contracts at least keeps the independents alive. They survive as small business units. The situation is not ideal from either their point of view[8] or that of the nation. But the alternative which the Court offers is far worse from the point of view of both.

The elimination of these requirements contracts sets the stage for Standard and

to retain their ill-gotten gains and continue their hold on the economy. The philosophy of that decision can be summed up in the words Brandeis used to describe the decree effecting a so-called dissolution of the American Tobacco Co. He said that its defenders "appear to have discovered in the Constitution a new implied prohibition: *'What man has illegally joined together, let no court put asunder.'*" *The Curse of Bigness* (1935) p. 103.

[5] See *Schine Theatres v. United States, supra,* pp. 129-130.

[6] It should be noted in this connection that a majority of the Court could not be obtained for holding illegal *per se* the vertical integration in the motion picture industry. See *United States v. Paramount Pictures, supra,* pp. 173-174.

[7] *Other People's Money* (1933) p. 110.

[8] For the plight of the independent service station operator see *Control of the Petroleum Industry by Major Oil Companies* (TNEC Monograph No. 39, 1941) pp. 46, 47, 52. See also *Review and Criticism on Behalf of Standard Oil Co.* (New Jersey) and *Sun Oil Co. of Monograph No. 39 with Rejoinder by Monograph Author* (TNEC Monograph 39-A, 1941).

the other oil companies to build service-station empires of their own. The opinion of the Court does more than set the stage for that development. It is an advisory opinion as well, stating to the oil companies how they can with impunity build their empires. The formula suggested by the Court is either the use of the "agency" device, which in practical effect means control of filling stations by the oil companies (cf. *Federal Trade Commission v. Curtis Co.*, 260 U. S. 568), or the outright acquisition of them by subsidiary corporations or otherwise. See *United States v. Columbia Steel Co., supra.* Under the approved judicial doctrine either of those devices means increasing the monopoly of the oil companies over the retail field.

When the choice is thus given, I dissent from the outlawry of the requirements contract on the present facts. The effect which it has on competition in this field is minor as compared to the damage which will flow from the judicially approved formula for the growth of bigness tendered by the Court as an alternative. Our choice must be made on the basis not of abstractions but of the realities of modern industrial life.

Today there is vigorous competition between the oil companies for the market. That competition has left some room for the survival of the independents. But when this inducement for their survival is taken away, we can expect that the oil companies will move in to supplant them with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent business man will be supplanted by clerks. Competition between suppliers of accessories (which is involved in this case) will diminish or cease altogether. The oil companies will command an increasingly larger share of both the wholesale and the retail markets.

That is the likely result of today's decision. The requirements contract which is displaced is relatively innocuous as compared with the virulent growth of monopoly power which the Court encourages. The Court does not act unwittingly. It consciously pushes the oil industry in that direction. The Court approves what the Anti-Trust Laws were designed to prevent. It helps remake America in the image of the cartels.

Mr. Justice Jackson, with whom The Chief Justice and Mr. Justice Burton join, dissenting: I am unable to join the judgment or opinion of the Court for reasons I will state, but shortly.

Section 3 of the Clayton Act does not make any lease, sale, or contract unlawful unless "the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730, 731, 15 U. S. C. § 14. It is indispensable to the Government's case to establish that either the actual or the probable effect of the accused arrangement is to substantially lessen competition or tend to create a monopoly.

I am unable to agree that this requirement was met. To be sure, the contracts cover "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not." But that fact does not automatically bring the accused arrangement within the prohibitions of the statute. The number of dealers and the volume of sales covered by the arrangement of course was sufficient to be substantial. That is to say, this arrangement operated on enough commerce to violate the Act, provided its effects were substantially to lessen competition or create a monopoly. But proof of their quantity does not prove that they had this forbidden quality and the assumption that they did, without proof, seems to me unwarranted.

Moreover, the trial court not only made the assumption but he did not allow the defendant affirmatively to show that such effects do not flow from this arrangement. Such evidence on the subject as was admitted was not considered in reaching the decision that these contracts are illegal.

I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions.

But if they must decide, the only possible way for the courts to arrive at a fair determination is to hear all relevant evidence from both parties and weigh not only its inherent probabilities of verity but also compare the experience, disinterestedness

and credibility of opposing witnesses. This is a tedious process and not too enlightening, but without it a judicial decree is but a guess in the dark. That is all we have here and I do not think it is an adequate basis on which to upset long-standing and widely practiced business arrangements.

I should therefore vacate this decree and direct the court below to complete the case by hearing and weighing the Government's evidence and that of defendant as to the effects of this device.

However, if the Court refuses to do that, I cannot agree that the requirements contract is *per se* an illegal one under the antitrust law, and that is the substance of what the Court seems to hold. I am not convinced that the requirements contract as here used is a device for suppressing competition instead of a device for waging competition. If we look only at its effect in relation to particular retailers who become parties to it, it does restrain their freedom to purchase their requirements elsewhere and prevents other companies from selling to them. Many contracts have the effect of taking a purchaser out of the market for goods he already has bought or contracted to take. But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged.

It does not seem to me inherently to lessen this real competition when an oil company tries to establish superior service by providing the consumer with a responsible dealer from which the public can purchase adequate and timely supplies of oil, gasoline and car accessories of some known and reliable standard of quality. No retailer, whether agent or independent, can long remain in business if he does not always, and not just intermittently, have gas to sell. Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it. The Government can hardly force someone to contract to stand by, ever ready to fill fluctuating demands of dealers who will not in turn undertake to buy from that supplier all their requirements. And it is important to the driving public to be able to rely on retailers to have gas to retail. It is equally important that the wholesaler have some incentive to carry the stocks and have the transport facilities to make the irregular deliveries caused by varied consumer demands.

It may be that the Government, if required to do so, could prove that this is a bad system and an illegal one. It may be that the defendant, if permitted to do so, can prove that it is, in its overall aspects, a good system and within the law. But on the present record the Government has not made a case.[1]

If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing. That, insofar as I am permitted by the record to learn the facts, appears to be the case before us. I would reverse.

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[1] The Government can derive no comfort for this sort of thing from *International Salt Co. v. United States,* 332 U. S. 392. There the defendant started with a patent monopoly of the machine for utilization of its product. The customers, canners, were in effect the ultimate consumers of salt as such. But they could get the advantages of the invention only if they tied themselves to use no other salt therein.

[¶ 62,433] **Fred Martin and Max Lanier v. National League Baseball Club.**

In the United States Court of Appeals for the Second Circuit. No. 259, October Term, 1948. Docket No. 21340. Argued May 4, 1949. Decided June 2, 1949.

Appeal from an order of the District Court for the Southern District of New York, denying the plaintiffs' motion to restrain the defendants, *pendente lite,* from continuing them on the list of "suspended" and "ineligible" baseball players, and for other relief.

Sherman Antitrust Act

Organized Baseball—Failure To Establish Jurisdiction—Television and Radio Allegation.—The Court refused to reverse a discretionary order which denied two baseball players' motion to restrain a baseball commissioner and league clubs from continuing them on a list of suspended and ineligible players. Since the extent of radio broadcasting and television in the baseball business did not appear in the record the Court held that the bare allegation did not support the jurisdiction of the Court. No ruling was made as to whether the "reserve clause" violated the Antitrust Acts.

See the Sherman Act annotations, Vol. 1, ¶ 1650.275.

Affirming the decision of the District Court for the Southern District of New York, reported at ¶ 62,397.

For the appellants: John L. Flynn, New York, New York.

For the appellees: Mark F. Hughes, New York, New York.

[*Review of Facts*]

L. HAND, Circuit Judge: This is an appeal from an order denying an injunction, *pendente lite,* in an action under the Anti-Trust Acts to restore the plaintiffs' to their privileges as baseball players and for damages for their exclusion from "organized baseball." It is a sequel of our decision in *Gardella v. Chandler,** in which a majority of the court held that the complaint set out a claim under the Anti-Trust Acts against the defendants in that action, who together with others are defendants in this. The plaintiffs in the case at bar moved for an injunction, *pendente lite,* to compel the defendants to take them off the "suspended" list, and to restore them to their former position as "eligible" baseball players, freed from the "reserve clause" contained in contracts under which they had been employed until 1946 when they accepted engagements elsewhere. The complaint alleged that the defendants, who are the owners and officers of the "Major Leagues" in baseball, regularly broadcast the games play by play to distant audiences by radio and television; but neither in the complaint nor in any supporting affidavits is it alleged how great a part these activities constitute, either absolutely or proportionately to the total activities or to the income of the business. By the "reserve clause" a player promises that "while under contract or reservation he will not play baseball * * * otherwise than for the Club or a Club assignee"—4(a)— and that "on or before February 15 * * * of the year following the last written notice to the player * * * the Club or any assignee hereof may renew this contract for the term of that year" at a salary agreed upon, "or in default of agreement the Player will accept such salary rate as the Club may fix, or else he will not play baseball otherwise than for the Club or for an assignee thereof." The club is given the privilege of terminating the contract upon ten days notice, so that in effect the player agrees to an indefinite employment at any salary—after the first year —which the club may fix, subject to discharge at the club's pleasure. Although the complaint and the affidavits alleged generally that the defendants had a monopoly of the whole business of "organized baseball," this was denied and stands unproved, save as we could take judicial notice of it, which we cannot.

[*Three Grounds of Decision In Court Below*]

The plaintiffs during 1946 were players with the St. Louis team under contracts containing the "reserve clause"; but, finding better pay elsewhere, they joined Mexican teams. Whereupon the defendants, acting for the "Major Leagues" and for the "Minor

* 172 Fed. (2d) 403.

Leagues" (59 other teams, affiliated with them), "suspended" them for five years, under the sanction that no players in the "Major Leagues" or the "Minor Leagues" are allowed to play on any team with a "suspended" player. The plaintiffs allege that this has substantially excluded them from their calling by confining them to non-professional, or "semi-professional" teams. The defendants counter by alleging that the "reserve clause" was "indispensable" to the conduct of professional baseball, and that they had not prevented the plaintiffs from playing on any teams except those of the "Major" and "Minor" leagues. The judge denied the motion on three grounds. First he held that the injunction would "disturb the status quo" by restoring the plaintiffs to positions which they had voluntarily resigned three years before; second, he held that their rights depended upon disputed questions of fact and law; third, he held that they had an adequate remedy at law in the recovery of damages.

[*Second Ground Considered*]

Of these three grounds we find it necessary to consider only the second. All members of the court in *Gardella v. Chandler, supra,** held that, if the facts alleged in the complaint, which was all that was before us, had been the same as in *Federal Baseball Club v. National League,*** it would have been our duty to follow that decision, and to hold that the defendants were not engaged in interstate commerce. Judge Chase held that that decision was authoritative in spite of the new facts alleged in the complaint. Judge Frank and I thought otherwise, although we did so for not quite the same reasons. We both thought that radio broadcasting from the "ball-parks" of narratives of the games play by play, and projecting the actual scene by television, might make the defendants' activities interstate commerce, but Judge Frank thought that it was necessary to look only at the absolute extent of the radio broadcasting and television. If that was substantial, it colored the sum total of the activities and made the business interstate, regardless of the proportion which it bore to the whole. I thought that there had been some interstate activities in the *Federal Baseball Club v. National League, supra,* but that the court did not regard them as enough to make the business interstate. It seemed to me that it was a question of the proportion of the interstate activities to the whole business, and that the new activities of radio broadcasting and television should be added to the earlier interstate activities, and the sum should be compared with the business as a whole. So far as concerns the present record, it makes no difference which of us was right, for it does not appear what is the extent of the radio broadcasting or the television, either absolutely, or proportionately. We are all agreed that the bare allegation in a complaint that the defendants make contracts with broadcasting and television companies will not support the jurisdiction of the court.

[*Validity of Reserve Clause Not Decided*]

Apart from the question of jurisdiction, we are not prepared to say that, on the record now before us, the "reserve clause" violates the Anti-Trust Acts. Such a determination may involve consideration, among other things, of the needs and conduct of the business as a whole. We do not mean that it would not be otherwise, if the record showed, with enough certainty to support a preliminary injunction, that the defendants have established a monopoly of the baseball business, and that the "reserve clause" is a means of maintaining it. If it be established that they do have such a substantial monopoly, the "reserve clause" will take on a different face, as to which nothing we say now must be understood to express any opinion.

[*Order Affirmed*]

For the foregoing reasons, we hold, not only that we should not reverse what was in any event a discretionary order, but that the judge came to the only conclusion legally open to him on the record. It would, however, seem highly desirable that the cause should be preferred, and that it should be brought to trial as soon as possible.

Order affirmed.

* 172 Fed. (2d) 403.
** 259 U. S. 200.

[¶ 62,434] Daniel Gardella v. Albert B. Chandler, et al.

In the United States Circuit Court of Appeals for the Second Circuit. No. 266, October Term, 1948. Docket No. 21358. Argued May 5, 1949. Decided June 2, 1949.

Appeal from an order of the District Court for the Southern District of New York, denying the plaintiffs' motion to restrain the defendants, *pendente lite,* from continuing them on the list of "suspended" and "ineligible" baseball players, and for other relief.

Sherman Antitrust Act

Organized Baseball—Failure to Establish Jurisdiction—Television and Radio Allegation.—Refusal of temporary injunction affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1021.539, 1650.275.

Affirming the decision of the District Court for the Southern District of New York, reported at ¶ 62,412.

For the appellant: Frederic A. Johnson, New York, New York.

For the appellees: Mark F. Hughes; Willkie, Owen, Farr, Gallagher & Walton, New York, New York.

PER CURIAM: Affirmed on the authority of *Fred Martin and Max Lanier v. National League Baseball Club* handed down herewith.

[¶ 62,435] Calvert Distillers Corp. v. Charles J. Goldman, a sole trader d/b/a C. J. Goldman Liquor Shop.

In the Wisconsin Supreme Court. August Term 1948. No. 209. June 7, 1949.

Appeal from an order of the circuit court for Milwaukee County: Daniel W. Sullivan, Circuit Judge. Affirmed.

Wisconsin Fair Trade Act

Fair Traded Liquor—Reductions in Established Prices—Goods Acquired Prior to Notice.—An order granting a temporary injunction which enjoined a retailer from selling liquor below prices set forth in a distributor's latest price list, pending final determination of an action in which a distributor alleged violations of fair trade contracts, was affirmed. It was held that the allegations were made with sufficient positiveness to sustain the injunction and that there was no abuse of discretion accompanying its issue. The Court held that the non-contracting retailer was bound to sell at prices established by fair trade agreements even though the goods, covered therein, were purchased before receiving notice of the contracts.

See the Wisconsin Fair Trade Act annotations, Vol. 2, ¶ 8944, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7292.

For the appellant: Fred R. Wright of Milwaukee, Wisconsin.

For the respondent: Quarles, Spence and Quarles, Milwaukee, Wisconsin.

[*Review of Facts and Record*]

This action was commenced on November 19th, 1948, by the plaintiff Calvert Distillers Corporation, to enjoin the defendant Charles J. Goodman from violating the provisions of certain so-called Wisconsin Fair Trade Act contracts and to recover damages sustained by the plaintiff by reason of such violations. The order in question was entered on December 13, 1948. Paragraphs 1 and 2 of the plaintiff's complaint relate to the residence and status of the parties. Paragraphs 3, 4, 5, 6, 7, and 8 are set out in the margin.*

* "3. That the practice whereby retailers of liquor distributed by the plaintiff reduce the resale prices of such liquors is injurious to the good will of the plaintiff.

"4. That prior to November 15, 1940, plaintiff, pursuant to the provisions of Section 133.25 of the Wisconsin Statutes, began the practice of selling its products, including those hereafter

Upon the summons, the verified complaint and the affidavit of Alfred B. Chandler, state manager of the plaintiff, an order was issued on November 19, 1948, requiring the defendant to show cause why the court should not grant a temporary injunction restraining the defendant, his servants, employees and attorneys, pending the final hearing of this cause, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail any of plaintiff's products at prices less than those fixed by plaintiff in its latest consumer's price list. It was further ordered that until the determination of this order to show cause "the defendant, his servants, employes and attorneys, be and they are hereby restrained and enjoined from advertising, offering for sale, or selling any of said products at prices less than those set forth in said latest price list." This order to show cause was returnable November 26, 1948, at two o'clock P. M. The papers upon which the order to show cause was issued were filed in the circuit court of Milwaukee county November 23, 1948. The order to show cause was accompanied by the customary bond in the sum of $3,000.

Upon motion of the defendant the court issued an order requiring the plaintiff to show cause on November 22, 1948, at three o'clock P. M., why the restraining order issued November 19, 1948, should not be vacated and set aside. The motion of the defendant to vacate the restraining order of November 19, 1948, and the order to show cause of the plaintiff why a temporary injunction should not be granted herein, came on for hearing before the court on the 23rd day of November, 1948. On the 13th day of December the court entered an order enjoining "the defendant, his attorneys, agents, servants and employes temporarily and during the pendency of this suit and until judgment is entered herein from selling, offering for sale, and advertising any products of the plaintiff at prices below those set forth by plaintiff in its latest price lists," and the court further ordered that defendant's motion to vacate and set aside the restraining order of November 19, 1948, be denied. From the order entered on the 13th day of December, 1948, the defendant appeals. Further facts will be stated in the opinion.

[*Nature of Appeal*]

ROSENBERRY, C. J.: While the appeal is from the injunction *pendente lite* of December 13, 1948, and from that part of the order which denied defendant's motion to vacate the *ex parte* restraining order issued on November 19, 1948, the questions for decision are really presented by the appeal from that part of the order of December 13, 1948, which granted a temporary injunction pending the final determination of the action. The restraining order of November 19, 1948 was by its terms effective only until the determination of the order of November 19, 1948. A further order having been

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mentioned, exclusively under contracts known and referred to as 'Fair Trade Contracts,' and that by virtue of said contracts it was agreed that said products would not be sold at prices below those periodically set out in plaintiff's price lists.

"5. That defendant, as plaintiff is informed and believes, on and about November 15, 1940, and on various occasions thereafter, was advised that said products were to be sold at retail only in accordance with said Fair Trade Contracts and in accordance only with plaintiff's consumer's price lists; that defendant has secured substantial quantities of said branded and trade-marked liquors since being advised that said products were to be sold only in accordance with said Fair Trade Contracts and only in accordance with plaintiff's consumer's price lists.

"6. That defendant has wilfully and knowingly advertised, by advertisements appearing in the public press and otherwise, and he and his agents and servants have wilfully and knowingly offered for sale and have sold plaintiff's said products at prices less than those set forth in its latest consumer's price list; and that in an advertisement which appeared in the Milwaukee Journal under the date of November 18, 1948, and in a similar advertisement which appeared in the Milwaukee Sentinel under the date of November 19, 1948, defendant advertised one of plaintiff's said liquors, to-wit, Calvert Reserve, at the price of $3.29 a fifth, and also set forth that the regular price thereof was $4.10, which said regular price of $4.10 was in fact the minimum price for the sale of a fifth of said liquor in accordance with plaintiff's latest consumer's price list.

"7. That plaintiff has protested to defendant against said price cutting and said other improper and unlawful practices; that defendant nevertheless has continued with knowledge to offer for sale and to sell said branded liquors at prices less than those set forth in plaintiff's latest price list and has advised plaintiff that he will continue to do so.

"8. That each and all of said products are in fair and open competition with commodities of the same general class produced by others; that plaintiff has sustained substantial financial damage through the loss of good will among its customers, including retailers who purchased some of its products from distributors, by reason of defendant's said practices; that defendant threatens to continue said practices; and that plaintiff's remedy at law is inadequate, since its damage cannot be accurately computed."

entered on December 13th, the order of November 19th was superceded and no longer of any force or effect. *Ritholz v. Ammon* (1942), 240 Wis. 578, 4 N. W. (2d) 173. The answer not having been served until December 13, 1948, and not filed until December 14, 1948, it was not before the court on the 23rd day of November, 1948, when the hearing was had. The matter therefore stands upon the complaint and the affidavits filed in support of and opposing the motion heard on November 23, 1948.

[*Defendant's Argument*]

The appellant contends that the trial court abused its discretion in granting the injunction *pendente lite.* Appellant argues that the restraining order cannot be sustained because the essential allegations of the complaint must be positively stated. The material parts of the complaint have already been set out.

[*Allegations Positively Stated*]

It appears from paragraph 4 that some time prior to November 15, 1940, the plaintiff began the practice of selling its products, including those hereafter mentioned, exclusively under contracts known and referred to as Fair Trade Contracts, and that by virtue of said contracts it was agreed that said products would not be sold at prices below those periodically set out in plaintiff's consumer's price list. We are at a loss to understand how allegations could be more positively and clearly stated.

In paragraph 6 of the complaint it is alleged that the defendant has "wilfully and knowingly advertised . . . and wilfully and knowingly offered for sale and have sold plaintiff's said products at prices less than those set forth in its (plaintiff's) latest consumer's price list."

These two allegations state the essence of a cause of action under the Fair Trade Contracts statute. The verification of the complaint sets out that Alfred B. Chandler is Wisconsin State Manager of the plaintiff, and that

> "he was such agent in relation to the business out of which the cause of action set forth in plaintiff's complaint in this action arose; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and that as to such matters he believes it to be true."

The allegations of paragraphs 4 and 6 of the complaint being positively stated, the exception found in the verification does not apply. It is true that the allegations of paragraph 5 are upon information and belief and could hardly be made otherwise. It is considered that the allegations of the complaint are made with sufficient positiveness to sustain the restraining order and the temporary injunction.

In response to the motion of the plaintiff to enter a temporary injunction each of the parties filed affidavits in support of their respective positions. In addition to the allegations contained in the complaint, affidavits on behalf of the plaintiff set forth that the defendant had notice of the fact that plaintiff's products were sold under the Fair Trade Act. The defendant filed an affidavit by himself in which he denied that he had such notice. It would extend this opinion to a great length to set out the substantial parts of these affidavits. It is clear from an examination of the record that the affidavits raised a question as to credibility of the affiants. The trial court found that the defendant had such notice, and there are abundant facts stated in the affidavits to support that finding.

[*New Contention Raised*]

The appellant further contends that the order appealed from granting an injunction *pendente lite* specified a restraint which is in excess of the statutory authority to contract. Sec. 133.25, subsec. (4) and (5) provided:

> "(4) Every contract containing the provisions referred to in sub-sec. (3) shall include the provision that such commodity may be resold without reference to such contract in the following cases:
>
> "(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing delivering any such commodity.
>
> "(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
>
> "(5) Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract referred to in subsection (3), whether or not the person so advertising, offering for sale or selling is a party to such contract, is unfair compe-

tition and is actionable at the suit of any person damaged thereby."

This contention was first raised in this case in the appellant's briefs on appeal. It was not brought to the attention of the trial court in any way. If and when the defendant intends to avail himself of the provisions contained in (a) and (b) he should apply to the trial court for a modification of the temporary injunction.

[*Notice*]

The appellant further contends that the plaintiff's products in possession of the appellant were purchased by him prior to his receiving notice that they were sold pursuant to the terms of the Fair Trade Act, and therefore sec. 133.25 does not apply. We fail to find any provision in the Fair Trade Act which sustains appellant's contention. It appears, however, from the affidavits that the defendant had notice on November 19, 1948, and thereafter continued to make sales in violation of the Fair Trade Act.

The only provision in the Fair Trade Act relating to notice to an offending retailer is that he is guilty of unfair trade competition which is actionable only if the sales are made wilfully and knowingly. The defendant did not challenge the sufficiency of the complaint. While the court did not make formal findings it must have considered that for the purpose of deciding the motion the plaintiff had at least made a *prima facie* case of liability of the defendant under the Fair Trade Act, and therefore had sold plaintiff's products in violation of the terms of the Fair Trade Act knowingly and wilfully.

[*No Abuse of Discretion*]

Upon the whole record it is considered that the trial court did not abuse its discretion in making the order of December 13, 1948, granting the plaintiff a temporary injunction.

By the Court.—The order appealed from is affirmed.

[¶ 62,436] National Association of Real Estate Boards, et al. v. United States.

In the United States Court of Appeals for the District of Columbia Circuit. No. 9956. Argued May 17, 1949. Decided June 13, 1949.

Special Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia).

Sherman Antitrust Act

Real Estate Boards—Order Denying Summary Judgment Not Final—Appeal from Final Order Only.—An appeal brought by real estate boards and individuals named in a civil action brought by the government to enjoin antitrust violations was dismissed for lack of jurisdiction since the Expediting Act made specific provision for an appeal from a final decree of a district court to the Supreme Court rather than to the Court of Appeal and the intention of that Act was held to preclude an appeal to either court in the case of an interlocutory decree. An order denying a motion for summary judgment is not final and therefore not appealable.

See the Sherman Act annotations, Vol. 1, ¶ 1610.612.

For appellant Washington Real Estate Board and individual appellants other than Nelson and Smith: William E. Leahy, with whom William J. Hughes, Jr., and Ben Ivan Melnicoff were on the brief, all of Washington, District of Columbia.

For appellants National Association of Real Estate Boards and Herbert U. Nelson: Roger J. Whiteford, John J. Wilson and Jo V. Morgan, Jr., were on the brief, all of Washington, District of Columbia.

For appellant J. Hawley Smith: Walter M. Bastian and Archie K. Shipe, were on the brief, all of Washington, District of Columbia.

For appellee: Victor H. Kramer, Attorney, Department of Justice, with whom Herbert A. Bergson, Assistant Attorney General, and C. Heyward Belser, Attorney, Department of Justice were on the brief.

Before Edgerton and Proctor, JJ., and H. Church Ford, District Judge sitting by designation.

Edgerton, J.: The United States brought this civil action for an injunction under the Sherman Act, 26 Stat. 209, § 4, as amended, 15 U. S. C. § 4, against the National Association of Real Estate Boards, the Washington Real Estate Board, and certain

individuals. The defendants moved for summary judgment on the theory of *res judicata* because they were acquitted in a criminal prosecution based on the same facts. The District Court denied the motion.

The government moves to dismiss this special appeal for lack of jurisdiction. This motion must be granted. The Expediting Act, 32 Stat. 823, § 2, as amended, 15 U. S. C. § 29, provides that in a suit in equity brought by the United States under the Sherman Act "an appeal from the final decree of the district court will lie only to the Supreme Court . . ." In *United States v. California Cooperative Canneries,* a Sherman Act case from this court, the Supreme Court said: "the Canneries contends that the Court of Appeals had jurisdiction of the appeal from the order denying leave to intervene. It argues that the appeal was not within the purview of § 2 of the Expediting Act, because it was not 'an appeal from the final decree'; . . . and because, under § 226 of the District of Columbia Code, the Court of Appeals has, in its discretion, jurisdiction of an appeal from interlocutory orders. The contention is unsound. . . . Congress limited the right of review to an appeal from the decree which disposed of all matters . . . and it precluded the possibility of an appeal to either court from an interlocutory decree. . . . The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals . . ." 279 U. S. 553, 557-559. Cf. *Allen Calculators, Inc. v. National Cash Register Co.,* 322 U. S. 137, 142; *United States Alkali Export Ass'n, Inc. v. United States,* 325 U. S. 196, 202, 203. Section 226 of the District of Columbia Code of 1901, to which the Supreme Court referred in the *Canneries* case, and section 17-101 of the 1940 edition of the Code were substantially identical.

Appeal dismissed.

[¶ 62,437] Monticello Tobacco Company, Inc. v. The American Tobacco Company, et al.

In the United States District Court for the Southern District of New York. Civil 37-512. June 2, 1949.

Sherman Antitrust Act

Tobacco and Tobacco Products Industry—Summary Judgment Denied.—A tobacco company was held entitled to prove at trial that tobacco distributors acquired power to exclude it from the trade, regardless of how unlikely it may appear, on affidavit, that it will succeed. A motion for summary judgment was denied since the mover was not entitled to it as a matter of law.

See the Sherman Act annotations, Vol. 1, ¶ 1640.652.

For the plaintiff: Harry Kalman, New York, New York.

For the defendants: Chadbourne, Wallace, Park & Whiteside, New York, New York.

For the defendant Liggett & Myers Tobacco Co.: Webster, Sheffield & Horan, New York, New York.

[*Matter of Law*]

RIFKIND, D. J.: In passing on motions for summary judgment it is not the function of the court to weigh the probability of victory, upon the trial, for the moving party. Such a motion can not be granted even when the probability approaches certainty. The motion is not to be granted unless the moving party is entitled to a judgment as a matter of law.

[*Supporting Authorities*]

The motion in the instant case does not meet that test. I have not made an exhaustive analysis of the *Lexington* judgment. It probably establishes that the defendants violated the antitrust laws with respect to trade in tobacco or tobacco products. The opinion of the Supreme Court, *American Tobacco Co. v. U. S.,* 1946, 328 U. S. 781, indicates that the conviction established that the defendants jointly acquired the power to exclude actual or potential competitors from the trade and intended to exercise such powers. The plaintiff herein proposes to prove that they exercised that power to exclude it from the trade in tobacco products. It expects to prove the causal relation between the violation and its injury out of the mouths of tobacco distributors. To that opportunity it is entitled, cf. *Dixon v. American Tel. & Tel. Co.,* C. C. A. 2, 1947, 159 F. 2d 863, regardless of how unlikely it may appear, on affidavit, that it will succeed. *Bozant v. Bank of New York,* C. C. A. 2, 1946, 156 F. 2d 787, 790.

Motion denied.

[¶ 62,438] **Magnetic Engineering and Manufacturing Company v. Dings Magnetic Separator Company.**

In the United States District Court for the Southern District of New York. Civ. 49-633. June 15, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Patent Infringement—Treble Damages—Change of Venue.—In an action brought by an engineering company against a Wisconsin apparatus manufacturer claiming a declaratory judgment, with incidental injunctive relief, adjudging the invalidity and non infringement of patents of the latter company and for treble damages as a result of alleged illegal price fixing and monopoly in restraint of trade, the following procedural orders were made: an order directing amendment of the complaint to separate the causes of action into two counts, an order requiring more definite statement of the patents, an order transferring the action to a Wisconsin court. It was held that the Wisconsin corporation whose agent occupied an office in New York from where he solicited business and forwarded orders to his Milwaukee principal, was "doing business" in New York and could be sued there. The cause was transferred to Wisconsin for the greater convenience of the company whose books, records and properties were situated there. The injunction was denied because, in the opinion of the Court, there was nothing to justify the conclusion that the letters sent by the Wisconsin manufacturer to the customers of the complaining firm, informing them of alleged patent violations, were sent out in bad faith or otherwise than as notices of infringement as provided for in the patent laws.

See the Sherman Act annotations, Vol. 1, ¶ 1210.315, 1640.291, 1640.598, 1640.605, 1640.621, 1640.689, and the Clayton Act annotations, Vol. 1, ¶ 2032.55.

For the plaintiff: Robert E. Burns, Asbury S. Edmonds, of Counsel, both of New York, New York.

For the defendant: Ward, Crosby & Neal, Joshua Ward, of Counsel, New York, New York.

Opinion

HULBERT, D. J.: There are numerous motions by both plaintiff and defendant in this action now pending before the Court. Plaintiff moves to (1) amend the complaint, and (2) secure a temporary injunction. Defendant moves (1) for a transfer of the action under 28 U. S. C. sec. 1406 for improper venue, (2) for transfer because of *forum non conveniens* under 28 U. S. C. sec. 1404, (3) to dismiss a portion of the complaint for failure to state a claim on which relief can be granted, and (4) for a more definite statement as to certain matters in the complaint. The motions will be considered and disposed of separately.

Motion To Amend Complaint

Plaintiff seeks to amend paragraph 11 of its complaint to read as set forth in the notice of motion. Defendant objects to the amendment on the ground that it would not alter the questions of improper venue raised by defendant's motions and also that the complaint as amended would still fail to set forth sufficient facts to give rise to a claim under the anti-trust laws. Defendant, however, cannot be prejudiced by the amendment. The action is not yet ready for trial, the complaint having only been filed on April 6, 1949. Furthermore, on the argument of the motions, defendant urged its motion to dismiss on the basis of both the original and proposed amended complaint. The motion to amend is granted, and the Court will consider the complaint as amended in disposing of the remaining motions.

Motion for More Definite Statement

The complaint, in form, sets forth one count. The prayer for relief, asks for the following: a declaratory judgment of non-infringement of defendant's patents, a declaration of the invalidity of defendant's patents, a judgment for $750,000. which is treble the damages alleged in paragraph 11 of the amended complaint, and an injunction restraining defendant from interfering with plaintiff's business or customers. In essence, the complaint sets forth two claims: (1) for a declaratory judgment, with incidental

injunctive relief, adjudging the invalidity and non-infringement of defendant's patents, and (2) for treble damages under the anti-trust laws because of defendant's alleged illegal price fixing and monopoly in restraint of trade. As a matter of fact, plaintiff in its memorandum on those motions admits that the action seeks these forms of relief. Therefore, it is apparent that the complaint would be subject to a motion under Rule 10(b) F. R. C. P. to separately state and number the counts. We will consider the motion for a more definite statement to be such.

Plaintiff asserts that defendant's motion to dismiss certain paragraphs of the complaint is "unique", but the reason for defendant's motion taking that form is plaintiff's failure to separately state and number its claims. Thus defendant was obliged to attack those paragraphs which it felt asserted the faulty claims.

Furthermore, the Court feels that the complaint, even as amended in paragraph 11, does not adequately set forth plaintiff's claim under the anti-trust laws. When plaintiff amends its complaint to separately state and number the counts, it is directed to set forth a more definite statement as to item 5(b) in defendant's notice of motion. As to item 5(a), plaintiff is to make a more definite statement by identifying by name and date all prior patents and publications to be relied upon.

Motion for more definite statement granted to extent indicated above, and plaintiff is directed to serve its amended complaint within 60 days after entry of an order hereon.

Motion To Dismiss

Because of the disposition of the motion for a more definite statement, the motion to dismiss is denied, without prejudice to a renewal thereof after the amended complaint is served.

Motion To Transfer

Defendant seeks the transfer of this action to the District Court for the Eastern District of Wisconsin on the ground that the venue is presently laid in the wrong District; that the Court lacks jurisdiction over the defendant in this District, and that defendant has not been properly served with process here. As an alternative form of relief, defendant seeks a transfer of the action on grounds of *forum non conveniens* under 28 U. S. C. sec. 1404(a).

Defendant, a Wisconsin corporation, is not registered to do business in this District, and asserts that it is not doing business here.

A few preliminary observations are in order before considering the merits of the motions. That the doctrine of *forum non conveniens* as codified in revised Title 28 section 1404(a) applies to actions under the anti-trust laws has recently been decided in the affirmative. *U. S. v. National City Lines,* decided by the Supreme Court on May 31, 1949. The Court will consider both motions addressed to venue at the same time because the question of corporate "presence" (raised by defendant in motion under sec. 1406) is very closely allied to, and at times may be coincidental with, the doctrine of *forum non conveniens. Latimer v. S/A Industrias Reunidas F. Matarazzo,* docket No. 21301, decided June 8, 1949 (C. A. 2).

For the most part, plaintiff and defendant agree on the facts relevant to these motions. One Herbert F. Motz has secured office space at 50 Church Street, New York, N. Y. for the purpose of soliciting customers for apparatus manufactured by defendant. By the terms of his arrangements with defendant, Motz is free to solicit business for other manufacturers as well as defendant. Prior to Motz' connection with defendant early in February 1949, defendant had another representative in this district, George I. Thatcher, who also had offices at 50 Church Street. Letters attached to affidavits in opposition to these motions indicate that Thatcher was connected with defendant as far back as February 1936.

Motz receives compensation from defendant in the form of commissions on orders solicited; Motz' operating expenses are paid by himself, although defendant at times advances funds against future commissions "to defray operating and living expenses".

Motz has the name "Dings Magnetic Separator Company" painted on the door of his office, and also had a telephone installed and listed in the telephone book under the company's name, with the company's acquiescence. Motz' affidavit sets

forth the manner of his doing business as follows:

"When a prospective buyer of Dings Company equipment comes to my attention, it is my practice to submit to such buyer a proposal in accordance with data furnished to me by said Company, which proposal gives specifications of the equipment which I believe the customer desires and a proposed price therefor which is specified as being subject to change without notice. I send copies of all such proposals which I submit to prospective buyers to the Dings Company, Milwaukee, Wisconsin for their information and approval, the same all being subject to said Company's approval, rejection or modification in Milwaukee. The practice then is for the buyers to mail to me on their own stationery or order blanks orders for the equipment which they desire, and it is then my practice to address informal letters of thanks to the customers, and to advise them that I have forwarded the order to the factory of the Dings Company, at Milwaukee, Wisconsin."

From that point on, Motz has nothing further to do with the processing, filling, or collection of payment for, the orders.

Other factors bearing significantly on this question are summarized below:

Communications between Motz in New York and defendant in Milwaukee were written on paper entitled "Inter-Office Correspondence". In advertising literature proposed to be sent out by defendant, reference to Motz is made as "our new Sales Manager in your area". Letterheads on stationery used by Motz to write to prospective customers contain the company's name and Milwaukee address, and also the notation, "New York Office" followed by the New York address and telephone number. A catalogue of defendant lists the addresses of its branch offices including the New York office.

Venue of the anti-trust claim is laid under sections 4 and 12 of the Clayton Act, 15 U. S. C. A. sections 15, 22, under which venue is proper in any district in which a defendant resides, is found, or has an agent, and for corporate defendnats this includes any district in which it transacts business; venue of the declaratory judgment count is assumed to be under the general venue statute, 28 U. S. C. section 1391(c), under which a corporation may be sued in the district in which it is incorporated, or licensed to do business or is doing business.

Under the facts as detailed above, it is apparent that defendant comes within the literal meaning of the venue statutes. That Motz is defendant's agent can hardly be denied; and the continuous solicitation of business was itself "doing business" within the meaning of the venue statute. *Kilpatrick v. Texas & P. Ry. Co.*, 166 F. 2d 788 (C. A. 2). cf. also *International Shoe Co. v. Washington*, 326 U. S. 310 in which the facts were substantially similar to those herein, with one exception (discussed below).

Although the defendant comes within the literal language of the venue statutes, it still remains to be determined whether this forum would be so inconvenient to defendant as to trespass on its right of due process. *Latimer v. Matarazzo, supra.* If the subject matter of the action arose out of defendant's activities in this district, which is the distinguishing factor in the *International Shoe Company* case, the question of convenience would hardly detain us. But nowhere in either the complaint or plaintiff's affidavits is this fact alleged.

It is uncontradicted that no director, officer or employee of defendant, other than Motz, is located in this district. Defendant owns no property here (the office equipment in New York was supplied by Motz).

The complaint does not allege the other parties who entered into the alleged illegal price fixing agreements with defendant. However, from an affidavit submitted by plaintiff it is asserted that one James J. Ferris attended meetings in Milwaukee, Wisconsin, between defendant and two other Wisconsin corporations at which the alleged agreements were made. Presumably the testimony of the people who attended these meetings, named in the affidavit, will be necessary in defense of the claim under the anti-trust laws. Furthermore, all defendant's officers, books and records are located in Wisconsin and would be more readily available for inspection and examination there than in this district.

In opposition to the motion to transfer, plaintiff urges that a large percentage of the installations which have been claimed to infringe defendant's patents are located nearer to this district than to the Eastern

District of Wisconsin; but none of them are alleged to be within this district. Thus, this fact does not aid plaintiff. Plaintiff is also not located within this district. One of plaintiff's customers who has been allegedly threatened by defendant has its headquarters in New York City, and four expert witnesses for plaintiff "reside within a radius of 35 miles of New York City." The residence of expert witnesses cannot be considered as controlling, or even of great importance, in determining questions of *forum non conveniens. Fifth & Walnut Inc. v. Loew's Inc.,* 76 F. Supp. 64, 67 (S. D. N. Y. 1948).

Thus, the convenience of plaintiff in having the action tried here is reduced to the convenience of one witness, a customer of plaintiff's. Certainly the convenience of defendant and its witnesses, and the convenience of the Court with its heavily overburdened calendars greatly outweigh this convenience to plaintiff in this action which did not arise out of defendant's activity in this district. *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501.

For all of the foregoing reasons the Court concludes that there does not exist here that second element in "presence" necessary to subject the defendant corporation to suit here in this action. cf. *Hutchinson v. Chase & Gilbert Inc.,* 45 F. 2d 139 (C. A. 2). The motions to transfer are granted and the whole action (both the declaratory judgment anti-trust claims) will be transferred to the Eastern District of Wisconsin.

Motion for Temporary Injunction

Plaintiff seeks an injunction *pendente lite* restraining defendant from interfering with plaintiff's customers by writing letters to them threatening them with suit on account of alleged use or infringement of any of the patents involved in this suit. The basis of the motion is a series of letters sent out by defendant, one to plaintiff, and others to customers of plaintiff informing them of alleged violations of defendant's patent rights. There is nothing in the moving papers to justify a conclusion that these letters were sent out in bad faith or otherwise than as notices of infrigement as provided for in the patent laws, 35 U. S. C. A. sec. 49. Since defendant is specifically permitted to send out such notices, in the absence of a showing of bad faith the motion must be denied. *Art Metal Works Inc. v. Auto Match Corp.,* 36 F. 2d 954 (S. D. N. Y., 1930); cf. also *Zephyr American Corp. v. Bates Mfg. Co.,* 59 F. Supp. 573 (D. N. J., 1945).

Settle orders on notice.

[¶ 62,439] District of Columbia Citizen Publishing Co., et al. v. Merchants and Manufacturers Ass'n, Inc., et al.

In the United States District Court for the District of Columbia. Civil Action No. 2218-48. April 30, 1949.

Sherman Antitrust Act

Agreement To Withdraw Advertising Business—Concerted Action By Trade Association Members—Treble Damage Action Dismissed.—A treble damage action brought by a publisher of a monthly newspaper against a merchants' and manufacturers' association was dismissed for failure to state a cause of action. The concerted action of the advertising committee in refusing to approve of its members' advertising in the paper did not offend the antitrust laws. Disapproval of the paper resulted in a decrease in its income, but it was found that the committee's lawful function did not affect interstate commerce or create an unreasonable restraint of trade.

See the Sherman Act annotations, Vol. 1, ¶ 1230.101, 1640.121, 1640.619.

For the plaintiffs: Eugene E. Ditto, Harold L. Schilz, Washington, D. C.

For the defendants Merchants & Manufacturers Ass'n, Inc., and The Hecht Company: John J. Carmody, Jo V. Morgan, Washington, D. C.

For the defendants Kann, Inc. & A. Kahn, Inc., and Young Men's Shop: Leon Tobriner, Gilbert Hahn, Washington, D. C.

For the defendant Woodward & Lothrop: Hogan and Hartson (Joseph J. Smith, Jr.), Washington, D. C.

Opinion

BEN MOORE, District Judge: Plaintiffs have brought an action against defendants for treble damages, alleging violation of Sections 1, 2 and 3 of the Sherman Anti-trust Act, 15 U. S. C. A. § 1 *et seq.*, and consequent injury to plaintiffs.

Motions to dismiss filed by each of the defendants are pending, as well as a motion for summary judgment filed by plaintiffs. Argument on all these motions was heard at the same time by the Court. The motions to dismiss are based on numerous grounds, but this opinion will deal only with the first, which is, in each motion, that the complaint fails to state a claim against the respective defendants upon which relief can be granted.

[*Allegations Summarized*]

The substantial allegations of the complaint may be briefly summarized as follows:

Plaintiff District of Columbia Citizen Publishing Company is the publisher of the District of Columbia Citizen, a monthly newspaper with general circulation in the District of Columbia and elsewhere, which derives its income largely from advertising. Plaintiff Paul P. Walsh was for a time the owner and publisher of this newspaper, having transferred his rights therein to the corporate plaintiff in March, 1948.

Defendant Merchants and Manufacturers Association, Inc., is a trade association in the District of Columbia. The other defendants are alleged to be members of this trade association.

The Association maintains a committee on donations and advertising, whose decisions are alleged to control the advertising policy of the members of the Association. This committee is alleged to maintain an approved list of newspapers and publications in which it allows members of the Association to advertise. The members of the Association are alleged to comply with a rule of the Association that they will not advertise in any publication not approved by the committee. Solicitations for advertizing by agents of the District of Columbia Citizen directed to members of the Association have been referred by them to the committee, which, it is alleged, has refused to approve such advertising, and thereafter advertising has been declined by these Association members. The refusal is alleged to be arbitrary and capricious, and for the purpose of injuring and destroying competition, and potential competition of the District of Columbia Citizen with other publications, "and some in which some of the said defendants and co-conspirators have a financial interest."

The District of Columbia Citizen is alleged to be an attractive newspaper comparing favorably in its essentials with any "specific purpose" Tabloid newspaper or trade publication published on a weekly or monthly basis in any comparable metropolitan area. Its advertising is alleged to be well presented, and advertisers are alleged to have expressed satisfaction with its services. Its mail circulation is 15,000 copies, part of which go into interstate commerce; in April, 1948, it distributed 36,000 copies. It is alleged that the circulation would be much larger and more widespread but for the so-called boycotting or blacklisting by defendants, which, it is alleged, has diminished its circulation, impaired its prestige, and caused it heavy financial loss because of its failure to obtain advertising which it would have otherwise obtained.

For the purpose of passing on the motions to dismiss, the foregoing factual allegations of the complaint will be treated as true.

Section 1 of the Sherman Act makes combinations in restraint of interstate commerce unlawful; Section 2 extends the ban to monoplies and attempts to monopolize any part of interstate commerce; and Section 3 makes the prohibitions of Section 1 applicable to commerce in the District of Columbia.

While all monopolies involve restraints of trade, there may be restraints of trade which are not monopolistic. Consideration of this motion, therefore, involves two inquiries; first, whether the allegations, if true, show that the defendants monopolized or attempted to monopolize any part of interstate commerce; and secondly, if not, do they show that defendants combined to restrain trade in the District of Columbia, or in interstate commerce?

[*No Monopoly of Interstate Commerce*]

Obviously, the acts charged to defendants do not tend to create any monopoly of the newspaper publishing business on the part of defendants. They are not engaged in that business. It is alleged that some of them have a financial interest in some other publications; but the extent of this interest is not shown, nor is it alleged that defendants or any of them advertise in these other publications, or that any of them are on the committee's so-called approved list. None of the evil effects which are inseparably connected with monopolies can be reasonably expected to result from the mere agreement of defendants not to advertise in this small monthly newspaper.

Although not alleged, it is a matter of common knowledge that there are in the District of Columbia many large daily newspapers engaged in the dissemination of news and advertising matter to the public. It would strain the imagination to say that the reduction in circulation of a small monthly newspaper such as the District of Columbia Citizen could substantially affect the business of these daily newspapers one way or the other. The only possible monopolistic tendency would be in relation to other publications of similar character to the District of Columbia Citizen; and it is not alleged that defendants are interested in the publication of any such newspapers, or even that any exist.

It is alleged in the complaint that the defendants and nineteen other of the larger and more important retail and department stores in Washington have engaged in wrongful and unlawful attempts to monopolize the circulation of advertising within the District of Columbia and in interstate commerce; but such allegations are clearly without basis in the facts alleged to support the charge. The complaint states that the method employed to effect this monopoly is the boycotting of plaintiffs' newspaper by refusal to advertise in it. There is no allegation that more than twenty-four stores refused to advertise in the District of Columbia Citizen. There is no allegation that the defendants or any of the other nineteen stores attempted to coerce, induce or in any way influence other stores in the placing of advertising in the plaintiffs' newspaper, or any other newspaper in the District of Columbia. The complaint itself refutes this charge in alleging that persons and stores that have placed such advertising have expressed satisfaction. In the absence of any allegation to the contrary, it must be assumed that these satisfied patrons are continuing to place advertising in the paper, without any threat of retaliation by the defendants in this suit. The only thing shown in the complaint in support of the charge of monopolization of advertising, is the mere refusal of approximately twenty-four concerns, out of the thousands of potential advertisers in the city of Washington and elsewhere to advertise in the District of Columbia Citizen. I hardly think that this is sufficient to indicate an attempt to monopolize advertising on the part of the defendants. Moreover, the mere withholding of advertising, without an accompanying intention to place such advertising elswhere, in some publication which would not otherwise have carried it, could have no tendency to create a monopoly.

Viewing all the allegations in their most favorable light from the standpoint of the plaintiffs, no element of monopoly is discernible, or at most it is so slight as to be negligible.

I am therefore of opinion that the complaint does not state any facts which tend to show that the defendants or any of them have monopolized, or attempted to monopolize, or combined to monopolize, any part of interstate commerce.

[*No Unreasonable Restraint Established*]

Whether the complaint shows facts which could warrant a conclusion that defendants have combined to restrain trade is a question which presents more difficulty. It is well settled that in actions of this nature the complaint must be construed with great liberality. However, although plaintiffs have great latitude, it still is necessary, in order successfully to resist a motion to dismiss, that they allege facts sufficient to justify the Court in requiring defendants to answer the complaint.

It has been well said that the end sought by the Sherman Act was: ". . . the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to

the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." *Apex Hosiery Co. v. Leader,* 310 U. S. 469. At another point in the same case Mr. Justice Stone pointed out that it has been "repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law;" and he mentions as such, "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production, and the like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." *Ibid.*

In short, it is the public interest which is protected by the Act. The right of an individual to sue for a private injury is conditioned upon and limited by the presence in the circumstances of a public detriment or injury, without which, although there may exist an actionable wrong, the individuals right to redress cannot be asserted by virtue of the Sherman Act. *Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co.* (C. C. A. 7, 1937) 88 F. (2d) 979, cert. denied 301 U. S. 696; *Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A. 4, 1934) 72 F. (2d) 885; *Shotkin v. General Electric Co.* (C. C. A. 10, Dec. 2, 1948) 171 F. (2d) 236; *Swartz v. Forward Association* (D. Mass., 1941) 41 F. Supp. 294.

It is true that there are certain types of combinations or restraints which are deemed to be illegal *per se* and no detriment to the public need be shown. However, in this type of case the injury to the public is presumed from the very nature of the restraint, even though the proof may be to the contrary. *U. S. v. National Lead Co.* (D. C. N. Y., 1945) 63 F. Supp. 513, affirmed 332 U. S. 319; *U. S. v. Aluminum Co. of America* (C. C. A. 2, 1945) 148 F. (2d) 416.

Trade associations such as the Merchants and Manufacturers Association, Inc., serve a useful purpose in the economic life of any community. Naturally, whatever actions such associations may engage in for the general welfare of their members is concerted action; and it is difficult to imagine any act relating to the general business practices of members of the association which would not in some degree put a restraint upon trade; but a restraint of trade, to be actionable, must be an unreasonable restraint. *Standard Oil Co. of New Jersey, et al. v. The United States,* 221 U. S. 1. *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344; *Sugar Institute, Inc., et al. v. United States,* 297 U. S. 553. It must either be unlawful in itself, or else it must tend naturally to produce one or more of the evils with relation to the public which have already been cited, and which it was the purpose of the Sherman Act to prevent. Aside from such acts, whatever an individual may lawfully do in his dealings with others when acting alone may also be lawfully done by a combination of persons. *Standard Oil Co. of New Jersey, et al. v. United States, supra; United States v. Reading Company,* 226 U. S. 324, 369. It cannot be doubted that a single advertiser has complete liberty of action to decide for himself whether he will or will not place advertising with a particular newspaper publisher. There is nothing unlawful *per se* in the maintenance by a trade association of a committee for the purpose of making decisions for or recommendations to its members with reference to what advertising media may be useful or advantageous. In the absence of facts alleged in the complaint on which to base the conclusion of plaintiffs that the agreement not to advertise in the District of Columbia Citizen was arbitrary and capricious and for the purpose of preventing competition with other publications, the Court must conclude from a consideration of the entire complaint and from general knowledge of the functions of trade associations that the committee was actuated by a proper and lawful purpose; and indeed it is quite natural that merchants in the city of Washington would agree that there is no advantage to them in advertising in a small monthly newspaper such as we have here. The situation is no different from that which would result if the publication denied approval were a theatre program, a city directory, or one of those pamphlets usually found in hotels whose purpose is to apprise guests of current events of interest. Whatever element of restraint of trade may be present in committee disapproval of advertising in such publications is not, in

my opinion, of such nature or degree as to warrant the characterization of unreasonableness.

[*Trade Association's Lawful Function*]

What we have here is simply a case of a trade association, in the exercise of a lawful function and for the benefit of its members, declining as an association to advertise in plaintiffs' newspaper. Plaintiffs may be injured thereby, and the circulation of the newspaper may be seriously impaired and its profits reduced; but in my opinion there does not follow as a natural result any detriment or injury to the public in restriction or suppression of competition, or in any other of the numerous evil results against which protection is afforded by the Sherman Act.

[*No Cause of Action*]

It is my conclusion that the complaint when construed as liberally as it may be for the plaintiffs does not state a cause of action under the Sherman Act. In view of this conclusion, it is unnecessary to deal with any other grounds of the several motions to dismiss, or with plaintiffs' motion for a summary judgment.

Therefore, the several motions to dismiss the complaint will be sustained. An appropriate order may be submitted for entry.

[¶ 62,440] **Isaac Cohen, Individually and Trading as Capital Wholesale Grocery Company, et al. v. Frey and Son, Inc., et al.**

In the Court of Appeals of Maryland. No. 168, October Term, 1948. Filed June 9, 1949. 122 The Daily Record, Baltimore 3, June 22, 1949.

Appeal from the Circuit Court of Baltimore City. W. Conwell Smith, Chief Judge.

Maryland Unfair Sales Act

Wholesale Groceries—Sales Below Cost—Allegations for Injunction.—A decree overruling a demurrer to an amended petition filed by a wholesale grocer for an injunction to enjoin his competitor from selling and advertising wholesale grocery products below cost in violation of the Unfair Sales Act was affirmed and the petition ordered to be answered. It was held that the bill which alleged competition between the parties, sales at less than cost not included in the exemption provided by the Act, destruction of competition, diversion of trade, suffering of loss and possible further loss, and that pecuniary compensation would not afford adequate relief, substantially complied with the statutory requirements. While the time, place and persons to whom the specific sales below cost were made may be required in proof of the case, they need not, the Court decreed, be included in the allegations of the bill.

See the Maryland Unfair Sales Act annotations, Vol. 2, ¶ 8368.

For the appellants: Harry Adelberg (Lawrence B. Fenneman and Fenneman, Johnson, Cronin & Sachs on the brief), all of Baltimore, Maryland.

For the appellees: Jacob Blum, Sidney Blum and William L. Siskind on the brief, all of Baltimore, Maryland (Court declined to hear argument for the appellees).

Argued before MARBURY, Ch. J.; DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

[*Nature of Appeal*]

COLLINS, J.: This is an appeal by Isaac Cohen, Individually and Trading as Capital Wholesale Grocery Company, et al., appellant and defendant below, from a decree of the Circuit Court of Baltimore City overruling his demurrer to the amended petition of the appellees, petitioners below, Frey and Son, Inc., et al.

[*Allegations*]

This amended petition states the following matters. Each of the petitioners are engaged in the wholesale grocery business in Baltimore in competition with each other and with the appellant, and the appellant is engaged in business in Baltimore where he is selling at wholesale a number of listed items at prices specified. The appellees are

reliably informed, believe and aver that pursuant to the Unfair Sales Act, Article 83, Sections 111 to 115, inclusive, of the Annotated Code of Maryland, 1943 Supplement, the cost of said items to the appellant, as defined in Section 112 of Article 83, was specific amounts set out in the amended petition. The appellees are advised, believe and allege that the aforesaid prices at which the appellant "has sold, is continuing to sell, has advertised and is continuing to advertise, has offered for sale and is continuing to offer for sale the said items at or less than cost of said items to him, as defined in Section 112 of Article 83 of the Annotated Code of Maryland, 1943 Supplement, and that said advertisements, such offers to sell and such sales by the Defendant were made, and are being made with the intent to injure your Petitioners who are competitors of the Defendant, and that such advertisement, such offers to sell and such sales were made, and are being made with the intent to destroy competition with and between your Petitioners and the Defendant."

The "Petitioners are advised, believe and therefore allege that such sales and offers to sell the said items, made by the Defendant from time to time at cost or less than cost, as defined in the aforesaid Unfair Sales Act, were not sold: (a) in bona fide clearance sales, advertised, marked, and sold as such. (b) to forestall loss. (c) as imperfect or damaged, or as being discontinued, and were not advertised, marked and sold as such. (d) upon final liquidation of any business. (e) for charitable purposes or to relief agencies. (f) on contract to departments of the government or governmental institutions. (g) by any officer acting under the order or direction of any court. (h) in good faith to meet competition. [Article 83, Section 114.]

"7. That your Petitioners are advised, believe and therefore allege that the Defendant, by selling and offering for sale the said items at the prices herein named, with the intent to injure your Petitioners who are competitors of the Defendant, and to destroy the competition of your Petitioners, that the Defendant has violated and is violating the Provisions of the Unfair Sales Act hereinbefore referred to; that such sales and offers to sell at the price aforesaid, with the intent to injure competition, and to destroy competition as aforesaid, are unfair methods of competition, contrary to public policy and in contravention of the aforesaid Act.

"8. That your Petitioners allege that such advertisement, such sales and offers to sell at the prices aforesaid, by the Defendant, are unfair methods of competition and have the effect and result of unfairly diverting trade from your Petitioners and otherwise injurying your Petitioners, who are competitors of the Defendant, and that the same has the result and effect of substantially lessening the competition of your Petitioners with the Defendant; that your Petitioners further allege that each of them has suffered a loss, has been injured and are suffering a loss and are being injured, and are threatened with further loss and injury by reason of the said act by the Defendant, as aforesaid, and that your Petitioners further allege that it is impossible to ascertain the amount of pecuniary loss that they each have already suffered as a result of the Defendant's violation of the said Act and will continue to suffer if the said practices of the Defendant are permitted to continue, and that the same, and the continuance of the same have resulted, and tend to result in irreparable loss of sales to your Petitioners, and the impairment of the goodwill of your Petitioners business; that your Petitioners further allege that pecuniary compensation would not afford adequate relief to your Petitioners; that it is necessary that the Defendant be restrained from continuing its unfair trade practices in derogation and violation of the said Act; to prevent multiplicity of judicial proceedings; that the wrongs complained of as above set forth, imminently imperil and immediately threaten destruction of your Petitioners businesses, and that your Petitioners have no adequate remedy at law."

The appellees ask that a preliminary and perpetual injunction be granted restraining and enjoining the appellant, his agents, employees, and personal representatives during the suit from advertising and selling and from offering for sale at wholesale, any of the items described therein at the prices described, or at any other price, which shall be less than the cost thereof, and any grocery products at prices which shall be at cost or less than cost thereof to the defendant, as defined by the Unfair Sales Act, Article 83, Sections 111 to 115 inclu-

sive, of the Annotated Code of Maryland, 1943 Supplement, "with intent to injure your Petitioners, competitors of said Defendant, or with intent to destroy competition with and between your Petitioners and the said Defendant." The amended petition also asks for other and further relief.

[*Agreement On Appeal*]

To that amended petition a demurrer was filed by the appellant and from a decree overruling the demurrer the appellant appeals.

The appellant contends that the petition should show when, where, how, and to whom, specific sales below cost in violation of the Act were made, and, if so, which particular person were the said sales intended to injure and, if a designated individual was intended to be so injured, how, where and in what manner was he so injured.

Appellant relies strongly on the case of *State ex rel. Malone v. Fleming,* 164 Kansas 723, 192 P. 2d 207. In that case, involving the Unfair Practices Act of the State of Kansas, the Court held the allegations not sufficient because the bill did not allege whether defendant sold or offered to sell below cost as a wholesaler or a retailer; in what manner it advertised to sell below cost; the county in which the alleged unlawful acts took place; and because the bill omitted essential elements of intent to divert trade unfairly from a competitor and to prevent competition and injure public welfare. That case is of little assistance here.

Article 83, Section 113, 1943 Code and 1947 Supplement of the Code, provides:

> "No retailer shall, with intent to injure a competitor or competitors, or destroy any competition, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer as defined in this Act, and no wholesaler shall, with such intent, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler, as defined in this Act. Evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him, shall be *prima facie* evidence of intent to injure a competitor or competitors, or destroy competition. Upon complaint of any person claiming to be injured, the Circuit Court of any county and the Circuit Courts of Baltimore City shall have jurisdiction to enjoin any such retailer or wholesaler from the commission of any act prohibited by the provisions of this Act." See *Blum v. Engelman,* — Md. —, 57 A. 2d 421.

[*Prerequisites for Injunction*]

Section 113, *supra,* specifically provides for an injunction to enjoin the violation of the Act. A bill for an injunction, of course, should ordinarily contain the allegations mentioned in the Act. Miller's *Equity Procedure,* Section 473, page 553; *Gayle v. Fattle,* 14 Md. 69, 85. The bill before us substantially alleges the statutory requirements. Allegations are made that the petitioners are wholesalers in competition with each other and the appellant; the sales, offers to sell and advertisements by the appellant of the articles by name at less than cost; the sale price of each item and the cost to the appellant; and that these sales, offers to sell, and advertisements, are not included in the exemptions provided by Section 114, *supra.* These are particular acts forbidden by the statute. As to appellant's contention that the time, place and persons to whom the sales were made should be alleged in the bill, these may be required in proof of the case but hardly in the allegations of the bill. It was said by this Court in the case of *Goldsborough v. County Trust Company of Maryland,* 180 Md. 59, 62, which involved an injunction provided for by statute and where on demurrer objections were made because certain allegations required by the statute were not included in the amended bill: "Before an injunction can issue of course, the statutory requirement must be substantially complied with; but that may be done at a later stage of the case."

[*Allegation of Damage*]

It has been stated many times by this Court that the mere allegation in a bill of complaint that irreparable damage will ensue is not sufficient unless facts are stated which will satisfy the Court that the apprehension is well founded. *Lamm v. Burrell,* 69 Md. 272; *West Arlington Land Co. v. Flannery,* 115 Md. 274; *Warren Mfg. Co. v. Baltimore,* 119 Md. 221; *Consolidated Gas Co. v. North. Cent. Railway Co.,* 107 Md. 671; *Fowler v. Pendleton,* 121 Md. 297; *Pope v. Clark,* 122 Md. 1; *Baltimore v. Sackett,* 135

Md. 56; *Salisbury v. Camden Sewer Co.*, 135 Md. 573; *Distillery v. Distilling Co.*, 168 Md. 212, 220; *Smith v. Shiebeck*, 180 Md. 412, 421.

In the instant case, we have such facts stated, namely: competition between the parties; advertisement and sale at less than cost price, not included in the exemptions provided by Section 114, *supra;* the destruction of competition; the diversion of trade from the petitioners; the suffering of a loss and the possiblity of further loss and destruction of business by reason of defendant's violation of the statute; together with the further allegation that pecuniary compensation will not afford petitioners adequate relief. Naturally sales by a competitor of goods for less than cost would divert trade from and injure competitors, thereby causing irreparable damage to competitors, the appellees. Furthermore, Section 113, *supra,* specifically provides that: "Evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him, shall be *prima facie* evidence of intent to injure a competitor or competitors, or destroy competition."

[*Decree Affirmed*]

We are of opinion that the demurrer was properly overruled in this case, and that the petition should be answered.

Decree affirmed, with costs.

[¶ 62,441] Bay Area Painters and Decorators Joint Committee, Inc. v. I. Orack, Doe One, Doe Two, Doe Company, Roe Corporation.

In the Superior Court of the State of California in and for the City and County of San Francisco. No. 384933. June 10, 1949.

Sherman Antitrust Act

Painting Industry—Agreement To Better Working Conditions—No Trade Restraint. —A demurrer to a complaint filed for a declaration of rights under an agreement covering wages and working conditions in the painting industry between decorators' associations and painters' unions and employers, which set up a committee to police the industry and make levies against employers to bear the cost of such supervision, was overruled. There was no reason to declare that an agreement which did not control prices, suppress competition or injure the public constituted a monopoly or restraint of trade.

See the Sherman Act annotations, Vol. 1, ¶ 1280.101.

For the plaintiff: Tobringer & Lazarus, San Francisco, California.

For the defendant: M. S. Hubermann, San Francisco, California.

[*Statement of Case*]

SAPIRO, J.: Plaintiff association has filed this action for declaratory relief for the purpose of having its rights declared under an agreement entered into by the defendant, which agreement required the defendant to make certain payments as his share of the expenses of administering the contract.

Plaintiff committee was organized under an agreement entered into between various painting and decorating contractors' associations in the Bay Area and various groups of painters' unions in the Bay Area.

The express purpose of the agreement under which plaintiff was created to stabilize the painting industry by creating harmonious relations and maintaining stability of conditions of employment. The agreement the subject matter of this proceeding, first provides for the organization of the plaintiff committee, then proceeds to set out certain provisions covering apprentices, employers and unions. It then provides for the wages and working conditions of employees, and other terms and considerations as to painting work.

Provision is made in the agreement for the supervision of the activities of the employers for the purpose of assuring their conformance to the working conditions that had been established.

The cost involved in supervising the conduct of the employers is borne by a fund to which members of the association are required to contribute $12.00, for which an official shop card is issued, and non-members of the association are required to pay $12.00 plus certain dues, and for which they receive an identification card. The dues that the non-members are required to pay

are equal to the dues paid by the members of the associations to their associations. Defendant has contended that the agreement is unenforceable as to him because it is invalid on its face. He bases his contention on a claim that the agreement violates the antitrust laws, and also that there is discrimination. Neither of these grounds of objection is tenable. The agreement appears clearly to be valid and enforceable.

[*Antitrust Laws*]

It has been long recognized, and it is clearly a desirable situation to achieve, that employers and unions work together for stability in the industry. As this agreement recites, if an employer enters into an agreement with the union and fails to conform to the working conditions, it would result in unfair competition among other employers, and would also create unrest, labor disturbances, and many other situations that would work to the disadvantage of public welfare. It is therefore proper for associations of employers and unions to agree on methods of procedure whereby their activities might be policed and supervised so as to insure observance of the labor agreement entered into between them.

Inasmuch as this is true as to the members of the association, it certainly follows that this activity could be extended one step further and a non-member who adheres to the agreement may well join in such an agreement for the purpose of producing stability in the industry. It follows as a matter of course that there is a certain cost involved in supervising and policing the industry. It is proper for this cost to be borne by a charge placed on the employers. The cases cited by plaintiff in the memorandum filed: *Electrical Contractors Association v. Schulman Electric Co.*, (1945) 391 Ill. 333, 63 N. E. (2d) 392, and also *Griffits & Sprague Stevedoring Co. v. Waterfront Employers Association of Pacific Coast*, (1947) 162 F. (2d) 1017, clearly set forth why such agreements are not in restraint of trade. Likewise in *Minkoff v. Jaunty Junior, Inc.*, 38 N. Y. S. (2d) 507 (1942), it is recognized that agreements entered into between employers and unions for the bettering of conditions in the industry, even where the employer is called upon to bear a charge involved therein, do not constitute illegal monopolies or restraints of trade. So here the agreement itself cannot be said to constitute a monopoly or restraint of trade. To the contrary, its provisions that would produce harmony and peace in an industrial activity are of the type that ought to be encouraged, and the Court should make every effort to see that they are lived up to for the purpose of producing industrial peace that would so benefit a community.

The particular agreement involved in this case does not in any manner control prices, nor limit the activities of the employer parties so as to stifle or suppress competition, nor injure the public. It purports only to regulate relations between employer and employee groups. There is nothing in the contract that would point to the contrary.

[*Discrimination*]

The claim of discrimination is not well founded. It is true that the non-member employer pays to the joint committee a sum greater than that paid directly to the joint committee by the employer who is a member of an association. However, that employer pays dues to the association in a sum equal to the amount required to be paid by the non-member employer to the committee. The employers are placed in exactly the same position when it comes to a determination of the amount expended by them in this activity. The fact that the non-member employer pays to the committee rather than to an association does not constitute a discrimination, inasmuch as the amounts paid are exactly the same. There is no contention, and there could be no contention, that the amounts paid are unreasonable because it appears from the agreement that the charge made is but a small charge that would not work a hardship on any employer.

There seems to be no reason whatsoever for declaring this agreement invalid. On the other hand, there seems to be ample reason to sustain the agreement and to grant the declaratory relief called for by the complaint.

The Court therefore orders the demurrer of the defendant overruled.

If the parties, in view of this opinion, stipulate that declaratory judgment may be entered in accordance therewith, the Court will so order. If, however, there is any question in reference to whether a declaratory judgment should be entered without the right to answer, the Court will grant the defendant the right to answer.

[¶ 62,442] United States v. Owens-Corning Fiberglas Corporation et al.

In the District Court of the United States for the Northern District of Ohio, Western Division. Civil No. 5778. Filed June 23, 1949.

Sherman Antitrust Act

Glass Fiber Products—Consent Judgment—Practices Enjoined.—Contracts between manufacturers of glass fiber products were terminated and further performance of them enjoined by a consent judgment entered in a civil antitrust action charging violations of Section 2 of the Sherman Act. The decree enjoined the following practices: allocation of markets, limitation of production and imports, exclusion of any manufacturer from any market, refraining from competing and receiving or exchanging exclusive rights to patents, inventions or technical information. Agency relationships with and control over foreign corporations were enjoined by the order. It also required the issuance to any applicant, on a royalty free or a reasonable royalty basis of licenses to use patents for the manufacture of glass fibers and glass fiber products as well as a grant of immunity from infringement actions. Affiliated directorates among the companies named were condemned and the companies were enjoined from acquiring any securities or assets in other concerns also engaged in the manufacture of glass products.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1022.25, 1220.211, 1530.10, 1530.50, 1590.

For the plaintiff: Tom C. Clark, Attorney General, Washington, D. C.; Don C. Miller, U. S. Attorney, Cleveland, Ohio; Gerald P. Openlander, Assistant U. S. Attorney, Toledo, Ohio.

For the defendants: Marshall, Melhorn, Bloch & Belt, Toledo, Ohio; Welles, Kelsey, Fuller, Cobourn & Harrington, Toledo, Ohio; Halsey Sayles, Elmira, New York; Fraser, Shumaker, Kendrick & Winn, Toledo, Ohio.

Final Judgment

The Plaintiff, United States of America, having filed its amended complaint herein on July 16, 1948; the defendants Owens-Corning Fiberglas Corporations, Owens-Illinois Glass Company, and Corning Glass Works, having appeared and filed their consolidated answer to the amended complaint denying the violation of law charged therein; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission of any party defendant in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of all parties hereto. The amended complaint states a cause of action against the defendants under Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II.

[*Parties Designated, Terms Defined*]

As used in this judgment:

(A) "Owens-Corning" means Owens-Corning Fiberglas Corporation, a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at Toledo, Ohio.

(B) "Owens-Illinois" means Owens-Illinois Glass Company, a corporation organized and existing under the laws of the State of Ohio, with offices and principal place of business at Toledo, Ohio.

(C) "Corning" means Corning Glass Works, a corporation organized and existing under the laws of the State of New York, with offices and principal place of business at Corning, New York.

(D) "Foreign Company" or "Foreign Companies" means Schiedam, Maatschappy, A. K. M., St. Gobain, Chance Brothers, Fiberglass Limited, Modigliani, and Fiberglas Canada.

(E) "Schiedam" means N. V. Van Deventer's Glasfabricken a corporation organized and existing under the laws of Holland, with offices and principal place of business at Schiedam, Holland.

(F) "Maatschappy" means Maatschappij tot Beheer en Exploitatie van Octrooien, N. V., a corporation organized and existing under the laws of Holland, with offices and principal place of business at Schevenigen, Holland.

(G) "A. K. M." means Algemcene Kunstvezel Maatschappij N. V., a corporation organized and existing under the laws of Holland, with offices and principal place of business at Nunspect, Holland.

(H) "St. Gobain" means Societe Anonyme des Manufactures des Glaces et Produits Chimiques de St. Gobain, Chauny et Cirey, a corporation organized and existing under the laws of France, with offices and principal place of business at Paris, France.

(I) "Chance Brothers" means Chance Brothers and Co. Limited, a corporation organized and existing under the laws of the United Kingdom, with its registered office at Glass Works Smethwick in the County of Staffordshire, England.

(J) "Fibreglass Limited" means Fibreglass Limited, a corporation organized and existing under the laws of the United Kingdom, with offices and principal place of business at Firhill, Glasgow, N. W., Scotland.

(K) "Modigliani" means Societa Anonima Vetroria Italiana Balzaretti Modigliani, a corporation organized and existing under the laws of Italy, with offices and principal place of business at Leghorn, Italy.

(L) "Fiberglas Canada" means Fiberglas Canada Limited, a corporation organized and existing under the laws of the Dominion of Canada, with offices and principal place of business at Oshawa, Ontario, Canada.

(M) "Glass fibers" means thread-like filaments or fibers composed of glass.

(N) "Glass fiber products" means articles which are manufactured by or for producers of glass fibers and which are made from or contain glass fibers in the usual commercial forms, including glass wool, glass textiles, and glass fiber mat.

(O) "Future Glass Fiber Patents" means:

(1) all United States letters patent issued or acquired, or rights under United States letters patent acquired, during the five years following the date of the entry of this judgment, and all United States letters patent which may issue on or result from applications filed during said period;

(2) all applications for United States letters patent filed during the five years following the date of the entry of this judgment; and

(3) all divisions, continuances, reissues, or extensions of the patents and applications described above in clauses (1) and (2);

covering glass fibers, glass fiber products and any material, process, method or machinery used in the production or manufacture of glass fibers or glass fiber products, or products which contain glass fibers.

(P) "Person" means an individual, partnership, firm, association or corporation.

III.

The provisions of this judgment applicable to any defendant shall apply to such defendant, its officers, directors, agents, employees, successors, and all other persons acting under, through or for such defendant.

IV.

[*Contracts Terminated, Performance Enjoined*]

Each of the contracts, agreements, arrangements or understandings, hereinafter described, between the defendants and the various Foreign Companies is hereby terminated, and each of the defendants is hereby enjoined and restrained from the further performance or enforcement of any of said contracts, agreements, arrangements or understandings, or from entering into, adopting, adhering to or furthering any agreement or course of conduct for the purpose or with the effect of maintaining, reviving or reinstating any of said contracts, agreements, arrangements, or understandings:

(A) Amending agreement between Owens-Illinois and Schiedam bearing date January 1, 1938.

(B) License contract between Owens-Illinois and Maatschappy bearing date January 1, 1938, to which A. K. M. became a party.

(C) Agreement between Owens-Illinois and St. Gobain dated December 9, 1936.

(D) License agreement between Owens-Illinois and Maatschappy, as joint licensors, and Chance Brothers bearing date January

1, 1937, to which Fibreglass Limited became a party.

(E) Contract between Owens-Illinois and Modigliani dated November 1, 1937.

(F) Agreement between Owens-Corning and Fiberglas Canada dated December 29, 1939, sometimes referred to as "Agreement B".

(G) Agreement between Owens-Corning and Fiberglas Canada dated December 29, 1939, sometimes referred to as "Agreement C".

(H) All existing amendments, renewals and extensions of the foregoing contracts, agreements, arrangements and understandings set forth above in clauses (A) through (G), including those by which Corning and Owens-Corning became parties thereto.

V.

[*Practices Enjoined*]

Each of the defendants is hereby enjoined and restrained from:

(A) Entering into, performing, abiding by, carrying out, adhering to, maintaining, furthering, or enforcing, directly or indirectly, any combination, conspiracy, contract, agreement, understanding, plan, or program with any of the Foreign Companies, any agent, sales representative or distributor thereof, or any person acting or claiming to act on behalf of such Foreign Companies, agent, sales representative or distributor thereof, or with any other foreign manufacturer of glass fibers or glass fiber products, any agent, sales representative or distributor thereof, or any person acting or claiming to act on behalf of such manufacturer, agent, sales representative or distributor;

(1) to allocate or divide territories or markets for manufacture, sales, or distribution of glass fibers or glass fiber products;

(2) to refrain from, restrain, or limit production or distribution of glass fibers or glass fiber products;

(3) to limit, restrain or prevent importation into or exportation from the United States, its territories, or possessions, of glass fibers or glass fiber products;

(4) to exclude any manufacturer or distributor thereof from any market for glass fibers or glass fiber products;

(5) to refrain from competing in manufacture or sale of glass fibers or glass fiber products in any territory or market; or

(6) to receive or exchange exclusive rights to patents, inventions, or technical information relating to glass fibers, glass fiber products, or to any material, process, method or machinery used in the production or manufacture thereof, or to grant exclusive rights to future patents, inventions, or technical information.

(B) Referring any order or inquiry for glass fibers or glass fiber products to any of the Foreign Companies, any agent, sales representative or distributor thereof, or to any other foreign manufacturer of glass fibers or glass fiber products, or any agent, sales representative or distributor for such manufacturer.

(C) Appointing or designating any of the Foreign Companies or any other foreign manufacturer of glass fibers or glass fiber products as the agent, sales representative, or distributor of a defendant, in connection with glass fibers or glass fiber products, or otherwise distributing or selling glass fibers or glass fiber products through any of the Foreign Companies or any other such manufacturer.

(D) Appointing, designating or continuing the appointment or designation of, any person as the agent or sales representative (including distributor) of a defendant, in connection with glass fibers or glass fiber products, who also act as agent or sales representative (including distributor), for, or is affiliated or connected with, any of the Foreign Companies or any other foreign manufacturer of glass fibers or glass fiber products.

(E) Acting for or representing as agent, cluding distributor) of a defendant, in connection with glass fibers or glass fiber products, any of the Foreign Companies or any other foreign manufacturer of glass fibers or glass fiber products.

(F) Refusing or failing to sell glass fibers or glass fiber products, manufactured or sold by them, without discrimination as to price, terms or conditions of sale to any person located in the United States for sale in, or shipment by such person to, any area or territory outside of the United States, or selling glass fibers or glass fiber products to any such person on the condition, agreement or understanding that such person not sell in, or ship such glass fibers or glass

fiber products to, any area or territory outside the United States.

(G) Exercising any control over or influencing in any manner whatsoever, by virtue of stock ownership, representation on the Board of Dirrectors, or otherwise, Fiberglas Canada with respect to the markets or territories in which.it shall or shall not manufacture, sell or distribute glass fibers or glass fiber products, or with respect to any combination, conspiracy, contract, agreement, understanding, plan or program between Fiberglas Canada and any of the Foreign Companies, any agent, sales representative or distributor thereof, or any person acting or claiming to act on behalf of such Foreign Companies, agent, sales representative or distributor, or any other foreign manufacturer of glass fibers or glass fiber products, any agent, sales representative or distributor thereof, or any person acting or claiming to act on behalf of such manufacturer, agent, sales representative or distributor, to do any of the things hereinabove enjoined and restrained in Section (A) of this Article V.

VI.

[*Licenses Ordered to Be Issued*]

Defendant Owens-Corning is hereby:

(A) Ordered and directed, insofar as it has the power or authority to do so, to issue to any applicant, including any defendant, making written request therefor;

(1) a non-exclusive, unrestricted, royalty-free license under any, some or all of the patents and patent rights listed in Schedule A attached thereto [not reproduced herein]; and

(2) an unrestricted, unconditional and irrevocable grant of immunity from any action or proceeding by any defendant for all past and present acts of infringement of any or the patent or patent rights listed in said Schedule A.

(B) Enjoined and restrained from making any disposition of any of the patents listed in Schedule A [not reproduced herein], or rights under such patents, which deprives it of the power or authority to issue said licenses or grants of immunity required by Section A of Article VI, unless it sells, transfers or assigns said patents or rights and requires, as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee thereof shall observe the provisions of Article VI of this judgment with respect to the patents or rights so acquired and the purchaser, transfers or assignee shall file with this Court, prior to the consummation of said transaction, an undertaking to be bound by the provisions of Article VI with respect to the patents or rights so acquired.

VII.

(A) Defendant Owens-Corning is hereby ordered and directed: (1) insofar as it has the power or authority to do so, to grant to any applicant, including any other defendant, making written request therefor, a non-exclusive license to make, use and sell glass fibers and glass fiber products under any, some or all of the patents, listed in Schelule B attached hereto [not reproduced], and under any, some or all Future Glass Fiber Patents; (2) within thirty days after the date of application, issuance or acquisition of any of the Future Glass Fiber Patents, to advise this Court and the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, in writing, of the number and date of such application, issuance or acquisition; and (3) to refrain from making disposition of the patents listed in Schedule B [not reproduced herein], or rights under any such patents, or the Future Glass Fiber Patents, which deprives it of the power or authority to grant said licenses, unless it sells, transfers or assigns said patents or rights and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee thereof shall observe the provisions of Article VII of this judgment with respect to the patents or rights so acquired and the purchaser, transferee or assignee shall file with this Court, prior to the consummation of said transaction, an undertaking to be bound by the provision of Article VII with respect to the patents or rights as acquired.

(B) Defendant Owens-Corning is hereby enjoined and restrained from including any restriction or condition whatsoever in any such license granted by it pursuant to the provisions of this Article except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable;

(4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; and (5) the license must provide that the licensee may cancel the license at any time by giving thirty days' notice in writing to the defendant Owens-Corning.

(C) Upon receipt of a written request for a license under the provisions of this Article, defendant Owens-Corning shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license is received by defendant Owens-Corning, the applicant therefor or Owens-Corning may forthwith apply to the Court for the determination of a reasonable royalty, and defendant Owens-Corning shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on the defendant Owens-Corning to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and to all other licensees under the same patent or patents. Pending the completion of any such negotiations or proceeding, the applicant shall have the right to make, use and vend glass fibers or glass fiber products under the patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of Subsection D of this article.

(D) Where the applicant has the right to make, use and vend glass fibers or glass fiber products under Subsection C of this Article, and applicant or defendant Owens-Corning may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, defendant Owens-Corning shall then issue and the applicant shall accept a license providing for the periodic payment of royalties at such interim rate from the date of the filing of such application for an interim royalty. If the applicant fails to accept such license or sublicense or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under Subsection C shall terminate. Where an interim license or sublicense has been issued pursuant to this Subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date of the filing of the application by the applicant.

(E) Any license granted to defendant Owens-Corning by defendants Owens-Illinois or Corning under the Future Glass Fiber Patents shall be non-exclusive and shall permit Owens-Corning to sublicense others. Defendant Owens-Corning is ordered and directed to grant such sublicenses on the same terms and conditions as it is required to grant licenses under its own patents as in this Article VII provided. Defendants Owens-Illinois and Corning are ordered and directed, at the option of the applicant, to grant a license under any such patent to the applicant on the same terms, including royalties, if any, as the license which shall have been granted to defendant Owens-Corning.

(F) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity or scope of any of the patents, nor shall this judgment be construed as imparting any validity or value to any of said patents.

VIII.

Each of the defendants herein is ordered and directed, insofar as it has the power or authority to do so, to grant upon written request to any applicant licensed under the provisions of Articles VI and VII of this judgment, with respect to any products manufactured in the United States pursuant to such license, a non-exclusive grant of immunity from suit under foreign patents or patents issued on foreign applications for patents corresponding to any United States letters patent under which the applicant is licensed.

IX.

Defendant Owens-Corning is hereby ordered and directed to furnish promptly for a period of five years from the date of this judgment and at a purely nominal charge, to each person who is licensed pursuant to the provisions of Articles VI or VII of this judgment, and who makes written request therefor in connection with the manufacture or intended manufacture in the United States of glass fibers or glass fiber products,

a written manual or manuals describing all the methods, processes, materials and machinery employed by Owens-Corning at the date of entry of this judgment in the commercial production of glass fibers and glass fiber products manufactured by it involving the use of the licensed inventions. Defendant Owens-Corning is further ordered to compile and furnish annually, at the end of each of the five years following upon the entry of this judgment, at a charge (which shall be nil as to any applicant paying royalties to defendant Owens-Corning and reasonable as to other applicants) to each such applicant upon request, any written amendments or supplements to said manuals necessary to assure that the manual or manuals accurately and completely describes all the methods, processes, materials and machinery then currently employed by Owens-Corning in the commercial production of glass fibers and glass fiber products manufactured by it involving the use of the licensed inventions. In the event that any such person shall find the information set forth in any such manual, or in any supplement or amendment thereto, inadequate to enable successful utilization by that person of any of the methods, processes, materials or machinery described therein, and such person shall so inform Owens-Corning, then defendant Owens-Corning is ordered and directed to furnish promptly such additional written information as shall be reasonably necessary to the successful utilization thereof. Owens-Corning may require that such manuals, amendments and supplements thereto, and additional written information shall be returned upon said person entirely discontinuing the manufacture of glass fibers or glass fiber products.

X.

Defendant Owens-Corning is hereby enjoined and restrained from:

(1) Entering into, carrying out or performing any contract, agreement or understanding with any person by the terms of which such person agrees or undertakes to refrain from the manufacture, sale or distribution of glass fibers or glass fiber products;

(2) Selling or supplying glass fibers or glass fiber products to any person on the condition, agreement or understanding that such person purchase or obtain glass fibers or glass fiber products only from Owens-Corning, or that such person refrain from purchasing or obtaining glass fibers or glass fiber products from any person other than Owens-Corning;

(3) Fixing, establishing, adhering to or maintaining arbitrary, unreasonable or discriminatory prices, discounts or other terms or conditions of sale with the purpose of suppressing or injuring competition in the manufacture, sale or distribution of glass fibers or glass fiber products.

(4) Entering into, performing or carrying out any contract, agreement or understanding with any other manufacturer of glass fibers or glass fiber products with respect to prices, discounts or other terms or conditions of sale of any glass fibers or glass fiber products.

XI.

[*Purchase of Assets or Securities Enjoined*]

Each of the defendants Owens-Illinois and Corning, so long as it owns or controls any shares of stock or other financial interest in Owens-Corning, and defendant Owens-Corning, is hereby enjoined and restrained from acquiring, directly or indirectly, any ownership interest, by purchase or acquisition of assets or of securities or otherwise, in any person engaged in whole or in part of the manufacture, sale or distribution of glass fibers or glass fiber products in the United States, or from leasing, or from acquiring any control over, any such person.

XII.

Defendant Owens-Corning shall cause each of its officers, directors, or employees, and of its subsidiaries, who is serving as officer, director or employee of any other defendant, or subsidiary of such defendant, within 30 days from the entry of this judgment, to sever his connections from such other defendant or subsidiary. Thereafter each defendant is enjoined and restrained from causing, authorizing or knowingly permitting any of its officers, directors, or employees, or of its subsidiaries, to serve as an officer, director, or employee of any other defendant or subsidiary thereof.

XIII.

[*Control of Commercial Policy Enjoined*]

Each of the defendants, Owens-Illinois and Corning, is hereby enjoined and restrained, so long as it is entitled to vote any of the shares of the capital stock of Owens-Corning, from:

(A) Participating in, controlling, directing or influencing in any manner whatsoever any act or commercial policy of Owens-Corning except with respect to the matters as to which stock can be voted as set forth in this Article;

(B) Exercising the right to vote any stock of Owens-Corning for any purpose other than (1) the election or removal of directors, subject to the provisions of Sections C and D of this Article; and (2) such necessary business acts as, under Owens-Corning's certificate of incorporation, require the vote of the stock of Owens-Illinois and Corning and are approved by the Attorney General, provided that, upon disapproval by the Attorney General for any reason, such vote may be exercised only if the Court shall determine that the action proposed is not inconsistent with the provisions or purposes of this judgment.

(C) Exercising the right to vote the stock of Owens-Corning for the election of any individual as a director who shall not be approved by the Court, after thirty days notice to the Attorney General, as not being affiliated with or interested in Owens-Illinois or Corning, provided, however, that once a director of Owens-Corning has been so elected, said director may be re-elected without recourse to the provisions of Section C of this Article XIII of this judgment.

(D) Exercising the right to vote the stock of Owens-Corning for the removal of any director unless the Court shall approve such proposed action after thirty days notice to the Attorney General, and refusing to vote such stock for the removal of any director of Owens-Corning of whom this Court, after notice to the defendants and opportunity for hearing, shall disapprove as being affiliated with or interested in Owens-Illinois or Corning.

XIV.

Upon 60 days' written notice to the defendants, the plaintiff may, notwithstanding this judgment, in this action, file a petition with the Court at any time after five years following the date of this judgment asking that the Court determine and adjudge whether at that time any defendant is monopolizing or is party to an unlawful monopoly of any part of the trade or commerce in glass fibers or glass fiber products among the several states or with foreign nations, and that the Court award such relief as is appropriate. This judgment shall not be construed to bar the government from prosecuting, civilly or criminally, any charge involving a new violation of the antitrust laws.

XV.

[*Securing Compliance*]

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to any defendant, made to its principal office, be permitted subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and upon request the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this judgment as may from time to time be necessary to the enforcement of this judgment. No information obtained by the means provided in this Article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

XVI.

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment or for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

We hereby consent to the entry of the foregoing Final Judgment.

For the Plaintiff: Herbert A. Bergson, Assistant Attorney General; Sigmund Tim-

berg, Special Assistant to the Attorney General; Don C. Miller, United States Attorney, by Gerald P. Openlander, Asst. U. S. Attorney; George W. Wise, Edwin H. Pewett, Attorneys.

For the Defendants: Frederick M. Eaton, John Marshall Briley, Shearman & Sterling & Wright; William A. Belt, Marshall, Melhorn, Bloch & Belt; Henry H. Fowler, Fowler, Hawes & Symington, for Owens-Corning Fiberglas Corporation; Fred E. Fuller, Frank A. Harrington, Leslie Henry, Welles, Kelsey, Fuller, Cobourn & Harrington, for Owens-Illinois Glass Company; Halsey Sayles, Sayles & Evans; Ross W. Shumaker, John W. Winn, Shumaker, Loop, Kendrick & Winn, for Corning Glass Works.

[¶ 62,443] United States v. National Association of Real Estate Boards, et al.

In the District Court for the District of Columbia. Civil Action No. 3472-47. June 28, 1949.

Action by the United States of America against the Washington Real Estate Board and others, to enjoin alleged violations of the Sherman Act. Judgment for the defendants.

Sherman Antitrust Act, Clayton Antitrust Act

Real Estate Business—Fixing of Commissions—Labor Not a Commodity.—A civil action brought by the Government for an injunction enjoining associations of real estate boards from fixing brokerage commissions was dismissed. The Court was of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act. The legal right of those who toil for wages to combine to regulate the compensation to be charged by them for their own services applies also to persons who work for commissions. A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or commerce.

See the Sherman Act annotations, Vol. 1, ¶ 1021.221, 1220.194, 1230.101, 1280.101, 1610.612, and the Clayton Act annotations, Vol. 1, ¶ 2026.10.

For the plaintiff: Victor H. Kramer, Herbert N. Maletz and C. Heyward Belser, all of Washington, D. C.

For the defendants National Association of Real Estate Boards and Herbert U. Nelson: Roger J. Whiteford and Jo V. Morgan, Jr., both of Washington, D. C.

For the defendants Washington Real Estate Board and others: William E. Leahy and William J. Hughes, both of Washington, D. C.

For the defendant J. Hawley Smith: A. K. Shipe, of Washington, D. C.

Opinion

HOLTZOFF, District Judge:—This is a civil action by the United States for an injunction to restrain the defendants from continuing alleged violations of the Sherman Antitrust Act. The suit is brought under Section 3 of the Act, U. S. Code, Title 15, Section 3. The pertinent portions of this section are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the District of Columbia is declared illegal."

[*Parties*]

The defendants in this case are, first, the Washington Real Estate Board, which is a corporation having its place of business in the District of Columbia. Other defendants are members of the Board, who are sued as a class, a few of the members being named as representatives of the class. Finally, there is also joined as a defendant the National Association of Real Estate Boards, which is a corporation having its principal place of business in Chicago, Illinois. The National Association comprises among its

members various local real estate boards, and the Washington Real Estate Board is one of these members.

[*Argument*]

The Government contends that the defendants have combined to fix real estate brokerage commissions to be charged by real estate brokers in the District of Columbia. The Government urges that this activity constitutes a violation of the Sherman Antitrust Act.

[*Evidence Reviewed*]

In brief, the evidence shows that the membership of the Washington Board embraces about 250 real estate brokers out of a total number of about 2,000 brokers operating in the District of Columbia. The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers on sales of real property. The rates are published and are readily available to the public. All members of the Board are urged to use these rates. Actually, both members and many nonmembers employ them. There is nothing clandestine or surreptitious about this activity of the Washington Board. The National Association has been joined as a defendant on the theory that it has encouraged and has incited the Washington Board to fix and prescribe rates of commissions to be charged by the members of the latter.

In 1943 the rates were changed, resulting in higher charges in many instances and in lower commissions in other situations. In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board. For example, smaller commissions than the standard rate have been charged in connection with large developments comprising a great many homes.

[*No Evidence of Unreasonable Restraint*]

No evidence has been introduced tending to show that the standard rate of commissions prescribed by the Washington Board is unreasonable or excessive or that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the sales of real property. On the contrary, there is evidence in the record to the effect that before the Board attempted to fix standard commission rates there was chaos and confusion, resulting in occasional overcharges on the part of the less scrupulous members of the craft, and that one of the purposes of the Board was to eliminate this undesirable condition. The Government contends, however, that irrespective of whether it is reasonable or laudable, the fixing of commission rates is illegal *per se* and constitutes a violation of the Sherman Act.

[*Rule of Reason*]

Ever since the decisions of the Supreme Court in *Standard Oil Co. v. United States,* 221 U. S. 1, and *United States v. American Tobacco Co.,* 221 U. S. 106, it has been consistently held that the Sherman Act does not ban all restraints of trade, but proscribes only those that are unreasonable. In the two cases to which I have referred, the Court held that the Sherman Act must be construed in the light of reason and that the rule of reason must prevail.

[*Price Fixing of Personal Services v. Price Fixing of Commodities*]

In recent years it has been held by the Supreme Court that price-fixing is *per se* an unreasonable restraint of trade and, therefore, illegal in and of itself, even under the so-called rule of reason. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, and *United States v. Trenton Potteries Co.,* 273 U. S. 392. The cases in which this doctrine has been formulated and enunciated, however, involved prices of commodities and of articles of trade. This principle has never been invoked, so far at any rate, in connection with charges for personal service. There is a vast distinction in principle between fixing the prices of commodities or articles, on the one hand, and prescribing charges for personal services, on the other hand.

[*Labor Not a Commodity*]

A statement of the pertinent public policy in respect to personal services is to be found in the Clayton Act, U. S. Code. Title 15, Section 17. The statement is as follows:

> "The labor of a human being is not a commodity or article of commerce."

This is a very important, basic pronouncement. The term "labor" as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It com-

prises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of these organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.

[*Right to Contract for Personal Services*]

A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. To contract for one's personal services is a fundamental right of every man. For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that the Government has challenged this right.

It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the resulting stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood.

[*Rates Not Oppressive or Unreasonable*]

The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act. A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or commerce. There is no such showing or even contention in this case.

Judgment for the defendants.

Counsel will submit proposed findings of fact and conclusions of law.

[¶ 62,444] Maxwell Palmer, Moe Weiss and David Katzman, doing business under the firm name of Linden Pharmacy, Israel Willner, Reid and Yeoman, Inc., Caton Pharmacy, Inc., and Rodman and Billins, Inc. v. Sam B. Angert, doing business under the firm name and style of Angert's Cut Rate Drug.

In the New York Supreme Court, Appellate Division, 2nd Judicial Department. June 27, 1949.

New York Fair Trade Act

Issuance of Cash Receipts—Price-Cutting Device—In an appeal taken by drug retailers, an order denying a motion to punish another retailer for contempt in violating the provisions of a judgment was reversed and the motion granted. Redeeming cash register receipts for ten per cent of their amounts, in merchandise, was held to be a price-cutting device in violation of the provision in a judgment against selling at prices lower than those established by fair trade contracts.

See the Resale Price Maintenance Commentary, Vol. 2, ¶ 7314, and the New York Fair Trade Act, Vol. 2, ¶ 8604.45.

Reversing the decision of the New York Supreme Court, reported at ¶ 62,362.

For the appellants: Abraham Sarason, New York, New York.

For the respondent: Milton M. Eisenberg, New York, New York.

[*Opinion*]

In an action to restrain violation of contracts made under the provisions of the Fair Trade Law (art. XXIV-A, General Business Law), order denying appellants' motion to punish the respondent for contempt in violating the provisions of the judgment, reversed on the law, with $10 costs and disbursements, the motion granted, and the respondent fined $250.

[*Price-Cutting Device*]

In our opinion the practice of redeeming cash register receipts for ten per cent of their amounts, in merchandise, is a price cutting device in violation of the provision of the judgment against selling at prices lower than those established by Fair Trade contracts.

CARSWELL, Acting P. J. ADEL, WENZEL and MACGRATE, JJ., concur.

[*Dissenting Opinion*]

JOHNSTON, J., dissents and votes to affirm the order, with the following memorandum:

I agree with the majority that the practice of defendant was a violation of the injunction. However, the proof shows that the acts of defendant were not wilful but were the result of an honest mistake, based on advice of counsel given and followed in good faith. At the time defendant committed the acts in question and up to the time of the making of the order at Special Term denying the motion to punish him for contempt, the only reported cases in this and other jurisdictions held that similar acts were not a violation of the injunction or of the Fair Trade Act. (*Nechamkin v. Picker,* 189 Misc. 61; *Weco Products Co. v. Mid-City Cut Rate Drug Stores,* 55 Cal. A. 2d 684, 131 P. 2d 856; *Bristol-Myers Co. v. Lit Bros. Inc.,* 336 Pa. 81.) The single case which up to that time had held that the act was a violation of the injunction was reported only in the New York Law Journal. (*Radin's Pharmacy, Inc. v. Wolf,* N. Y. L. J., May 29, 1941, p. 2431, col. 4.) Under these circumstances, where defendant could not apply to vacate or modify the injunction or seek an advisory opinion as to whether his acts were a violation of the injunction, where the law is unsettled and there is a debatable question as to whether the act complained of was actually a violation of the injunction, defendant's reliance in good faith on advice of counsel prevents punishment for contempt. (*Matter of Granz,* 78 App. Div. 399.) This court has consistently held that, where a defendant is guilty of no more than an honest mistake, or where the proof does not show that defendant has wilfully and contumaciously violated the provisions of an injunction order, defendant should not be punished for contempt. (*Ditomasso v. Loverro,* 242 App. Div. 190, 194; *Palisi v. Yanarella,* 76 N. Y. S. 2d 211, 218 [not officially published], affd. 272 App. Div. 1070.) To the same effect is *Grant v. Johnson* (272 App. Div. 1085, 3d Dept.). We have applied the same rule to motions to punish for contempt for violation of an injunction order under the Fair Trade Act. (*Evans v. Stein,* 269 App. Div. 1052.)

Settle order on notice.

[¶ 62,445] Opinion of the Attorney General of Minnesota.

No. 417-E, addressed to James W. Clark, Commissioner, Department of Business Research and Development, by J.A.A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. June 17, 1949.

Minnesota Unfair Trade Practices Act

Sale of Cigarettes by Wholesaler to Retailer—Sales Below Cost—Out of State Sales.—A wholesaler located outside the state of Minnesota is governed by that state's laws forbidding sales below cost, if the sale is made within the state.

See the Minnesota Unfair Trade Practices Act annotations, Vol. 2, ¶ 8428.

Your letter of June 15 calls attention to M. S. A. 325.04, which forbids a retailer or wholesaler engaged in business within this state from selling goods at less than cost thereof to the vendor for the purpose or with the effect of injuring competitors and destroying competition.

You also refer to L. 1947, C. 619, Sec. 4, M. S. A. 297.04. This is the cigarette tax law. It is there provided in Subd. 3 that a

person without this state who ships or transports cigarettes to retailers in this state, to be sold by those retailers, may obtain from the commissioner of taxation a license as a distributor of cigarettes. Subd. 5 is authority to such licensee to engage in business as a distributor or sub-jobber of cigarettes at the place of business shown in his application.

You ask the question.

Are wholesalers or jobbers, located outside the state, who have complied with the licensing provision last mentioned, required to comply with Sec. 325.04, *supra?*

Opinion

Sec. 325.04 is directed against the making of certain sales. If the sale is made in Minnesota, this section applies. If the sale is made in another state, it does not apply. The laws of Minnesota can have no force beyond its borders under such a statute. For example, if a retailer in Minnesota writes a letter to the wholesaler in Milwaukee, Wisconsin, and gives him an order for the purchase of cigarettes and the wholesaler at Milwaukee fills that order, received by mail at Milwaukee, it is a Milwaukee contract and is not controlled by Sec. 325.04. But if the Milwaukee wholesaler has an office in Minnesota and the business transacted is done at that office so that the contract is made in Minnesota, then, of course, Sec. 325.04 applies. There are other circumstances under which the contract might be considered a Minnesota contract. So, the first point is to determine where the sale was made.

[¶ 62,446] John A. Allgair v. Glenmore Distilleries Company, Incorporated, New England Wine & Liquor Co., Conway Liquor Co., Inc., Conway Company, Inc. and American Beverage Co.

In the United States District Court for the Southern District of New York. Civil 49-603. June 28, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Basis of Jurisdiction—Transacting Business—Motion to Dismiss Denied.—In a suit brought by a New Jersey corporation against various liquor companies for violation of the antitrust laws, a motion made by two Massachusetts corporations to dismiss the action and quash service of the summons for lack of jurisdiction was denied. It appeared from the affidavits filed that parts of the transactions that gave rise to the action took place within the jurisdiction of the Court. It was found that the New York company which sold the cases of whiskey acted for the Massachusetts vendors as well as for itself.

See the Clayton Act annotations, Vol. 1, ¶ 2032.55.

For the plaintiff: Jay Leo Rothschild, New York, New York.

For the defendant: Breed, Abbott & Morgan, New York, New York.

[*Nature of Motion*]

LEIBELL, D. J.: Two of the defendants, New England Wine & Liquor Co. and Conway Company, Inc., have made identical motions to dismiss the action and to quash the service of the summons for lack of jurisdiction over the person of said defendants on the grounds that (1) the defendants are Massachusetts corporations and are inhabitants of the Commonwealth of Massachusetts; (2) that they do not transact business within the State of New York or the Southern District of New York; and (3) that the defendants have not appointed an agent for the service of process and are not subject to service of process within the State of New York or Southern District of New York.

[*Parties in the Action*]

The defendant, Glenmore Distilleries Company, Incorporated, is a Delaware corporation, but is authorized to do business within the State of New York and has an office

at Rockefeller Plaza, New York City, for the transaction of business. It has appeared in the action and filed an answer and an amended answer.

The fourth defendant, American Beverage Company, has not appeared or answered. But a return of the United States Marshal from the Massachusetts District (Boston) shows that he served the summons and complaint on one Isadore Paretsky, a director of American Beverage Company, on April 7, 1947, and that on the following day the summons and complaint were returned to him by Paretsky with instructions to serve them on Attorney Harry L. Margolis, now of San Francisco, California, who was the last President and Treasurer of the corporation before its dissolution in Massachusetts. The Marshal re-served Paretsky on April 14th at the direction of plaintiff's attorney.

This action, brought by plaintiff, a New Jersey corporation, is a suit by a private party for violation of the anti-trust laws. [T. 15 U.S.C.A. § 15].

Section 22 provides:—

"District in which to sue corporation. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

[*Questions Raised*]

There is a question raised as to whether Glenmore acted as an agent for the two moving defendants in the transactions that gave rise to this suit. There is also a question raised as to the transactions themselves, where they were initiated and carried out, by whom and for whom, and whether they were sales of merchandise by the said two defendants, New England and Conway, or so called "participations" by them in plaintiff's wholesale profit. These questions are also involved in the merits of the controversy itself.

[*Parts of the Transactions*]

Enough appears from the affidavits submitted, especially from the exhibits annexed to plaintiff's affidavit, to show that parts of the transactions did take place within this Southern District of New York, that they related to cases of whiskey claimed to be owned by New England and Conway (Exs. A, B, and J), having been sold to them by Glenmore (as Glenmore's original answer admitted). Plaintiff's dealings were with and through Glenmore here in New York City. I am satisfied that for these transactions Glenmore acted for New England and Conway as well as for itself. In these deals New England and Conway were transacting business in New York City, within this Southern District of New York. [*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 at p. 373, and *United States v. Scophony Corp.*, 333 U. S. 795 at p. 808.]

As those cases indicate, all that is involved here is the question of venue. For reasons stated above this suit may be brought here.

[*Motion Denied*]

The motion is to quash the service and to dismiss. There is no contention that the wrong person was served or that there was any defect in the service. Indeed the file indicates that the attorneys for these two defendants are appearing only specially until the motion is decided. Even if this were the wrong venue the Court would not be obliged to dismiss the action but could transfer it to the proper venue under T. 28, U. S. C., § 1406.

The defendants' motions are in all respects denied.

[¶ 62,447] United States v. Schine Chain Theatres, Inc., et al.

In the United States District Court for the Western District of New York. Civil Action No. 223. June 24, 1949.

Sherman Antitrust Act

Theatre Operation—Consent Judgment—Practices Enjoined.—In a civil antitrust suit which alleged monopolization of theatre operations, a theatre circuit, its affiliated companies and individual officers consented to a judgment which ordered disposition of forty

theatres, laid down conditions under which films were to be bought and licensed, and enjoined practices and the performance of agreements which eliminated independent competition.

In order to create substantial motion picture theatre operating competition, specified properties were ordered to be conveyed to persons who would use them as motion picture theatres. Provision was made for leasing of theatres provided that no covenant based upon a share of the profits of the theatre was included in the lease. The company was enjoined from acquiring any financial or operating interest in additional theatres unless such acquisition would not unreasonably restrain competition.

When buying pictures, the theatre circuit was prohibited from combining open and closed towns to increase its buying power. The number of first-run pictures to be taken by the chain was curtailed to a stipulated percentage of all pictures released. Licenses were ordered to be taken on a single-theatre basis and free of restrictive conditions not available to competitors.

The decree enjoined the following practices: attempting to control the admission price charged by others by agreement with distributors or demands made upon distributors, demanding or receiving any clearance over theatres not in substantial competition, entering into any licensing agreement for more than one picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement, measuring a license fee by a specified percentage of the feature's national gross, operating theatres normally in competition as a unit, enforcing any agreement not to compete or restrict the use of real estate to non-theatrical purposes, preventing a competitor from acquiring or operating a theatre and cutting admission prices to prevent independent competition.

See the Sherman Act annotations, Vol. 1, ¶ 1210.501, 1220.273, 1530, 1590, 1610.301, 1610.318, 1610.411, 1610.450, 1610.601.

Superseding the provisions for relief contained in the previous decree of this Court, dated October 8, 1945, reported at 1944-1945 TRADE CASES ¶ 57,413.

For the plaintiff: Tom C. Clark, Washington, D. C., Attorney General; Herbert O. Bergson, Washington, D. C., Assistant Attorney General; George L. Grobe, Buffalo, N. Y., United States Attorney; Sigmund Timberg, Philip Marcus, Washington, D. C., Special Assistants to the Attorney General.

For the defendants: Irving R. Kaufman, New York, New York; Willard S. McKay, New York, New York; Howard M. Antevil, Gloversville, New York.

Consent Decree as to Schine Defendants

JOHN KNIGHT, District Judge: The plaintiff, the United States of America, having filed its Second Amended Complaint herein, and all the defendants having appeared and severally filed their answers to such complaint, denying the substantive allegations thereof, the Court after trial having entered a decree herein consisting of a judgment dated October 31, 1945, an Amended Judgment dated March 29, 1946, and an Order of Divestiture dated July 2, 1946; the defendants having appealed from such decree; the Supreme Court having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948, and this Court having, on August 13, 1948 entered an order vacating certain parts of its decree, findings of facts and conclusion of law, affirming other parts thereof, and providing for further proceedings pursuant to the Mandate and Opinion of the Supreme Court, and no further testimony or evidence having been taken after the remand of this cause; and no decision having been rendered by this Court after said remand upon the issues to be determined upon said remand, and all parties hereto, by their respective attorneys, having severally consented to the entry of this final judgment without admission by the defendants in respect to any such issue to be determined on remand.

It is hereby Ordered, Adjudged and Decreed:

[*Previous Decree Superseded*]

I

This judgment shall supersede the provisions for relief contained in the previous decrees of this Court.

[*Practices Enjoined*]

II

The Schine defendants, their officers, agents, servants, and employees are each hereby enjoined:

1. From combining open and closed towns in buying pictures for theatres operated by them or any one or more of them.

2. Except for the towns of Amsterdam, N. Y.; Glens Falls, N. Y.; Salisbury, Md.; Buffalo, N. Y.; and Syracuse, N. Y., from licensing for a period of three years from July 1, 1949 (or, in the case of a locality where a theatre is required to be divested pursuant to the provisions of paragraph IV, for a period of three years from the date possession of a theatre in operating condition is taken):

a. More than 60% [1] of the feature films released by the major distributors for first run [2] exhibition in any fiscal year, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer; [3] and

b. More than 48 [4] feature films from among the eighty pictures constituting the aggregate of the ten pictures released by each of the major distributors, respectively, for first run [2] exhibition in any fiscal year, which are allocated by the respective distributor to its highest selling bracket or brackets, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer.[3]

3. From attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever.

4. From demanding or receiving any clearance over theatres not in substantial competition.

5. From demanding or receiving any clearance over theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Upon request or complaint made by an exhibitor to the Schine defendants, or notice received by the Schine defendants of a request or complaint made to a distributor, that the clearance held by a Schine theatre over his theatre is unreasonable, the defendants agree to procure, from each of the major distributors from whom they license film, a review of the reasonableness of such clearance. Before such review shall be undertaken, written notice shall be given to the exhibitor affected, which notice shall advise such exhibitor that he may present his views orally or in writing to the distributor as to what, if any, clearance he deems reasonable. The defendants also agree, with respect to any complaint of unreasonable clearance, to submit upon request by the complainant the same to arbitration before any impartial arbitrator for determination, and decision of such arbitrator shall be binding upon the parties. Nothing herein shall prejudice the plaintiff or the exhibitor, in any court or arbitration proceeding in which the reasonableness of any clearance is in issue.

6. From asking or knowingly receiving, in the licensing of feature films for any theatre operated by the Schine defendants, discriminatory terms or conditions not available to competitors.

7. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits.

8. From making any franchise agreements. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

9. From making any formula deal or master agreement. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means

[1] For towns where defendants shall have two or more theatres and there is first run competition, substitute "two thirds."

[2] For the City of Rochester, N. Y., substitute "second run" for "first run."

[3] As to towns where Schine has competitors who desire first run feature films and in which there is a theatre to be divested, this limitation shall take effect not later than July 1, 1952.

[4] For towns where defendants shall have two or more theatres and there is first run competition, substitute "53."

a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

10. From conditioning the licensing of films in any competitive situation upon the licensing of films in any other situation.

11. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to pre-arranged percentages.

12. From enforcing any existing agreements not to compete, or to restrict the use of any real estate to non-theatrical purposes.

13. From using any threats or deception as a means whereby a competitor is induced to sell or is prevented from acquiring or operating a theatre.

14. From buying or booking films for any theatre other than those in which the Schine defendants own a financial interest.

15. From cutting admission prices for the purpose of eliminating or preventing the competition of independent competitors.

16. From continuing any contract, conspiracy, or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States.

[*Pooling Arrangements Dissolved*]

III

The existing pooling arrangements at Fostoria and Medina, Ohio, and Syracuse, New York, shall be dissolved.[5] Such dissolution in Fostoria and Medina may be effected either by dissolution of the respective corporations through which the defendants' theatre interests in these towns are jointly held with non-defendants and return of the theatres involved to the respective stockholders who owned them prior to the formation of the corporation or by a sale of the defendants' stock in such corporations. In the event that said corporations have not been dissolved as outlined above by August 15, 1949, the defendants' stock therein shall be sold to the other parties to the pool or to a party other than a defendant or owned or controlled by or affiliated with or related to defendants.

[*Disposition of Property Ordered*]

IV

A. For the purpose of creating substantial motion picture theatre operating competition in the localities hereinafter listed where the plaintiff claims that no competition or no substantial or adequate competition now exists or did exist during the years covered by the evidence and findings of fact in this cause, the Schine defendants shall dispose of all of the interest of each or any of the defendants in the following properties to persons who will use them as motion picture theatres[6] within three years from the date of the entry of this judgment, and shall entertain offers for the purchase of such theatres at any time. As to at least one-third of said properties such disposition shall be completed within one year from such date, and as to at least two-thirds of the said properties such disposition shall be completed within two years from such date. Each such disposition shall be to a party other than a defendant or owned or controlled by or affiliated with or related to a defendant, and shall be subject to the approval of this Court, upon notice to the Attorney General. The Schine defendants are also ordered and directed to comply with the other directions contained in the following tabulation:—

[5] The original order of the District Court directing the dissolution of the pool at Syracuse, New York, dated July 5, 1946, has been complied with in a manner approved by the District Court on August 18, 1947.

[6] The following properties, which the Schine defendants have certified either have never been used for theatre purposes or have not been so used for a long period of time and are not equipped or adaptable for use as such, need not be subject to the requirement of disposition for use as motion picture theatres:

Carthage—Bank property, former State Theatre property
Newark, Crescent Theatre
Perry, Vacant Lot
Seneca Falls, Seneca Theatre
Piqua, Bijou Theatre
Norwalk, Moose Theatre.

NEW YORK

TOWN	THEATRE
Auburn	Jefferson
Canandaigua	Lake
Carthage	Bank property and former State Theatre property
Corning	State
Cortland	Temple
Geneva	Regent
	Temple, if not in regular operation during the major part of each year.
Herkimer	Richmond
Little Falls	Hippodrome
Lockport	Palace or Rialto
Malone	Plaza
Newark	Crescent
Ogdensburg	Pontiac
Oneonta	Palace or Oneonta
Oswego	Strand
	Capitol, if not in regular operation during the major part of each year.
Perry	Vacant lot
Rochester	Madison or Monroe and Riviera or Liberty
Salamanca	Andrews
Seneca Falls	Seneca
Watertown	Palace

OHIO

Ashland	Palace
Bellefontaine	Strand
Bucyrus	Southern
Delaware	Star
Kent	Opera House [7]
Ravenna	Ohio [7]
Piqua	Miami or Piqua
	Bijou, if not re-opened by Schine defendants within three months from entry of judgment and kept in operation during the major part of each year.
Van Wert	Strand
Wooster	Opera House or Wayne or Wooster at buyer's option
Tiffin	Ritz or Tiffin unless the Schine defendants no longer have any interest in, or control over, any theatre in Fostoria.
Mt. Vernon	Vine [8]
Norwalk	Moose

KENTUCKY

TOWN	THEATRE
Corbin	Kentucky
Lexington	Kentucky or Strand and one other, not the Ada Meade
Maysville	Hollywood
Paris	Bourbon

MARYLAND

Cambridge	Arcade or State [9]
Easton	Avalon or New Easton [9]
Cumberland	Liberty
Salisbury	In accordance with the Order of Judge Knight dated October 15, 1948

B. As to such of the theatres required to be disposed of under this judgment as defendants have been unable to sell on reasonable terms, defendants, upon application to the Court in any such case and with the approval of the Court first obtained, may lease or sublease the same to a party not a defendant herein or owned or controlled by or related to or affiliated with a defendant herein; on condition, however, that no such lease or sublease shall contain any rental provisions based upon a share of the profits of the theatre covered by the lease or any other theatre; and further on condition that defendants shall thereafter sell their interest in any such theatre so leased or subleased as soon thereafter as they can do so upon reasonable terms and in any event prior to the expiration of such lease or sublease. Approval of the Court to lease such theatres shall not be obtained without a prior showing of due diligence on the part of the defendants to sell the theatres.

[*Further Acquisition of Financial or Operating Interest Enjoined*]

V

A. The Schine defendants are hereby enjoined from acquiring any financial or operating interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this Court upon reasonable notice to the Attorney General at Washington, D. C.

[7] In lieu of selling one theatre in each town, defendants may dispose of both theatres in either town.

[8] If the ownership and operation of either the Vernon Theatre or the Memorial Theatre shall be permanently disposed of to a person who (1) will use it as a motion picture theatre, (2) is not a defendant or owned or controlled by or affiliated with or related to a defendant, and (3) is not an exhibitor now operating in Mt. Vernon, the Vine Theatre need not be disposed of.

[9] In lieu of disposing of any theatre in Cambridge defendants may dispose of both theatres in Easton.

B. Nothing herein contained shall be deemed to prevent the Schine defendants from acquiring interests in theatres (other than those required to be disposed of hereunder).

a. As a substantially equivalent replacement for theatres held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes, or

b. In renewing leases covering any theatres held or acquired in conformity with this judgment or in acquiring an additional interest in any such theatre under lease, or

c. As a substantially equivalent replacement for any theatre held or acquired in conforming with this judgment which has been lost through inability to obtain a renewal of the lease thereof upon reasonable terms, if the defendants shall show to the Court and the Court shall find that such acquisition shall not unduly restrain competition.

C. The term "acquisition" or "acquiring", as used in this judgment, shall include, without limitation, construction, or completion of construction, of theatres.

[*For the Purpose of Compliance*]

VI

A. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege , (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present. For the purpose of securing compliance with this judgment any defendant, upon written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

[*Jurisdiction Retained*]

VII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

We hereby consent to the foregoing Judgment.

[¶ 62,448] State of Wisconsin v. Retail Gasoline Dealers Association of Milwaukee, Inc., et al.

In the State of Wisconsin Circuit Court, Milwaukee County. No. 213-601. May 11, 1949.

Wisconsin Statutes on Trusts and Monopolies

Activities of Retail Gasoline Dealers' Association—Price-Fixing Conspiracy—Corporate Charter Annulled.—In an action instituted by the Attorney General of Wisconsin, the corporate charter of an association formed to promote the interests of retail gasoline dealers was cancelled. In ordering both the organization and its officers to forfeit certain

sums of money, the Court declared that they had violated the several provisions of Section 133.01 of the Wisconsin statutes by becoming parties to an unlawful combination in restraint of trade and by engaging in concerted action to fix, maintain and control the retail price of gasoline. The fact that the combination was engaged in the promotion of the interests of the trade, or was seeking to eliminate competitive evils, or was exercising a stabilizing control over prices did not constitute a legal justification for price-fixing activity which was held to be inherently illegal.

See the Wisconsin statutes on Trusts and Monopolies, Vol. 2, ¶ 8955.

For the plaintiff: Thomas E. Fairchild, Attorney General; Leonard Bessman, Assistant Attorney General, both of Madison, Wis.; William J. McCauley, District Attorney in and for Milwaukee, Wis.; Henry Wozniak, Assistant District Attorney, Milwaukee, Wis.

For the defendants: John C. McBride, Alois K. Voissem, Roman H. Pitz, all of Milwaukee, Wis.

Decision

[*Review of Pleadings*]

CHAS. L. AARONS, Judge: In this action the State charges in its complaint that between January 1, 1944 and the time of filing the complaint the defendants severally and the retail gasoline dealers in Milwaukee County represented by the defendants as a class "engaged in an unlawful combination, conspiracy or agreement intended to restrain and prevent competition in the retail sale price of gasoline sold in the county of Milwaukee"; and that "said combination and conspiracy did control, raise and fix the retail sale price of gasoline sold in the county of Milwaukee, Wisconsin and did illegally restrain commerce and trade within the State of Wisconsin, contrary to the provisions of section 133.01" of the Wisconsin statutes (paragraph 20). The complaint sets forth in effect that pursuant to said conspiracy the defendants did restrain commerce and prevent competition by agreeing to fix and fixing certain uniform and increased prices to be charged the general public per gallon for certain grades of gasoline in six specific instances (on and between March 12, 1947 and January 6, 1948) as indicated in paragraph 22 of the complaint.

The answers of the defendant Retail Gasoline Dealers Association of Milwaukee, Inc. (hereinafter referred to as the "Association") and of the other defendants who are officers and directors of such Association specifically deny the several allegations pertaining to the alleged conspiracy, combination and agreement and deny that there was any intention to restrain and prevent competition in the retail sale price of gasoline sold in Milwaukee County.

As a separate defense the defendant Association sets forth that it and the directors of such Association are exempt from the provisions of section 133.01 by section 133.04 of the Wisconsin statutes in that said Association is an organization intended to, and that it does, legitimately promote the interests of trade, commerce and manufacturing in the State of Wisconsin.

A separate answer by the defendant Lester Kleinmann embodies the denials and defenses set forth by the other individual defendants; and adds as a separate defense that he was not a director of the Association until a time subsequent to the time of the offenses charged in the complaint.

It was conceded that all of the individual defendants except Louis M. Faber (the executive secretary of the Association) have been engaged in the retail sale of gasoline in Milwaukee County.

On May 14, 1948, upon order of the Circuit Court of Milwaukee County and pursuant to application made by the State, the defendant Association and all of the individual defendants named in the complaint (except the defendants Kenneth Grundmann and Al Volz) were temporarily restrained from taking part in any manner in any conspiracy, combination or agreement to fix, maintain or increase the price of gasoline sold at retail in Milwaukee County.

The action was tried on November 29th and 30th and December 1st, 1948. Thereafter arguments and briefs were submitted by counsel for the parties.

[*Documentary Evidence*]

The documentary evidence produced by the State includes the Articles of Organization of the Association and a number of

written communications in the form of notices and bulletins issued by the Association. The State also called Louis M. Faber, the executive secretary of the Association, as an adverse witness and a number of gasoline dealers who received the communications issued by the Association. There was also oral testimony given by investigators employed by the State.

It appeared from the Articles of Organization of the Association that it was organized as a Wisconsin corporation in 1933. Included among the business purposes of the corporation are the following:

> "To buy, sell, and generally deal in automobile accessories, tires, batteries, alcohol, gasoline, lubricating oil, motor fuel, grease, kerosene, heating oil, and all petroleum products and merchandise of like character and description for and on behalf of its members.
>
> "To promote and further the best interests of all persons who are engaged in the business of conducting, operating, and maintaining gasoline filling and service stations who are now, or who shall hereafter become members of this association and to do any and all acts which may tend to promote and protect the interests of its members, and in connection therewith to provide a uniform system of accounting to all members of such association and to furnish advice, assistance and information relative to collections, credits, advertising, and statistics and to do all things incident to the efficient conduct of the members' business and to do all valid acts which tend to put the business of its members on a more profitable, efficient and economical basis and for such purpose and in connection with such business to hold, possess, purchase, lease, mortgage, and convey real and personal property, enter into contracts and in general do any and all things and exercise any and all powers necessary or convenient for the accomplishment of any of said business." (Article I)

Such corporation was organized as a nonstock association, it being provided that no dividends or pecuniary profits shall be declared to the members. The Articles provide, among other things, that members of the Association shall be such as are engaged in the business of selling at retail or wholesale such articles of merchandise as are enumerated in paragraph 2 of Article I of the Articles and who shall pay the fees and dues prescribed by the board of directors.

The communications which were issued by the Association were, except as otherwise designated, transmitted to all retail gasoline dealers in Milwaukee County. Some of them were signed in the name of the Association; others were signed by the corporate secretary, defendant Robert E. Dunford. (T. 28, 35*) All of them were prepared by Louis M. Faber, the executive secretary. (T. 117, 118, 119)

(The emphasis in the following communications is reproduced as it appears in the original exhibits.)

On January 17, 1946 a notice (Exhibit 10) was sent "To All Service Station Operators," which began with a statement: "This is a report to you on the recent price discussion." The substance of the notice is that there were rumors of dealers and supplying companies "having difficulty in maintaining the gasoline prices that have been posted for the past few years"; and that such rumors have been checked and have been found to be in error. It was stated therein: "*The over-whelming majority of dealers did not change their prices*"; and that a few dealers were misinformed and lowered their posted prices but returned to their former level "upon clarification of the sitution." The letter concludes:

> "We are now checking all rumors and suggest that prices remain at the old postings.
>
> "*In any case should the condition warrant a suggested change you will be informed by this association.*" (T. 36, 37)

In explanation of Exhibit 10 the testimony of Faber, given on adverse examination, was, in part, to the effect that a few dealers had complained that there were "bad competitive conditions," or that somebody was selling "at a price that was bad," or "at a different price." (T. 37, 38)

On February 1, 1946 the defendant Dunford, as secretary of the Association, sent a letter (Exhibit 11) addressed "to All Shell Dealers." This letter calls attention to the fact that salesmen for the Shell Company were encouraging many of their lessees to reduce their selling price of gasoline. The argument is made in the letter that the supplying company has no legal control

(* Pagings cited are those of a temporary transcript.)

over the price charged by the dealer and urges upon the dealer the necessity of "a greater margin of profit." (T. 40)

On July 25, 1946 a notice (Exhibit 12) addressed "To All Retailers of Gasoline," signed by Robert E. Dunford as secretary of the Association, again calls attention to prices, saying that some dealers at times "have been selling their gasoline at almost unheard of prices." It refers to an impending price cut by stations selling Clark's Super Gas but urges:

> "*Every dealer is asked to sit tight at his present prices.*
>
> "We are watching this situation very carefully and hope that no dealer will make any price move until he is informed by this association on what to do.
>
> "For your own salvation, don't make any move, regardless of what any oil company tells you until you hear from us." (T. 41, 42)

On August 12, 1946 the Association held a regular monthly meeting in which, among other things, there appeared the following:

> "Unfinished Business:
>
> "Faber gave a complete analysis of the dealer's margin in comparison with increased wholesale and retail prices of gasoline and also what the additional margins mean to stations averaging the different amounts of gasoline and how many years of dues the dealers could pay with just their increased earnings during the year of 1946." (Exhibit 15) (T. 44)

On January 1, 1947 the Association issued a bulletin (Exhibit 13) which, among other things, contains an item entitled "*Gasoline Prices Up.*" In the discussion concerning prices under that heading the statement is made:

> "In checking over prices over a span of years, we find that gasoline prices at the present time are the highest that they have ever been for over 20 years. This high price is not attributable to dealers' activities alone. * * * We hope that some day these prices will level off." * * * (T. 42)

On April 19, 1947 the Association issued a bulletin (Exhibit 14) in which, under the heading "*Gasoline Prices*" the statement is made: "Since the end of the war the prevailing retail prices have increased 3.3¢ per gallon." It also states: "The continuous increase in the tank wagon prices, particularly in gasoline, has brought the prices up to quite a high level." The item contains the further statement:

> "When prices began to rise and it was suggested that dealers increase their margins by 4/10 of a cent per gallon, some of the supplying oil companies put up a tremendous howl and, in fact, intimidated and coerced dealers from taking this 4/10 of a cent margin. Considering that the supplying oil companies have taken 75.8% of the 3.3¢ increase in prices, they haven't done so badly!" (T. 43)

On March 12, 1947 a notice (Exhibit 4) issued by the defendant Association, addressed "To All Gasoline Retailers," stated in effect that the tank wagon price on all grades of gasoline will be increased by one-half cent on a designated day. The notice adds: "It is suggested that dealers pass along this increase by raising their retail prices by the same amount." This is followed by a schedule of "the prevailing prices" on premium, regular and third grade gasoline. (T. 14)

A similar notice addressed "To All Retailers," dated March 24, 1947 (Exhibit 5), announcing a tank wagon price increase, suggested an increase in the retail prices by the same amount "to compensate for the increase." (T. 16)

Shortly before October 13, 1947 a notice (Exhibit 6) purporting to be signed by Robert E. Dunford, secretary, addressed "To All Retailers of Gasoline," was sent to all members of the Association and, likewise, generally mailed to non-members together with an application form for membership on the reverse side of the notice. The notice announces an increase of the tank wagon or wholesale price of all grades of gasoline to cover a 3/10 of a cent per gallon increase in freight rates. The notice also states:

> "It is suggested that you increase your retail price postings on all grades of gasoline by 6/10¢ per gallon. This will give the retailer a much needed additional 3/10¢ per gallon margin, in addition to recovering his increased costs in the tank wagon price, due to a freight increase."

This is followed by the statement that "Prices on almost everything have gone up," and seeks to justify the dealers in adding "some additional margin to cover increased costs of operation." The notice contains a schedule of "the prevailing price of gasoline" for ethyl (or premium), regular and third grade gasoline. The notice also

contains a suggestion of an increase of the retail prices of certain types of anti-freeze. (T. 19, 20)

On October 21, 1947, a notice (Exhibit 7) purporting to be signed by Robert E. Dunford, secretary, addressed "To All Gasoline Retailers," is to the effect that the tank wagon or wholesale price of all grades of gasoline will go up 8/10 of a cent per gallon on the day designated. It also states:

> "It is suggested that all retailers increase their prices at their pumps by 8/10¢ per gallon so as to recover this new increase in your cost. This suggested increase of 8/10¢ is in addition to the 6/10¢ per gallon suggested increase of last week."

The notice also contains a schedule of "*Suggested Posted Prices*" for the various grades of gasoline. The notice contains the further statement:

> "This increase is all for the benefit of your supplier. If there still is any dealer whose conscience bothered him last week when it was suggested that he increase his margins by 3/10¢, he certainly should have a change of mind, when he sees the suppliers now grab 8/10¢ at one crack.
>
> "Why should you collect additional money for the railroads and the oil companies without occasionally getting some to cover your increased costs? These increases are generally explained by stating that they are to cover increased costs—you have them too." * * * (T. 27)

On December 15, 1947 a notice (Exhibit 8) purporting to be signed by Robert E. Dunford, secretary, addressed "To Retailers of Gasoline," calls attention to an increase in the tank wagon, or wholesale, price of gasoline and suggests "that retailers of gasoline increase their retail price posting on all grades of gasoline by 2¢ per gallon." It further states:

> "This suggested increase in the posted price will cover the 1½¢ increase in the tank wagon price, and provide for a much needed additional ½¢ per gallon margin for the dealer."

It contains further discussion in justification of the increase by reason of increases in all costs in the operation of a service station and in the cost of living. The notice schedules "the prevailing price" of several grades of gasoline (including the suggested increase). The notice was sent both to members of the Association and to non-members. The reverse side of the notice contains a form of application for membership in the Association headed by a drawing representing a chef in the act of tasting some palatable preparation contained in a kettle designated "Results." Underneath this illustration appears the legend: "You Have Tasted the Results of an Active Association. Now Is the Time to Join." (Exhibit 8 (Reverse side) and T. 30, 31.)

On January 6, 1948 an unsigned postal card notice (Exhibit 9) was issued by the Association, addressed "To All Gasoline Dealers," which suggested that "retailers of gasoline increase their price postings on all grades by .3¢ to recover the increase in tank wagon prices." (T. 32)

In addition to the notices mailed by the Association to all gasoline dealers in Milwaukee County, there is oral testimony to the effect that direct personal appeals were made by Association representatives to gasoline dealers to maintain the prices scheduled by the Association as the "prevailing prices."

[*Oral Testimony*]

David Boeshaar, who was employed by the Association during the summer of 1947 for the purpose of collecting dues from members and also to solicit new memberships, testified that he was instructed by the defendant Louis M. Faber to say in the "sales talk" which he gave to prospective members "that if all the dealers in Milwaukee got together that they would be able to get the prices that they wanted through the organization—higher profits, that is." (T. 48)

The defendant Ray Powers, called adversely, testified that after receiving the notice of October 13, 1947 (Exhibit 6), which recommended a dealer margin increase of 3/10 of a cent in addition to the tank wagon increase of 3/10 of a cent, he did not immediately comply by adding the dealer margin increase. Thereupon he received a telephone call from the defendant Faber urging him to make the additional raise of 3/10 of a cent "so that I would . . . my price would be the same as the other stations." Thereupon, within a day or two, Powers raised his price as requested. (T. 56) Powers also gave testimony to the effect that Faber was having trouble with the Shell service stations in respect to getting them to take the 3/10 of a cent increase and that by getting Powers to "break the ice" he, Faber, "might have easier sailing

with the other Shell stations to take that 3/10 of a cent increase." (T. 56, 57)

Others of the defendants, called adversely, testified that they acted upon the notices received from the Association and raised their prices accordingly.

The defendant Lester Kleinmann—one of the Association directors—called adversely, was, as the court indicated on the trial (T. 83), "inclined to do a little fencing with the counsel." When asked as to whether he followed the price recommendations of the Association, he testified:

"Well, it is a recommendation possibly that * * * is guiding to a certain extent because, after all, I assume that the Association is paying a secretary for — to do something and to figure out costs of business and operations and the like of it and the trend throughout the country, what is happening. And it certainly would be his job to try to advise as to cost of operation, because in most cases I don't believe the average filling station man sits down and figures out his costs of operation or knows whether he is losing money or making money until he is broke." (T. 83, 84.)

The witness Gerald Malone, who was a retail gasoline dealer in Milwaukee County but was not a member of the Association at the time of the trial, although he had been a member in prior years, testified that after receiving the notices from the Association pertaining to price increases he checked with his competitors in the neighborhood and that when they indicated that they were going to raise their price to the amount recommended by the Association, he also did so. "As a general rule," he said, "we went along with the price suggested." (T. 68, 69, 70.)

While there was reluctance on the part of some of the witnesses to admit that the price recommended by the Association was the sole influence, it is established beyond question that the large majority of retail gasoline dealers acquiesced in the Association's suggestions.

Exhibits 17, 18 and 22 consist of compilations of price statistics pertaining to Association and non-Association members. (T. 91, 92, 93 and 106.) It is shown by the statistics contained in these exhibits that at the time of the making of an investigation by a representative of the State employed by the Attorney General's office 90.15 per cent of the number of members of the Association were selling gasoline at the last recommended price contained in the Association notices, namely 29.4 cents for premium grade gasoline and 27.4 cents for regular grade gasoline. (T. 106 and Exhibit 22.) They also show that 55.32 per cent of the non-members of the Association who were on the Association mailing list were selling such grades of gasoline at the last Association recommended price. (T. 107.) They further show that 69.86 per cent of the total number of stations on the mailing list of the Association, including members and non-members, were at the time of such investigation selling at such last recommended price. (Exhibit 22 (summary) and T. 106, 108.)

The investigation referred to was made in July 1948. The last Association recommended price is the one contained in Exhibit 9, dated January 6, 1948, pursuant to which the retail price of premium (or ethyl) grade gasoline was scheduled at 29.4 cents per gallon and the price of regular grade gasoline at 27.4 cents per gallon. (T. 32.)

The influence of the Association's recommendations is further shown by the fact that there were 135 service stations where gasoline was sold at retail which were not on the Association mailing list, and that 72 of such stations (i. e. 53.33 per cent) were at the time of said investigation posting the exact price last recommended by the Association. (See Exhibit 21 and T. 94 and recapitulation and summary, Exhibit 22.)

When testimony regarding these statistics was introduced objection was made by defendants' counsel on the ground that the investigation by which the prices were ascertained to be as indicated was made in the month of July 1948, approximately six months after the time of the Association's last recommended prices. But it should be borne in mind that the Attorney General's inquisitorial proceeding under section 133.06 was instituted by the service of subpoenae on January 7, 1948—the day after the issuance of the Association's price suggestion of January 6, 1948—and that thereafter the present action was instituted and a temporary injunction granted. Without the evidence of such statistics, however, it appears quite conclusively that generally the price recommendations of the Association were followed.

[*Defendant's Testimony*]

The testimony adduced on behalf of the defendants was meager. Only the defendants Faber and Dunford were called by the defense. Their testimony was to the effect that they "did not agree with or conspire with anyone" to send out the several notices pertaining to price increases (Faber T. 116 *et seq.;* Dunford T. 123 *et seq.*); that the purpose of the notices was to give information of increases in tank wagon or wholesale prices and to quiet rumors of reductions that might result in a "price war." (T. 118 as to Exhibit 10.)

The State contends that the evidence overwhelmingly establishes serious violations of section 133.01, Wisconsin statutes.

The defendants contend: that there was no proof of a contract or combination to restrain trade or to prevent competition; that there was no intention to fix or control retail prices but merely a "passing on" to the public of wholesale price increases and the adding of a percentage of profit which was reasonable in view of increased costs imposed on the retailer. They contend that there is no evidence that the defendants were capable of controlling prices of gasoline or that they actually did control the price; that no coercion was exercised—each retail dealer being free to make his own decision. It was further contended by the defense that the defendant Association's activities were not unlawful; that they were within the exemption provision of section 133.04 pertaining to "associations or organizations intended to legitimately promote the interests of trade, commerce or manufacturing in this state."

[*Statutes and Law Applicable*]

The several contentions on both sides have been carefully studied in connection with the evidence and in the light of the statutes and law applicable.

Section 133.01(1) reads as follows:

"133.01 Unlawful contracts; conspiracies. (1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000. Any such person, corporation, copartnership, trustee or association shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section."

It has been pointed out in *Pulp Wood Co. v. Green Bay P. & F. Co.,* 157 Wis. 604, 625, and again in *State v. Lewis and Leidersdorf Co.,* 201 Wis. 543, 549, that section 133.01 (formerly section 1747e) is a mere re-enactment of the first two sections of the Sherman Anti-Trust Act applied to intrastate transactions, "and that its construction is ruled by the federal decisions construing the federal statute."

Although the cases indicate occasional seeming variations in the conclusions reached by the courts as applied to specific factual situations a study of the decisions discloses that the following principles are now generally firmly adhered to in dealing with violations of the so-called "Anti-Trust Act":

[*Governing Principles*]

1. In order to establish the existence of an illegal combination it is not necessary to prove that those who are parties thereto have bound themselves contractually; nor that the unlawful conspiracy be formed by simultaneous action of the participants. Direct proof of an illegal combination is rarely possible. *Lange v. Heckel,* 171 Wis. 59, 64; *Wm. Goldman Theatres v. Loews, Inc.,* 150 F. (2d) 738, 743.

In *Interstate Circuit v. United States,* 306 U. S. 208, 226-227; 83 L. Ed. 610, 620, Mr. Justice Stone, in delivering the opinion of the court, uses the following language:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Citing cases.) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. (Citing cases.)"

In this connection attention is directed to the testimony of some of the witnesses called adversely by the State's counsel. That those who attended the Association meetings had knowledge of and discussed the subject of the maintenance of increased and uniform prices for the retail sale of gasoline as indicated in the notices referred to appears fairly inferable, if not quite obvious, from the oblique manner in which answers were given to questions propounded by the State's counsel. See Kleinmann's testimony T. 84-87; and Faber's testimony who when asked whether the suggestions for price increases referred to in Exhibits 4 to 9, inclusive, were discussed at any of the meetings of the Association, replied:

> "Not to my knowledge. Because the 'Chair' always called the membership's attention to the fact that such decision at a meeting would be in violation of the anti-trust laws."

When again asked whether there was any discussion at the meetings as to the suggestions for price increases, he replied:

> "Not officially as part of the meeting."

When asked under what circumstances such discussion was had, he replied:

> "Well, under some circumstances a man might be talking about cost of living and the likes of it, and the increased cost of operation, and what it is costing him to operate, but no decisions. They were prevented to be had. Every man had to to make his own decision." (T. 33.)

In this connection see the illuminating article in Vol. 61 *Harvard Law Review* (Sept. 1948) on "Competition and Antitrust Laws," particularly page 1324 dealing with "The Meaning of 'Conspiracy.'"

2. To establish a combination as being one in violation of the anti-trust laws it is not necessary to prove that coercion was exercised for the purpose of obtaining compliance with the plan of the combination. *State v. Lewis and Leidersdorf Co.,* 201 Wis. 543, 557. In that case Mr. Justice Fowler, in delivering the opinion of the court, stated:

> "We are of opinion that if monopoly be created or attempts thereat be made through combinations and conspiracy with intent and purpose to produce such results, the statute is violated although coercion be absent."

3. To establish the combination as being one in violation of the Anti-Trust Act it is not essential that there be proof of an overt act. The mere intention to conspire is in itself the offense. With reference to a combination to fix or maintain prices it is necessary only to show a combination intending to secure such result.

This appears clearly from the statute here involved—particularly the second sentence (133.01(1)) containing the language "combination * * * *intended* to restrain" etc. And see *Nash v. United States,* 229 U. S. 373, 378; 57 L. Ed. 1232, 1236, where Mr. Justice Holmes uses the following language:

> "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." Id. 1236.

(See comment and citations under "4" (the next subdivision).)

4. It is not essential that the result of the combination should be a compelte monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. *State v. Lewis and Leidersdorf Co.,* 201 Wis. 543, 557.

In the *United States v. Socony Vacuum Oil Company,* 310 U. S. 150, 224; 84 L. Ed. 1129, 1168, the court comments upon this subject, saying:

> "Price fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control."

It should be borne in mind that it is not necessary that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under the antitrust law. The existence or exertion of

power to accomplish the desired objective becomes important only in cases where the offense charged is the actual monopolizing of any part of the trade or commerce (dealt with in section 2 of the Sherman Act). Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, the statute directs itself against that dangerous probability as well as against the completed result. (This language is in part quoted from *United States v. Griffith,* 334 U. S. 100, 105, 106; 92 L. Ed. 1236, 1242 and 1243. On this subject see also "Note 59" in *United States v. Socony Vacuum Oil Company,* 84 L. Ed. at page 1168, 1169.)

Also see *Pulp Wood Co. v. Green Bay P. & F. Co.,* 168 Wis. 400, 413; *Ethyl Gasoline Corp. v. U. S.,* 309 U. S. 436, 458; 84 L. Ed. 852, 862.

5. The fact that the combination sought to eliminate competitive evils such as ruinous competition by reason of price cutting and was engaged in an endeavor to curb competitive abuses does not constitute a legal justification for the activity of such combination in respect to fixing or maintaining prices; and likewise the fact that the prices are fixed by the combination at the fair going market price is immaterial. (Anno. 50 A. L. R. at p. 1000 to *U. S. v. Trenton Potteries Co.,* 50 A. L. R. 989 (Syl. 1) and 995. This case is also reported in 273 U. S. 392, 397; 71 L. Ed. 700, 705.) The fact that the method of attempted control may be considered "as stabilization" does not alleviate the price fixing evil. *United States v. Socony Vacuum Oil Company,* 310 U. S. 150, 220 to 224; 84 L. Ed. 1129, 1166 to 1169. See also *State of Minnesota v. Minneapolis Milk Company,* 124 Minn. 34; 51 L. R. A. (n. s.) 244, where it was held that a beneficent purpose such as that the increased price was necessary to afford the members a profit can not excuse a violation of the statute. *Id. 248.*

In the instant case defendants "point the finger" at the wholesalers who raised the tank wagon price. From the time of Adam, Eve and the serpent such defense has been repeatedly asserted but has never been good law. While not passing here on the conduct of the wholesalers the statute does not permit this court to hold that the violation of law by one condones the violation by another in engaging in a forbidden combination. To so hold would mean the complete failure of law enforcement.

6. Price fixing agreements are unlawful *per se* under the Wisconsin statute here involved as well as under the Sherman Act. *U. S. v. Socony Vacuum Oil Company,* 310 U. S. 150, 218, et seq.; 84 L. Ed. 1129, 1165, 1167, *et seq.*

7. The fact that the Association is one engaged in the promotion of the interests of trade in this state does not exempt it from liability under sec. 133.01(1).

Considerable stress was placed upon the following provision of section 133.04 of the Wisconsin Statutes:

> "133.04. What Organizations Included. The word 'person' wherever used in the three next preceding sections shall be deemed to include, besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States, any of the territories of this or any other state or of any foreign country; provided, that nothing therein shall be construed to affect labor unions or any association of laborers organized for the purpose of promoting the welfare of its members, ***nor associations or organizations intended to legitimately promote the interests of trade, commerce or manufacturing in this state*** * * *." (Italics supplied)

Said section does not operate to exempt the Association from the provisions of section 133.01 since the activity of the Association in respect to the fixing and maintenance of price does not "*legitimately* promote the interests of trade, commerce or manufacturing in this state."

In section 17 of Title 15 of the Clayton Act there is a similar provision to the effect that nothing contained in the anti-trust laws shall

> "forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The word "organizations" as there used referred to "labor, agricultural or horticultural organizations instituted for the purpose of mutual help."

That provision has been held to give no exemption to a union if it engaged in a combination to violate the Sherman Act. One of the most recent decisions to that effect is *Allen-Bradley Company v. Local Union No. 3 etc.*, 325 U. S. 797, 805, 806, *et seq.;* 89 L. Ed. 1939, 1945, 1946.

[*Violation Established*]

In the light of these principles, the facts elicited upon the trial compel the conclusion that there has been a clear violation of several provisions of section 133.01(1) of the Wisconsin statutes.

The several notices issued by the Association to its members as well as to retail gasoline dealers generally in Milwaukee County disclose unlawful activities in attempting to "tamper with price structures." (84 L. Ed. at p. 1167)

The circulation by the Association of schedules of the "prevailing price of gasoline"; the "suggestions" in the notices that such scheduled prices be maintained; the warnings against reductions of the scheduled prices "until informed by this Association on what to do"; the attempts to enlarge the membership of the Association by appeals to non-members which point out graphically that the Association, by its campaign for uniformly fixed and progressively increasing retail prices, was bringing "results" in additional profits to the retail gasoline dealer;—were in themselves sufficient to establish that those who authorized the issuance and mailing of said notices intended to restrain or prevent competition in the retail price of several grades of gasoline; and that a standard or figure was fixed by those responsible for the issuance of said notices in which the price of gasoline sold at retail to the public was in some manner controlled or established. The said written notices were, however, reenforced by personal pressure exercised by the executive secretary of the Association (Faber) in personal contacts with members of the Association when they did not promptly respond to the notices by posting the increased prices.

The evidence in this case establishes not only the specific intent to fix the retail price of gasoline—and thus to restrain or prevent competition in Milwaukee County—but also that the activities of the Association succeeded in fixing and establishing increased and uniform prices of that commodity by a large proportion of the retail gasoline dealers in said county. (Exhibits 17, 18 and 22; and pages 13 and 14, *supra.*)

That the Association's activities were produced by concerted action—by an unlawful combination—is likewise established by the evidence and the reasonable inferences therefrom. That the directors may have exercised caution in avoiding discussion of the price-fixing notices "officially as part of the meeting" because *"such decision at a meeting would be in violation of the anti-trust laws"* (T. p. 33—*supra* p. 19) emphasizes the transparency of the defendants' categorical denials of conspiracy.

As to the parties to that combination: It cannot fairly be doubted that Robert E. Dunford, corporate secretary of the Association, whose name was signed by Faber to a number of the communications, was aware of and acquiesced in their contents. (T. 119-124) This is also true of all of the officers and directors of the Association since they were the governing body of the Association, were recipients of the price-fixing notices, and acted in accordance with the suggested price schedules.

The evidence is undisputed that no officer or director of the Association at any time attempted to dissuade Faber from his unlawful activities in circulating the price maintenance notices. (T. 35) Under the circumstances, and in accordance with familiar rules, the officers and directors of the Association must be held responsible for the activities of their executive secretary. *State ex rel Kropf v. Gilbert*, 213 Wis. 196, 217.

Attention has been directed to the fact that the Association is not exempt from the provisions of section 133.01(1) in so far as it pertains to acts intended to restrain trade or prevent competition in the price of gasoline. (*Supra.* p. 23)

The fact that the Association was engaged in circulating statistical information pertaining to the trade and was seeking to prevent "disastrous price wars" does not justify its activities in fixing retail prices of gasoline in violation of the Wisconsin Anti-Trust Law. (*Supra* p. 21-22)

A case involving the activities of a trade association whose methods were closely analogous to those used in the instant case is *Food & Grocery Bureau of Southern Cali-*

fornia v. United States, 139 Fed. (2d) 973. In the District Court the "Bureau" and individual directors were convicted of conspiring to restrain interstate commerce in fixing retail prices of goods and groceries in violation of section 1 of the Sherman Anti-Trust Act. (43 F. Supp. 974) Such conviction was affirmed by the Circuit Court of Appeals. (139 Fed. (2d) 973)

It appeared there that the "Bureau" circulated many letters to its members containing statements as to "minimum prices" and asking the members to "kindly observe this price" or to "conform." There were exhortations to hold to the prices announced and injunctions against deviation thereof with appeals to the profit motive. A marked similarity of language employed by the Association in the instant case is observable in the "Bureau's" letters. In that case, as here, an unsuccessful attempt was made by the directors to disclaim responsibility for the acts of the secretaries of the "Bureau."

Respecting the "good motives" of the "Bureau" the District Judge said: (43 F. Supp. 974 at 980)

> "If there be a violation of law, it matters not that the Bureau may have engaged in other very laudable activities." * * * "But when, under the guise of enforcing the (California Unfair Practices) Act, clear price-fixing and price stabilization activities are carried on, the protestations of lawful motive lack force." *Id.* 980.

The conclusion is unescapable that the Association as well as its officers and directors have violated the several provisions of section 133.01 by becoming parties to an unlawful combination in restraint of trade, and by engaging in concerted action to fix, maintain and control the retail price of gasoline sold in Milwaukee County.

[*Immunity to Certain Defendants*]

Certain of the defendants are entitled to immunity by virtue of the provisions of section 133.24 since they were examined in inquisitorial proceedings instituted by the Attorney General under section 133.06 and 133.03. These defendants are Louis Faber, Kenneth Grundmann, Al Volz and Ray Powers. As to those the State has announced that it asks for no forfeitures or costs by reason of the immunities thus granted by the statute.

As to the defendant Lester Kleinmann, the evidence shows that he was not elected a director until after the mailing of the price-fixing notices referred to. It is not shown that he was in a position to prevent the commission of the unlawful acts of the Association.

As to those retail gasoline dealers who are not made parties defendant to this action but who are intended to be included only as members of a class pursuant to the provisions of section 260.12, I am of the opinion that no judgment *in personam* can be entered against them since they do not appear to have been given a due opportunity to defend the action. This is particularly true of the class of non-member retail gasoline dealers who were on the Association's mailing list and who are alleged to have received price recommendations. Nor can those dealers who are not made defendants be rightly held to be adequately represented by others who were made parties but whose situation as to liability is not the same as those dealers who are not parties. It appears that the two defendants who were selected to represent such non-member class were the defendants Grundmann and Volz, both of whom acquired immunity as hereinabove stated.

In *Hansberry v. Lee,* 311 U. S. 32, 40, 85 L. Ed. 22, 26, it is said:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

In the opinion of *Mr. Justice Stone* in that case it is further said:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties (citations), or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." 85 L. Ed. 27, 28.

In that case the court held—after a discussion of potentially conflicting interests between those who were parties and those who were not but were sought to be brought in by representation—that the representa-

tion in the case of such absent parties did not satisfy the requirements of due process; and therefore such absent parties were not bound by the judgment. Id. p. 28-29.

[*Terms of Judgment*]

As to the judgment to be here rendered pursuant to the conclusions reached the court has no discretion except as to the amounts of the forfeitures to be imposed against the respective defendants. Judgment should be granted as follows:

1. The defendant Milwaukee Retail Gasoline Dealers Association of Milwaukee, Inc. shall forfeit the sum of $2,000 with costs and disbursements.

2. The corporate charter of the defendant Retail Gasoline Dealers Association of Milwaukee, Inc. must be cancelled and annulled pursuant to the provisions of section 133.01.

3. The defendants Henry Frey, Ted Schaumann, Robert E. Dunford, P. E. Griffin, Ray Kobs, Herold Luderus, Arthur Genner, Walter Nimmer, Arthur Tess, and Stanley Ufnowski, each of whom are directors of said Association, shall each forfeit the sum of $200 with costs and disbursements.

4. Each of the defendants named, together with all members of the said Association, shall be enjoined from continuing in said combination and conspiracy in restraint of trade and shall be further enjoined in the manner and according to the terms provided in the temporary restraining order granted by the Circuit Court of Milwaukee County of May 14, 1948.

Findings of fact and conclusions of law in harmony with the foregoing decision may be submitted by the Attorney General after the delivery of a copy of such proposed findings and conclusions to opposing counsel.

[¶ 62,449] Chicago Sugar Company v. The American Sugar Refining Company.

In the United States Court of Appeals for the Seventh Circuit. October Term, 1948, April Session, 1949. Nos. 9158, 9159. July 11, 1949.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Clayton Act, Robinson-Patman Act

Competitive Terms Offered by Suppliers to Customers—Price Discrimination—Good Faith in Meeting Competition.—A sugar distributor sought three-fold damages against a sugar refiner for alleged discrimination within the meaning of Section 2 (a) and (e) of the Clayton Act as amended by the Robinson-Patman Act consisting in the offer to other customers of the privilege of re-entering contract balances for a January contract at decreased June prices, when in response to a public announcement issued by the sugar supply company, the complaining customer had taken delivery under a comparable contract at a higher price. It was established by the course of dealing between the parties and public announcements outlining the basis upon which business was accepted under the contracts that customers were not obligated to accept delivery of contract balances. To encourage disposal of balances suppliers extended guarantee terms to unguaranteed balances, allowed re-entry of contract balances and cancellation of contract balances. The extension of such privileges were competitive terms so that when offered by one refiner, his competitors felt impelled to offer like terms in order to compete.

It was held that the distributor had voluntarily accepted delivery under his January contract; that he had been accorded all the privileges of all other customers. The Court declared that when the seller reduced its basis price it did so in good faith to meet the identical terms previously offered by its competitors and not for the purpose of discriminating between customers.

The Court upheld the lower court's decision which dismissed the action on count two in which it was alleged that the seller's classification of customers as manufacturers and distributors, the offer of contracts only to the manufacturing trade, and the repricing of these contracts resulted in discrimination.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212, 2216.

For the plaintiff: Leslie M. O'Connor, Chicago, Illinois.

For the defendant: Kenneth F. Burgess, Howard Neitzert, George A. Raney Jr., Chicago, Illinois.

Before MAJOR, C.J., KERNER and DUFFY, JJ.

KERNER, J. By the appeal in No. 9158 plaintiff challenges the propriety of a judgment dismissing its complaint after a trial upon the merits. In No. 9159 defendant appeals from that part of the same judgment which taxed to defendant one-half of the costs of the proceedings before a master.

[*Complaint*]

The complaint contained three counts. The first two counts charged violation of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. A. § 13 (a) and (e)) and sought to recover three-fold damages. The third count sought damages for breach of contract. After defendant had filed its answer, the cause was referred to a master for hearing and to report his conclusions and recommendations. The master having heard the cause, filed his report. He made 79 findings of fact. He also made conclusions of law and recommended that the cause be dismissed. Exceptions to the report were filed and overruled, and the report of the master was approved. In the judgment order dismissing the cause, the court adopted the master's findings of fact and conclusions of law.

[*Issue Defined*]

The issue is whether the acts of defendant were discriminatory within the meaning of § 2 (a) and (e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13 (a) and (e). Under § 2 (a) it is unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect may be to substantially lessen competition or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. And § 2 (e) forbids preferential services or facilities connected with the sale of a commodity upon terms not accorded to all purchasers on proportionally equal terms.

[*Facts Reviewed*]

Plaintiff, an Illinois corporation, is a distributor engaged in the business of buying and selling sugar, largely with industrial users. Defendant, a New Jersey corporation, is engaged in the business of buying and refining raw cane sugars and in selling domestic refined cane sugars and sugar products. In 1936 and 1937 there were 14 domestic cane refiners in the United States which, with the exception of those owned by Western Sugar Refinery and California & Hawaiian Sugar Refining Corporation (hereinafter referred to as "Pacific Coast Refiners") and located in San Francisco, California, were located along the Gulf and Atlantic coasts. Sugar is a standardized commodity, and the sugar business is extremely competitive. A customer will pay no more for one refiner's brand than for another; price and terms rather than brand control its sale and distribution, and no seller of sugar can continue in business unless he gives his customers the same privileges any other refiner gives. All domestic cane refiners sell their sugar through brokers on substantially the same terms. Two types of contracts are offered to the trade by refiners: (a) contracts containing specifications for the immediate sale and delivery of the sugar, and (b) contracts not containing specifications, referred to as 30-day contracts.

The 30-day contract form does not require contract bookings to be withdrawn within the guarantee period applicable to the contract. The guarantee period is not mentioned in the contract form, but, pursuant to announcement, contract prices may be guaranteed for 30 days, 42 days, or not guaranteed at all; yet, in all except in very unusual cases the delivery period as stated in the contract form is 30 days and delivery specifications are required of the purchaser within 15 days from the date of the contract. Many contracts do not carry a guarantee, yet the delivery period is determined in precisely the same manner as in the case of guaranteed contracts.

Most of the sugars sold by refiners are through the medium of 30-day contracts, entered on market moves. A market move develops when refiners announce an increase in their basis prices. Ordinarily a price increase is announced the day before a new and higher price becomes effective. In the interim between the announcement and the

effective date of the new price, sugar buyers enter into 30-day contracts with refiners, booking such amount of sugar as the seller will accept or as the buyer may consider to his advantage. These 30-day contracts do not contain specifications as to the grade, kind, style of package, or quantities of sugar to be delivered, nor are the dates on which the sugars are to be delivered specified. They contain a provision that the buyer agrees to buy and the seller agrees to sell a designated number of 100-pound bags of refined cane sugar at a basis price per pound. When sugars booked on a 30-day contract form are delivered to the customer, the deliveries are made pursuant to delivery specifications furnished by the purchaser, stating the kinds of sugar and amounts desired, and the refiners make deliveries until they advise their customers to the contrary. While the contract forms used by the various refiners differ in their terms, all require the purchaser to buy and the seller to sell specified quantities of sugar at a firm price, the sugar to be delivered within 30 days of the contract unless otherwise indicated.

The provisions of the 30-day contract forms requiring purchasers to specify for delivery sugars booked under the contract within 15 days of the contract date and to accept delivery within 30 days of the contract were ignored by both buyer and seller from the date of the introduction of the 30-day contract form, and buyers withdrew sugars if, as and when they desired so to do, and it became common practice for all refiners to make deliveries until they notified their trade to the contrary. No effort was made by any refiner to require its customers to withdraw contract bookings, and undelivered contract balances were cancelled at the request of the buyer.

[*Contracts Modified in the Course of Dealings*]

On January 4, 1937, the parties executed two 30-day contracts. By contract No. FA-21160, plaintiff agreed to buy and defendant agreed to sell 75,000 100-pound bags, and by contract No. FA-21161, 25,000 100-pound bags of refined sugar. The parties agree that the language of the contract did not express their true agreement, and both parties disregarded the rights and obligations provided by the contracts with respect to furnishing specifications, the withdrawal of contract balances or the delivery of sugar booked under the contracts. They also agree that the contracts were supplemented or modified by the course of dealing between the parties since January 1, 1932, and by public announcements outlining the basis upon which business was accepted under the contracts.

About 1936 California & Hawaiian Sugar Refining Corporation (hereinafter referred to as C. & H.), to improve its competitive position in the central states, offered to guarantee its 30-day contract price against a decline in its own basis price for 42 days following the date of its contracts. This move by C. & H. was met with like terms by other refiners, and the terms so offered became known as "guarantee terms" or as "the guarantee" and there evolved in the trade a term known as "the regular 42-day guarantee" and thereafter 42-day guarantee terms were extended to purchasers holding 30-day contracts to withdraw sugars booked at the lowest basis price during the first 42 days following the date of the contract.

[*Devices to Dispose of Contract Balances*]

Having given their customers cause to believe that they would not be required to withdraw 30-day contract bookings if they did not desire to do so, the refiners were confronted with the problem of inducing withdrawals and with the further problem of disposing of undelivered contract balances in cases where the buyer could not be induced to make such withdrawals. They devised various expedients for extending guarantee terms to the unguaranteed contract balances, two of which were known as "extending the guaranty period" and "re-entering contract balances." Re-entering January 4 contracts involved no making of new contracts, and when contract balances were re-entered, the refiners extended to their customers holding undelivered contract balances the same rights and privileges with respect to such contract balances as though the old contracts were cancelled, and upon the customer's request they could cancel undelivered contract balances.

Two methods were devised for the disposition of undelivered contract balances in cases where the customer failed to withdraw such balances. The practice was to advise contract holders by letter or public announcement that unless the balances were withdrawn by a specified date in the future, the contracts would be cancelled. By the other method the refiners announced that they

would permit customers to cancel the outstanding contracts. The extension of guarantee terms, the re-entry of contract balances, the cancellation of contract balances and the offer to cancel contract balances are competitive terms, and when extended by one refiner to its customers, competing refiners are required to offer like or similar terms in order to hold the good will of their customers.

[*Facts Leading Up to Alleged Discrimination*]

From January, 1932, until November 5, 1936, there were 32 market moves on which 30-day contracts were entered into between the parties, and during 1936, deliveries were made to plaintiff many days after the 30-day contracts had expired. January 4, 1937, the cane refiners announced that effective January 5, they would advance their basis prices from 4.80 cents to 5 cents per pound. In the market move which followed, substantial quantities of sugars were booked on 30-day contract forms, but withdrawals were light during January and February. February 11 the Pacific Coast Refiners announced a decline in their basis price. Other refiners met this competition. February 15, 1937, the 42-day guarantee contracts entered into on the January 4 move expired. At this time substantial balances were outstanding under the January 4 contracts. February 5, the Pacific Coast Refiners announced that upon the customer's request, they would cancel undelivered contract balances. This announcement placed customers of the Pacific Coast Refiners on a more favorable basis than customers holding 30-day January 4 contracts with eastern and southern refiners whose outstanding contract balances were unguaranteed and who were not free to enter new business because of such contract balances. Defendant and the other eastern and southern refiners promptly met this competition by extending guarantee terms on January 4 contract balances. Plaintiff did not request cancellation of its January 4 contracts, but its president expressed his satisfaction with defendant's extending guarantee terms to the contract balances.

In March, 1937, defendant announced that a sugar control bill introduced in the United States Senate on March 2 provided for the imposition of an excise tax on refined sugar manufactured after April 1, 1937, and that if the bill became a law in that form, all refined sugar manufactured in the United States before April 1 would be exempt from the tax. March 5, C. & H. announced that it would terminate the guarantee applicable to its 30-day contracts as of March 31, 1937. Defendant followed suit on March 6, and announced that it had extended its guarantees so that the guarantees would expire not later than March 31.

The demand for sugar during the month of March was exceedingly heavy, the deliveries being over 300% of their normal volume, with the result that it was impossible to buy sugar except in the form of contract withdrawal, and on March 17 defendant announced that as against January 4 contract balances, it could not obligate itself to make delivery of any sugar before April 1, unless specifications and shipping instructions were furnished.

At this time plaintiff was in the same position as all other customers of defendant in that it had the right and privilege as to when and how it would take delivery of sugars booked on the January 4 market move. Defendant did not require plaintiff to withdraw and take delivery of the sugars, nor did the contracts require plaintiff to withdraw or take delivery of the sugars; nevertheless, plaintiff elected to withdraw and take delivery of the sugars, and on March 6, a broker handling plaintiff's January 4 contracts telephoned to defendant an assortment of sugars amounting to 63,750 bags, to be placed in warehouses in Chicago, to be available to plaintiff prior to April 1. These sugars, together with sugars then held in the warehouse by defendant for plaintiff, were the equivalent of the undelivered balance due plaintiff under its contract No. FA-21160.

On March 9, 1937, plaintiff's president informed defendant that Purity Bakeries, one of plaintiff's customers, would withdraw balances due plaintiff under contract No. FA-21161, and that he was anxious to obtain title to outstanding contract balances prior to April 1 when it was anticipated that the tax bill would become effective, and offered to take delivery of sugars at defendant's refineries if that would facilitate delivery and pass title to the sugars that were undelivered under the January 4 contracts. Thereupon defendant submitted a plan for the delivery of balances due plaintiff to which plaintiff agreed. Pursuant to the plan the sugars were delivered, but because of the demands on defendant's shipping and refining facilities, the

deliveries were not completed until April 14, 1937.

The demand for sugars disappeared about the middle of April when it became apparent that the Sugar Tax Bill would not pass, and there was little activity in the trade. Contract balances were unguaranteed and new business was offered without a guarantee. May 12, C. & H. issued an announcement reinstating guarantee terms and re-entering January 4 contract balances. Similar announcements were made by at least six other domestic cane refiners, and defendant met this competition. The reinstatement of guarantee terms and the re-entry of contract balances marked the beginning of a new period of intense competition, and within a few days the market began to show signs of weakness and refiners cut their prices. May 20, 1937, a refiners' basis price of 4.70 cents per pound became effective. To meet this competition, defendant announced that its basis price was 4.70 cents per pound, specifications with order, prompt shipments, guarantees in effect to apply as theretofore. May 25, all of the refiners announced that on the buyer's request, they would cancel re-entered January 4 contract balances.

On May 26, 1937, defendant announced that balances against contracts booked on January 4 at 4.80 basis price were guaranteed to 42 days from May 11, and its customers were offered the privilege of cancelling. This offer was in effect an offer to re-enter contract balances under terms applicable to new business and to accept new contracts without regard to whether a customer held or had held an undelivered balance. At that time plaintiff cancelled balances, inactive since April 14, amounting to 40,432 bags. June 10 the refiners reduced their basis price to 4.50 cents and on that date defendant also announced that its basis price was 4.50 cents per pound, prompt shipment on 30-day contracts with guarantee against decline but not beyond 42 days from contract date.

[*Price Reduction in Good Faith*]

Plaintiff had considerable sugar delivered during March and April at defendant's refinery in Louisiana, which had been paid for in whole or in part in June after the price decline, and although there were no outstanding balances between the parties in March and April, 1937, under the re-entered January 4 contracts, the price decline on June 10 did affect the price paid by the trade for sugars previously delivered. Nevertheless when defendant reduced its basis price in June, it did so in good faith to meet identical terms previously offered by its competitors and not for the purpose of discriminating against plaintiff or any other customer. Plaintiff was accorded all the privileges and advantages of all other customers holding January 4, 30-day contracts. And there was no proof that any of defendant's customers had received more favorable prices or terms with respect to sugar booked on the January 4 move than those received by plaintiff.

During the five years preceding January 1, 1937, plaintiff had withdrawn all contract balances during the guarantee period applicable to such contracts on six occasions, although bookings had been made with defendant on 32 market moves during this period, and defendant had re-entered contract balances on at least five occasions when plaintiff held contracts with defendant.

[*Findings of Lower Court*]

Based upon these facts, the court concluded that by the public announcements of defendant and by its course of dealing with plaintiff, the provisions of the January 4 contracts were amended and modified; that defendant had waived the provision in the contracts requiring plaintiff to furnish specifications for the delivery of the sugars within the period mentioned therein, and any obligation requiring plaintiff to withdraw the sugars within 30 days or within any other period of time; that plaintiff did not consider itself legally obligated nor was it in fact obligated to withdraw sugars booked under the contracts; that plaintiff withdrew its January 4 contract balances voluntarily; that none of defendant's public announcements were made for the purpose of discriminating against plaintiff or any of its customers, but were made in good faith to meet similar terms offered by defendant's competitors; and that defendant violated no duty or obligation to plaintiff in reinstating guarantee terms and re-entering contract balances or by the price decline of sugar.

Plaintiff's contention is that defendant was guilty of discrimination in price between purchasers under the January 4 contracts. We experience some difficulty in comprehending just what it is that plaintiff claims and in what manner defendant discriminated. In its brief plaintiff says that the issue involves

"(a) refusal of cancellation rights in February-March and their granting on May 26, 1937; (b) price reductions on January 4 contracts deliveries under guarantee reinstatement of May 12; (c) relieving buyers who did not take delivery by March 31 of carrying costs—storage, interest, insurance, etc.; (d) enabling such buyers to get sugar at 4.70¢ and 4.50¢."

As we understand it, the conduct which plaintiff charges resulted in discrimination arose out of defendant's alleged misrepresentation with respect to cancellation rights under the contracts, that is, defendant's failure to require all its customers to withdraw January 4 contract balances prior to March 31, the re-entry of such contract balances under guarantee terms, and the cancellation of such balances in May. Plaintiff argues that defendant's announcements were, in fact, notice to the trade that contract balances had to be withdrawn before March 31, which it did, to its disadvantage in comparison with other customers, its competitors. It also says that even if it be assumed that plaintiff was under no obligation to take the sugar, it is no defense that plaintiff "owed no duty contractually or otherwise" to defendant to take the sugar.

[*Contracts Amended*]

Before proceeding to discuss plaintiff's contention it is well to say that parties to a contract always have the right, by agreement or their course of conduct, to waive the requirements of their contract. And it has been held that one of the parties to the contract cannot by a long course of conduct lead the other party to believe that it will not insist upon a strict performance of a duty imposed by the contract, and then without notice insist upon strict performance. *Hubshman v. Louis Keer Shoe Co.*, 129 F. 2d 137, 140. What facts will constitute a waiver is a matter of law, but whether the facts exist in any given case is a question of fact. *Aetna Life Ins. Co. v. Sanford,* 200 Ill. 126, 130, and *Baxter v. Metropolitan Life Ins. Co.,* 318 Ill. 369. We think there was competent evidence warranting the conclusion that by the course of conduct between the parties, the January 4 contracts had been amended as found by the court.

It cannot be gainsaid that before plaintiff may maintain its suit it must establish that defendant has violated the Robinson-Patman Act, and only discriminations that lessen or tend to prevent competition between customers or between sellers are prohibited. Section (2) (a), 15 U. S. C. A. § 13 (a), and *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission,* 106 F. 2d 667, 676. There must be proof that a seller has charged one purchaser a higher price for like goods than he charged one or more of the purchaser's competitors. *Federal Trade Commission v. Morton Salt Co.,* 334 U. S. 37, 45.

It is clear that plaintiff was not obligated to withdraw sugars under the January 4 contracts within 30 days, and that plaintiff withdrew the sugars voluntarily. It is also clear that no secret terms or concessions had been extended by defendant to any customer holding a January 4 contract. Plaintiff was subjected to no inducements that were not accorded to every other customer. All of defendant's customers were treated alike. All terms applicable to these contracts were made in good faith and publicly announced to meet similar terms offered by defendant's competitors, and all contract holders were privileged to take advantage of the terms so announced. The announcements contained no misrepresentation of fact, nor any suggestion that contract balances be withdrawn; they were made in good faith to meet identical terms previously offered by defendant's competitors and not for the purpose of discriminating against plaintiff, and specifically stated that customers should determine for themselves whether it was in their interests to withdraw contract balances. The announcements did not constitute a promise or representation that guarantees would not be reinstated. There was no proof that defendant charged one purchaser a higher price for the sugar than it had charged plaintiff under similar circumstances, and there was no evidence that the announcements lessened or tended to prevent competition between defendant's customers. In this situation, we think the District Court was justified in holding, under the first count of the complaint, that defendant was not guilty of discriminating in price between different purchasers under the January 4 contracts.

Under the second count, the conduct which plaintiff charges resulted in discrimination was defendant's classification of customers as manufacturers and distributors, the offer of contracts only to the manufacturing trade, i. e., the claimed elimination of plaintiff as

a distributor of defendant's sugar, and the repricing of these contracts.

We state the facts pertaining to this count. As already noted, plaintiff is a distributor. A sugar distributor is in a position to change his prices promptly to reflect changes in prices and costs, but manufacturers who have contracted to sell the output of their plants for some periods in advance, must speculate on the costs of sugars required in their manufacturing operations, unless, at the time they sell their merchandise they are able to determine their costs of sugar during the period of manufacture. Thus, manufacturers occupy a situation different from the position of the distributing trade. While the 30-day contract is adapted to the requirements of the sugar distributor, manufacturers have objected to the 30-day contract form because the seller had the right to discontinue deliveries at the end of 30 days.

Various attempts had been made by certain refiners and other sugar sellers over the years to devise some form of contract which would meet the requirements of manufacturers. To meet the needs of the manufacturing trade, defendant on November 9, 1936, offered the trade a contract for the delivery of sugar at a fixed price throughout 1937. The contract was known as a "Manufacturer's Contract," and under it the customer was required to specify definite quantities and periods for the delivery of the sugar, and the price was higher than the price at which 30-day contracts were offered to the distributing trade. The contract did not carry any guarantee against decline in price, and buyers were required to obligate themselves not to re-sell the sugar and agree to use the sugar solely for their own manufacturing purposes. Without the covenant, sugars sold to manufacturers could have been resold by the manufacturers in competition with sugars offered by the distributing trade, but defendant took precautions to insure observance of the covenant obligating the manufacturer not to resell the sugar. No part or portion of the sugar sold under the contract was ever resold.

The sugar under the "manufacturer's contract" was offered at a basis price of 4.70 cents. At that time 30-day contracts were offered at 4.65 cents. November 11, a basis price of 4.80 cents became effective for 30-day contracts. November 16 the basis price for manufacturers' contracts became 4.85 cents and thereafter remained at least 5 cents higher than the basis price for 30-day contracts, until the manufacturers' contracts were withdrawn from the market in May, 1937.

On May 26, 1937, to meet terms offered by its competitors, defendant repriced deliveries under the manufacturer's contract to eliminate carrying charges and to extend to customers holding those contracts the same terms as had been extended to customers buying 30-day contracts on the January 4 move, and offered all such customers the privilege of cancelling. The announcement did not place manufacturer's contract holders in a more favorable position than that enjoyed by holders of 30-day contracts entered on the January 4 move.

Plaintiff's president testified that it was hard for him to estimate what real damage was done to plaintiff and when asked whether he knew what damage plaintiff sustained as a result of the matters referred to in the second count, he testified: "In a general way, no, because I do not know to whom you (defendant) gave these contracts, whether you gave them to customers of mine (plaintiff's) and cut me (plaintiff) out of a possible profit because of no opportunity of doing business with them or not." Thereafter it was stipulated that plaintiff made no claim to damages for loss of business or for loss of customers. And there was no proof of any damage caused by the fact that plaintiff was not eligible for the manufacturer's contract.

The court concluded that defendant's classification of its customers as manufacturers and distributors was reasonable and lawful; that there was nothing in the terms announced by defendant on May 26 which was discriminatory; that defendant had not violated § 2 of the Robinson-Patman Act, or any part thereof, and that plaintiff had not been injured in its business or property as the result of any act or omission of defendant.

To be sure, under certain circumstances a seller of personal property cannot restrict the future alienation of the property, but if the restrictions are reasonable they will be upheld. See 5 Williston, Contracts (Rev. Ed. 1937) at pages 4604-5; *Wilder Mfg. Co. v. Corn Products Refining Company,* 236 U. S. 165; and *Fosburgh v. California & Hawaiian Sugar Refining Co.,* 291 Fed. 29. We fail to see, under the facts in this case, where and

in what manner the effect of the covenant requiring the manufacturer to agree that he will not resell the sugar but will use it for manufacturing purposes, was harmful to competition, or in restraint of trade. It seems to us that whatever restraint there was, was reasonable. It prevented manufacturers from re-selling the sugars delivered under the contract in competition with the distributing trade. Plaintiff should not complain of that fact.

We pass now to consider plaintiff's claim that the offer of the contract only to the manufacturing trade eliminated plaintiff, to his injury, as a distributor of defendant's sugar.

In support of its argument, plaintiff relies on *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, and *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132. We have studied these cases, but we are not convinced they support plaintiff's position.

The issue in the *Morton Salt* case was whether the seller, the salt company, had charged one purchaser a higher price for the salt than it had charged one or more of the purchaser's competitiors. The Commission found that the competitive opportunities of certain merchants were injured when they had to pay the salt company more for their goods than their competitiors had to pay. Here the manufacturers paid more for the sugars than was paid by plaintiff as a distributor, and had the manufacturer's contract been made available to the distributing trade, plaintiff would not have bought sugars under the contract to supply its regular business requirements.

In the *Arden* case, the Commission concluded that petitioners had violated § 2(e) of the Act because petitioners had not accorded demonstration service to purchasers who were in competition with purchasers to whom they did furnish such service. This is not our case. Here there was no discrimination between competing purchasers in connection with the offer by defendant of the manufacturer's contract to the manufacturing trade.

In the instant case there is no proof nor is it claimed that any distributor-competitor of plaintiff bought sugar from defendant under the manufacturer's contract, or that the contract effected any competitive injury between customers competing in the distribution of the sugar. However, plaintiff makes the point that the Act applies to sales of commodities to manufacturers using them, identically as it applies to other purchasers, and to discriminations whose effect may be to injure, destroy or prevent competition with any person who grants such discrimination, and argues that the manufacturer's contract was offered for the purpose of diverting to defendant the business of manufacturers using sugar.

To be sure, the statute requires no more than that there shall be no discrimination in favor of "one purchaser against another purchaser * * * of a commodity bought for resale * * * by contracting to furnish or furnishing * * * any services or facilities connected with the * * * sale, * * * of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." But, of course, discrimination by a seller of a commodity cannot lessen competition between customers under the Act unless the discrimination is between customers competing in the distribution of the commodity, *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 214, affirmed 324 U. S. 726, 734, and *Samuel H. Moss v. Federal Trade Commission*, 148 F. 2d 378. That is to say, the parties must be in competition with each other. There is nothing in the Act that prevents a seller of a commodity from eliminating middlemen from its distributive system and selling its commodity directly to consumers if it wishes to do so; and if it chooses it may distribute a part of its commodity direct and a part through wholesale distributions. *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F. 2d 674; *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988. See also *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598, affirmed 132 F. 2d 425, cert. denied, 318 U. S. 780.

Finally we reach the contention that defendant violated the Act when on May 26 it repriced manufacturers' contracts and permitted cancellation of undelivered balances.

The announcement merely relaxed the terms of the manufacturers' contracts. Hence in view of what we have already said, it will be enough to say that we agree with defendant that any relaxation of the terms of the manufacturer's contract was not a violation of the Act. The differences in the terms offered manufacturers and those offered distributors as revised by the announcement were justified by the same considerations that we have already pointed out, and this is dispositive of plaintiff's contention. We

conclude that the court was right in holding that defendant had not violated § 2 of the Act or any part thereof.

The court found that plaintiff had abandoned count three and concluded that it had not proved a breach of contract as alleged in that count. We have not discussed that count or any evidence claimed to sustain it because the plaintiff has not raised any question concerning it. Plaintiff, however, has argued other points mostly subsidiary to the ones already discussed. These we have considered, but since they do not change our conclusions they need not be discussed.

In No. 9159, defendant appealed from the part of the judgment directing it to pay one-half of the $9,130 fees and charges of the master. The judgment was predicated on the recommendation of the master that:

> "A substantial part of the time necessarily spent in hearings herein, was in reviewing the Defendant's business transactions over a number of years in order to properly construe its January 4th, 1937, contract with the Plaintiff; which contract, although appearing definite in its terms, Defendant contends is a mere option at the election of the purchaser * * *
>
> "While the Master does not presume to suggest to the Defendant the provisions its contract should contain, nevertheless, if the three words 'at purchaser's option' were contained in the Defendant's 30-day contract it would have avoided the necessity of reviewing approximately twenty years of the Defendant's business dealings under the same form of contract, to establish by custom and usage the fact that the contract in question is a mere option."

It thus appears that although the master had found plaintiff's charges completely groundless and defendant's conduct in the accused business dealings wholly innocent and carried on in good faith, nevertheless, because he considered defendant responsible for the difficulty and complexity of the proofs of that innocence and good faith, he charged half of the expense of such proofs to defendant.

While there is no question that, under Rule 54 (d) (Rules of Civil Procedure, 28 U. S. C. A. following § 723 c), which provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *" the court has discretion over the allowance of costs, we think the facts disclosed did not justify the exercise of that discretion. As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. *Highway Const. Co. v. City of Miami,* 126 F. 2d 777; *Royal Metal Mfg. Co. v. Art Metal Works,* 130 Fed. 778; *Harland v. Bankers' and Merchants' Tel. Co.,* 32 Fed. 305; *In re Swartz,* 130 F. 2d 229; Commentary, 5 F. R. S. 54d. 143. A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation.

In our case, the master's only criticism was that defendant should have incorporated a three-word provision in its contract, thereby avoiding the necessity of reviewing twenty years of business dealings to establish its defense. However, there appears to be no indication of any bad faith or deliberate confusion on defendant's part, hence, we are of the opinion that, in the absence of some showing of bad faith or the deliberate adoption of a course of business dealings calculated to render litigation pertaining thereto unnecessarily prolix and expensive, the penalty of denial or apportionment of costs under Rule 54(d) should be imposed only for acts or omissions on the part of the prevailing party in the actual course of the litigation, except that where it is clear that the action was brought in good faith, involving issues as to which the law is in doubt, the court may in its discretion require each party to bear its own costs although the decision is adverse to plaintiff. See *Bliss v. Anaconda Copper Mining Co.,* 167 Fed. 1024, 1028. In our case, since the judgment was not for each party to bear its own costs, but rather to pay half of the fees and charges of the master, and since that judgment in fact amounted to a penalty on defendant for prolongation of the litigation, the judgment was erroneous.

The judgment of the District Court in No. 9158 is affirmed, and that part of the judgment involved in No. 9159 taxing to defendant one-half of the costs of the proceedings before the master is reversed.

[¶ 62,450] Benal Theatre Corporation v. Paramount Pictures, Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48C 1599. June 15, 1949.

Sherman Antitrust Act

Production of Evidence as to Operating Expenses Ordered—Injunction Suit by Theatre Operator—Relevant Facts.—In an antitrust suit brought by a motion picture theatre operator for injunctive relief against an operator of a theatre circuit, books, accounts and records revealing the admission revenues, feature film costs, rebates and allowances of film rentals and all other operating expenses were ordered to be produced since the inspection was in regard to relevant facts.

See the Sherman Act annotations, Vol. 1, ¶ 1650.251.

For the plaintiff: Seymour F. Simon, Chicago, Illinois.

For the defendants: Miles G. Seeley, Bryson P. Burnham of Mayer, Meyer, Austrian & Platt, Edward R. Johnston, Samuel W. Block, Jacob I. Grossman & Alfred B. Teton, Matthews & Springer, Rosenberg, Stein & Rosenberg, all of Chicago, Illinois.

Memorandum

JOHN P. BARNES, Judge: On May 18, 1949, the plaintiff, Benal Theatre Corporation, filed its written motion entitled "Motion for Order on Defendant Balaban and Katz Corporation to Produce for Inspection and copying or Photographing Designated Documents, Papers, Books, Accounts and Records," wherein it said:

"Now comes the plaintiff in the above entitled cause, by its attorney, and respectfully represents to the Court:

"1. This is a suit for injunctive relief brought by the plaintiff corporation under the antitrust laws of the United States.

"2. Plaintiff operates the motion picture theatre in the City of Chicago known as the Ridge Theatre and located at 1550 West Devon Avenue.

"3. The defendant Balaban and Katz is the operator of a circuit of motion picture theatres in the City of Chicago and adjoining suburbs. Its wholly or partially owned subsidiaries operate a large number of theatres in the States of Indiana and Illinois outside of Chicago. Among the theatres operated by said defendant Balaban and Katz Corporation are those hereinafter named.

"4. The plaintiff claims that because of alleged violations of the antitrust laws to which it was subjected, it was not given the opportunity to license motion pictures for exhibition in the Ridge Theatre on early and preferred runs in the City of Chicago. Counsel for plaintiff believes that defendants will attempt to justify the practices which they have followed in licensing pictures on early and preferred runs to Balaban & Katz and not to the Ridge on the ground that the theatres operated by Balaban & Katz were able to pay the defendant distributors more money for their pictures than the plaintiff could pay for their exhibition at the Ridge, and that said Balaban & Katz theatres paid the defendant distributors high film rental. It is, therefore, relevant and material for the plaintiff to know how much the defendant Balaban & Katz did pay the defendant distributors for pictures and also to be able to show that the Ridge Theatre, when playing on an early and preferred run, could afford to pay the defendant distributors as much for their pictures as Balaban & Katz theatres paid, and that the prices at which the defendant distributors licensed pictures to Balaban & Katz were ridiculously low.

"5. The books and records requested concern several theatres whose run has been improved during the past several months by the defendant distributors, and the plaintiff desires to show that an earlier run is preferable because it increases the profit of the theatre whose run is advanced.

"6. The film rental information requested duplicates to some extent information previously furnished by the defendant distributors by way of interrogatory answers. It is desired to check the accuracy of the information furnished by comparing it with the Balaban & Katz records.

"7. Plaintiff also claims that the defendant Balaban & Katz buys pictures from the defendant distributors for all of its theatres as a circuit, and the film rental which the defendant Balaban & Katz agrees to pay is then allocated to various theatres in the circuit. For that reason, plaintiff desires to show that the film rental at which pictures were licensed to various Balaban & Katz theatres by the

defendant distributors did not bear any relation to the gross receipts which those theatres normally enjoyed, and that adjustments or lower film rentals were granted to Balaban & Katz in certain situations to compensate for higher film rentals paid in competitive situations.

"8. Plaintiff also desires to show that Balaban & Katz juggled runs in its theatres at will to best suit its rental arrangements with its lessors

"Wherefore, the plaintiff respectfully moves that the defendant Balaban & Katz be ordered to produce for inspection or copying or photographing by the defendant or its attorney, the following:

"A. All books, records and accounts of Balaban & Katz and its wholly and partially owned subsidiaries reflecting or containing entries with respect to admission revenues, other income, feature film costs, other film costs, advertising expenses, salaries and charges, licenses, taxes, repairs, supplies and materials, heat, power and light, rent, interest, insurance, adjustments, modifications, rebates or allowances on film and all other expenses in connection with the acquisition and operation of the following named theatres since February 1, 1942: (naming 25 theatres)

* * *

"B. If said books, records and accounts shall show, or it shall otherwise appear, that any item of income or expense or any rebate, adjustment or allowance on film rental credited or charged to any of the above named theatres during said period was a proration or allocation of income or expense involving other theatres or enterprises owned or operated by Balaban & Katz, then all such further books, records and accounts as may reflect or contain entries with respect to the total amounts of such prorated income or expense.

"C. All books, records and accounts of the defendant Balaban & Katz and its wholly or partially owned subsidiaries reflecting or containing entries with respect to admission revenues, feature film costs and other film costs and modifications, adjustments, rebates and allowances of film rentals in connection with the operation of all theatres operated by Balaban & Katz and its wholly or partially owned subsidiaries since February 1, 1942."

Attached to the motion is an affidavit of counsel for the plaintiff wherein he says:

"that he is attorney for plaintiff herein; that he is charged by his client with the responsibility for the conduct of this case; that he has studied the pleadings and is familiar with the issues thereby raised; that he is experienced in the preparation and trial of causes involving similar issues of law and of fact and that in his opinion inspection of the books, records and other documents enumerated in the foregoing motion is essential to the proper preparation for trial of the claims made by plaintiff. He further says that upon the request of the accounting firm of Touche, Niven, Bailey and Smart, which, he is informed and believes, has been employed by all defendants in this action, he has voluntarily consented to an inspection by said accountants of books and records of similar character to those whose inspection by plaintiff is requested by this motion."

On May 23, 1949, the motion was argued orally by counsel for the respective parties. The transcript shows that the following proceedings were had on that day:

"BY THE CLERK: No. 48 C 1599, Benal Theatre against Paramount.

"BY THE COURT: Proceed.

"BY MR. SIMON: May it please the Court, one category of documents that I wish to inspect are books which show admission revenues received by Balaban & Katz.

"BY THE COURT: Show what?

"BY MR. SIMON: Books which contain entries regarding admission fees received by——

"BY THE COURT: Admission?

"BY MR. SIMON: Admission, yes, sir.

"——admission revenues received by Balaban & Katz, and its subsidiaries; and books which show the cost of film at Balaban & Katz theatres, and any modifications, adjustments, rebates and allowances on film rentals received by Balaban & Katz or its subsidiaries.

"The reason we want to inspect those books to get that information is threefold.

"First, we expect that it will show that the greater number of theatres in a given area which play a picture on an early run the larger the gross receipts, the combined gross receipts of the theatres that play that picture are, and therefore the higher film rentals the distributor of that picture can expect.

"The second reason that we want this is to check the accuracy of certain answers to interrogatories which have been previously submitted to us on film rentals paid.

"The third, and most important reason —and this is the principal reason, your Honor, is this: It is our claim that when Balaban & Katz buys a picture it buys it as a circuit; it buys it for all of its theatres at one time.

"Now, when it makes a deal with the distributor and allocates film rental to various theatres, it may allocate a higher film rental than ordinary to the theatres which are in the vicinity of the plaintiff's theatre, the Ridge Theatre. And we want to find out whether Balaban & Katz is compensated for that by a lower film rental in another theatre somewhere else where it has no competition—a lower film rental than would ordinarily be expected there, or by rebate, modification, adjustment and allowance on film rentals either in the theatres near the Ridge or in some other theatres that the picture is played.

"Those are the reasons that we want that type of information, your Honor.

"In addition to that, we have asked for an audit on certain specific named theatres in Chicago, and some of the suburbs adjoining Chicago, in Evanston and in Berwyn.

"The reason we want to make this audit is to show, first, that a theatre makes more money in the City of Chicago when it plays on an early run than when it plays on a late run.

"Second, the defendants, as they have in other cases, are going to come into court and say that they sell Balaban & Katz because Balaban & Katz is a fine customer, they enjoy doing business with Balaban & Katz, they have had pleasant business relations with Balaban & Katz over the years.

"We hope to show by this audit that the leading Balaban & Katz theatres in the city pay an unreasonably low percentage of their receipts to these distributors as film rental, considering the operating expenses of those theatres. And in view of that we think that it is reasonable to expect that in the absence of a conspiracy and in view of that condition the distributors of motion pictures would encourage us to bid for their pictures—would want us to bid for their pictures, instead of telling us, as the situation has been, 'There is no way you can bid; Balaban & Katz is our customer, we sell them all pictures for exhibition first, and the only way you can buy these pictures is to show them after Balaban & Katz get through playing them.'

"The third reason we want to make the audit of these specific named theatres, your Honor, is to show that Balaban & Katz juggles the runs of its theatres—pushes the runs of theatres up or puts the runs of its theatres back in order to best suit its arrangements with its lessors; that is, where they have a percentage lease with a lessee the run of the theatre may be held back, and if the time comes when that lease arrangement with that lessor is changed so that they no longer pay the lessor a percentage of the gross receipts, then we find that the run of the theatre is advanced, because the extra income that comes to Balaban & Katz from that increase in run can be kept by Balaban & Katz instead of their having to share it with the landlord.

"Several weeks ago the defendants asked me to permit them to send auditors to inspect our books. And I have consented to that. And for at least the past two weeks they have been down at our offices making the type of inspection of our books that we want to make of the books of the defendant, Balaban & Katz.

"BY MR. JOHNSTON: May it please the Court, this is not a suit for damages. This is a suit for injunction, merely.

"The basis, or alleged basis, for an injunction is a conspiracy—a present conspiracy, a conspiracy existing at the time of the filing of the bill, and a threat, of course, of the continuance of that alleged conspiracy.

"It seeks merely an injunction to prevent the defendant distributors of motion pictures from preventing the plaintiff, which is a local theatre, a neighborhood theatre out on West Devon Avenue, from obtaining a prior run, or broader run of pictures in competition with the neighborhood theatres in the neighborhood of the Ridge Theatre.

"That is the issue presented by this bill and by the answers which will be filed to the bill.

"What the plaintiff is seeking in this case is this: He is asking your Honor to enter an order under Rule 34 which will permit an examination of the books of every Balaban & Katz theatre, whether located in Illinois, whether located in Ohio, or elsewhere.

"The bill alleges that there are fifty Balaban & Katz theatres in Chicago; that there are seventy outlying theatres in the State of Illinois, operated by subsidiaries; and some in the State of Ohio, and I believe in some other states.

"The order which is presented to your Honor, and the request which is made that we be required to submit to an investigation on that sort of an issue, an issue for an injunction based upon a conspiracy which affects only that local theatre in its right to compete against the theatres in its immediate vicinity—an investigation of the books of Balaban & Katz in these one hundred and twenty-odd theatres throughout this great territory.

"Not only what film rentals are being paid, but this order asks for all of the details of cost of Balaban & Katz in the operation of every one of these one hundred and twenty theatres—what they pay for rent; what they pay for light; what they paid for heat; and what they pay for every item of expense in connection with the operation of these theatres.

"Now, if the Court please, these rules were not designed for any such purpose as that. As your Honor knows well, they were designed to liberalize the rules of obtaining evidence in order to speed the trial of cases.

"They were not designed, and there is nothing in the rules which permits any such wholesale investigation of the books and records of a competitor, as the plaintiff seeks in this case.

"The limits of materiality under the allegations of this bill would be to determine what film rentals were paid by Balaban & Katz to these defendant distributors by the theatres in this small, local competitive area where the plaintiff's theatre operates. That might be material, what film rentals were paid. That might have something to do with the question of the alleged conspiracy or the impact of the alleged conspiracy.

"But what possible relevancy to the issues submitted in this suit does it have to find out what Balaban & Katz pays one of its large theatres in the City of Chicago, or one of its central theatres, or two or three of its outlying theatres on the north side which does not compete with this small neighborhood theatre, or what its rentals or other expenses are in connection with the operation of those theatres?

"Your honor, it is simply preposterous. It has no relevancy. And it does not come within this rule, which is that there must be relevancy to the subject matter.

"It is done clearly, not for the purpose of obtaining information for this suit; it is done for a purpose—one purpose, and that is to attempt to sufficiently annoy Balaban & Katz, one of these defendants, by subjecting all its books for all of these theatres to a series of examinations so as to force Balaban & Katz in some way to settle, or to agree to a settlement of this suit.

"The other purpose is that this same attorney has ten of these cases pending; he has brought ten of these cases in this Court against the same general group of defendants, for the same general relief, and in some cases making large claims for damages. And this general spread of information is for the purpose of aiding the plaintiff's counsel, not only in these pending cases, but in the starting of other cases that are being commenced now about once a week; and in fact the thing has become a regular racket since the decision in the *Bigelow* case.

"But not this sort of order, the sort of order that is sought here. We have no objection to an examination of our books as to the merits of this case, on the question of whether there was, or is, a present conspiracy. But not going away back. And mind, he is asking to go back to 1942, a seven-years' examination. On no possible theory can that be material.

"There, of course, are allegations in the bill about prior conspiracies of other groups of respondents, some of whom are involved here and some not.

"And as your Honor knows, the question which you Honor will decide is, was there a conspiracy? And is there now a conspiracy existing at the time this bill was filed, which prevents this plaintiff from obtaining its rights with respect to the purchase of film? Not what was done in the past, which has nothing whatever to do with the question of an existing conspiracy. Yet he is asking to go back to 1942, and for a period of seven years to examine the books of the hundred and twenty theatres scattered throughout this particular western territory.

"I cannot think of anything which would seem to me to be more clearly a perversion of what was intended by these rules.

"Your Honor is entirely familiar with it. The language now of course refers to the language for clarification to 26 (b). And 26 (b) of course makes it clear that the matter must be something relevant to the general subject matter of the inquiry of the suit, something which will either produce evidence or open up evidence to disclose facts which would aid the plaintiff either in prosecuting his suit or in aiding him in defending against the defense presented by the defendant respondents.

"I submit to your Honor that this sort of an order does not come within a million miles of that, and not only would be a most intolerable burden upon this one defendant. But mark what the plaintiff says in his petition.

"The reason he is asking this is because all these distributors—not these defendant distributors—are going to claim that they get more film rental when they sell to theatres in the immediate vicinity of his theatre than if they sell to his Ridge Theatre. And yet he is seeking this information from Balaban & Katz, which is his competitor in that local area, because it has

a theatre or two in that general vicinity which can be said to compete with his theatre.

"That is the scope and nature of the relief which is sought.

"I submit to your Honor that when the Supreme Court passed on Rule 34 in the *Hickman v. Taylor* case (329 U. S. 495), which your Honor knows is probably the most exhaustive discussion of Rule 34, they used this language:

"'Examination into a person's files and records,'—

Of course, that was an individual situation, and not a corporation:

"'— * * * including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries.'

"The same thing, as your Honor knows, runs all through the decisions mostly of the District Courts, because very few of these cases have gone up on appeal with respect to the examination of books and records. And if the examination is of the books and records of the competitor, the court will, as the Supreme Court says in this case, proceed with care to not compel the disclosure of books and records which may not have any relevancy to the general subject matter of the inquiry or to the lawsuit.

"The Court should take into account the fact that this plaintiff's counsel here is bringing one of these suits on the average once a week, or once every two weeks, by a new plaintiff, seeking this same sort of relief.

"If we are to be subjected to this sort of thing it becomes an intolerable burden, the sort of thing which the court certainly had in mind in Rule 30 (b) when it said the court should have the right in its discretion to protect a defendant against the unreasonable application thereof through such examination or discovery of documents.

"And I submit, your Honor,.there is no suggestion here for permitting this plaintiff to do more than examine and determine from the books pertaining to this immediate neighborhood—and he has indicated what those theatres are in that immediate vicinity out there, to find out what film rentals they paid to these various distributors, which may have some relevancy. But beyond that he has no right to go. And it would be a gross imposition, I say, to require any such discovery as he is now seeking in this case.

"I thank you."

"BY MR. SIMON: Your Honor, I should like to say——"

"BY MR. JOHNSTON: Let me just say this. This defendant did not ask for an examination of the plaintiff's books. Some of the distributors did. But we haven't asked for any. But that would be perfectly proper anyway."

"BY MR. SIMON: I should like to take just a minute or two, your Honor, to comment on what I consider a personal attack that Mr. Johnston has made upon me and upon my integrity.

"It is true that I have filed a lot of these cases. I assume the reason for it is that I have gained some familiarity with the motion picture business and with the way motion pictures are sold, with the way the defendants have conducted the motion picture business. But I think it ill becomes counsel for the defendant Balaban & Katz and Paramount, of whom the Supreme Court has spoken in the terms it spoke in its decision of last spring in *U. S. v. Paramount,* to accuse counsel and clients who are now suing that defendant to compel it to comply with the spirit of the opinion of the Supreme Court, of operating a racket.

"The reason that all these suits have been filed since that Supreme Court opinion is that the Supreme Court found that there was a conspiracy to monopolize trade and commerce; they found that there had been a violation of the antitrust laws; and at least four of the defendants in that connection, Mr. Johnston's clients, Paramount, and Balaban & Katz, Warner Bros., Universal, Columbia and United Artists have made no attempt to even comply with the Supreme Court's opinion and with the spirit of that opinion. They still tell you, your Honor, as they always have in the past when we ask to be able to license their pictures—and this is not only the Ridge Theatre itself, every independent theatre in the City of Chicago except those that have brought lawsuits, and every one, they all told them, and they tell each of these theatres, 'Go away, we sell to Balaban & Katz. We don't want to sell you. We are not interested in permitting you to compete. We don't care what you are paying for these pictures. Balaban & Katz is our customer. And when Balaban & Katz gets through playing them you can play them in the hierarchy of operation that we have always followed in Chicago' —the old playing position which the Supreme Court held to be illegal in the *Jackson Park* case.

"And that is why, as I have said to your Honor, this Court is flooded with these lawsuits.

"Apparently they will think they have a God-given right, so that when someone challenges their right to play pictures counsel comes in and accuses those people of running a racket.

"We have been all through this, your Honor, on the questions which Mr. Johnston has raised, when he says that this case ought to be confined to the north side of Chicago, and that we should not go into the south side of Chicago. We had that question up before your Honor, and your Honor ruled that it was material what the distributors received for pictures in south side theatres.

"Since that time these interrogatories have been answered, and I believe that they prove the point that I predicted they would prove at the time of the argument, that Mr. Johnston's own client, when it sells the Jackson Park Theatre, or the Piccadilly Theatre or the Tivoli Theatre to pay day and date on the south side the first run gets more money from those pictures as a distributor than it might when it is sold to its own theatre, the Tivoli, exclusively.

"Mr. Johnston says that the thing that is at issue here is what the theatres around the Ridge paid for pictures. I assume that he means the Uptown, the Granada, the Northtown—and I agree that that is the thing at issue, your Honor. But we want to find out what in fact those theatres pay for pictures; the matter of what the books of a circuit like Balaban & Katz show that these theatres pay for pictures may be just a matter of bookkeeping. There is nothing to prevent them from paying fifty or sixty percent of their gross receipts to Warner Bros. for the Uptown, the Granada, or the Northtown Theatres, and then coming in here and saying, 'Look, we paid $8,000 for this picture at the Northtown. You can't possibly offer Warner Bros. that price. That is why they sell us.'

"We want to make this inspection, your Honor, to make sure that these prices are *bona fide* film prices, and that somewhere else in the circuit they do not counterbalance that eight thousand dollars off and get the pictures at five percent of the gross receipts or at ten percent of the gross receipts.

"And actually, the check that I want to make here is for the purpose of satisfying ourselves and satisfying the Court that the film rentals paid at these theatres are *bona fide* film rentals which are paid throughout the Balaban & Katz circuit, and not just in a competitive situation where litigation is pending so that they have a pretty picture to come into court with and to offer in evidence at the trial of the case.

"I think Mr. Johnston also has misread the motion. I have asked for details of expenses, such as rent and costs other than film costs, only for certain specifically named theatres in the city. Outside of those specifically named theatres the only item of costs as I stated before that I want are the expenses of feature film costs and other film costs and modifications and adjustments and refunds and allowances on film rental, in addition to their admission revenues. I do not care about any of the other costs."

"BY THE COURT: I will take the papers and I will let you know what I think about the matter within a week."

"BY MR. JOHNSTON: If I might say, counsel is in error: We are operating under a decree, and we are following that decree. The decree has been entered in the Paramount case."

The defendant Balaban & Katz Corporation then filed a paper entitled "Objections of Defendant Balaban & Katz Corporation to Plaintiff's Motion for Order on said Defendant to Produce for Inspection and Copying or Photographing Designated Documents, Papers, Books, Accounts and Records," wherein it said:

"Balaban & Katz Corporation, one of the defendants in the above-entitled cause, by its attorneys, hereby respectfully represents to this Court, in opposition to the motion for an order on Balaban & Katz Corporation to produce for inspection and copying or photographing certain designated documents, papers, books, accounts and records, the following:

"1. This is a suit for injunctive relief brought by the plaintiff corporation under the anti-trust laws of the United States. It alleges, as it must, a present conspiracy involving Balaban & Katz Corporation and a number of defendant distributors. It is further alleged that this conspiracy presently is intended to and does deny to the plaintiff certain rights to purchase competitively feature motion pictures for exhibition in the Ridge Theatre in the playing position to which the plaintiff considers that the Ridge Theatre is entitled. The allegation of future damage is also included, as required by the statute.

"2. The plaintiff has served upon the various distributor defendants, and Balaban & Katz Corporation, a large number of interrogatories, answers to which in-

terrogatories are, in whole or in part, in the files of this Court. Said interrogatories contain, for various pictures in various theatres, details as to film rental paid by the particular exhibitor for the particular picture in each theatre. In the case of pictures played under contracts calling for rental to be determined by a percentage of gross receipts, the answers to the interrogatories also set forth the gross receipts of the theatre for the week or weeks in which the particular picture so licensed was exhibited.

"3. Plaintiff's motion here objected to is for discovery under Rule 34. It demands, first of all the right to make complete audits for the following twenty-five theatres for the years since February 1, 1942: (name 25 theatres)

* * *

"(a) Although plaintiff has been requested to supply defendant Balaban & Katz Corporation with the names of theatres with which the plaintiff considers the Ridge Theatre to be in substantial competition, plaintiff has not done so. Plaintiff's excuse, given orally, has been that it is uncertain whether both the Granada and the Northtown Theatres are in substantial competition with the Ridge, or only the Granada Theatre. Plaintiff in the instant motion demands intimate details for a period of seven years for twenty-five theatres, covering not only the competitive area surrounding the plaintiff's theatre, but also including theatres in Evanston and on the far south and west sides of Chicago;

"(b) Although plaintiff's complaint alleges a present conspiracy threatening plaintiff with future damage, the instant motion demands details for a period of seven years in the past. As the plaintiff's complaint shows, the method of licensing motion pictures for exhibition in the City of Chicago has changed since December, 1947, over a year prior to the filing of this suit. The manner of licensing pictures has, since December 1, 1947, been in accordance with the decree of this Court in the case entitled *'Bigelow v. RKO Radio Pictures Corporation, Inc.'* (Complaint, para. 25);

"(c) The details of income and expenses demanded by plaintiff, including rentals paid for particular theatres, are not for the purpose of preparing its case or defense in the instant matter. They are for the purpose of harassing the defendant Balaban & Katz Corporation, and for aiding plaintiff's counsel in the prosecution of the many other suits which have been filed in this District, or which plaintiff's counsel threatens to file;

"(d) The plaintiff's demand for the audits referred to in paragraph (a) of the motion (page 3) has no relevancy whatever to the case which plaintiff's complaint attempts to allege.

"4. Plaintiff's motion, in addition to the demand for the audit of twenty-five theatres, further demands an audit of all books, records and accounts for 'other theatres or enterprises owned or operated by Balaban & Katz' (Para. (b), page 3). It is true that the further audit is to be demanded only if the audit of the twenty-five theatres discloses 'or it shall otherwise appear,' that any item of income or expense or any rebate, adjustment or allowance on film rental credited or charged on the books of any of the twenty-five theatres prove to be a proration or allocation involving other theatres of the Balaban & Katz circuit. It is obvious that plaintiff will be able to claim that it at least 'otherwise appears' that a proration is involved in some item of income or expense and thus demand, under the order, a complete audit of all of the books and records of Balaban & Katz Corporation for all of its 120 theatres.

"5. Even if limited solely to the twenty-five theatres named, the audit demanded goes far beyond any discovery to which plaintiff is properly entitled and is a clearly unwarranted excursion into the privacy of the Balaban & Katz operation. This is particularly true where, as here, the demand is made on the part of a competitor of Balaban & Katz and by an attorney whose constant harassment of the distributors and exhibitors makes clear the purpose for which the audit is sought.

"6. The motion here objected to further requests all admission revenues and film rentals for all of the Balaban & Katz theatres. Plaintiff alleges in the complaint that 120 theatres at a minimum are involved in this demand. Clearly, the film rental and admission revenues in theatres other than those in the immediate competitive area of the plaintiff theatre are in no sense material and relevant. The sole question presented by the complaint is whether or not a conspiracy existed at the time of the filing of the complaint, and now exists, which denies to the plaintiff the rights to which it would otherwise be entitled. The motion for a discovery of 'admission revenues, feature film costs and other film costs and modification, adjustments, rebates and allowances of all film rentals in connection with the operation of all theatres operated by Balaban & Katz and its wholly-owned or partially-owned subsidiaries since February 1, 1942' is so extensive as to label it for what it

is—an unwarranted excursion into the privacy of the operation of the Balaban & Katz theatres.

"7. Plaintiff's motion states that all of this information is necessary in order to counter what plaintiff argues will be a defense put up by the defendants, i. e., the amount of film rentals that Balaban & Katz was able to pay the defendant distributors. This issue is one solely involved in the amount of rental paid by the theatres in the immediate competitive area of the Ridge Theatre, which film rentals plaintiff has already obtained from the defendant distributors by way of interrogatory. There is no reason for plaintiff to demand this information from the defendant Balaban & Katz Corporation, the sole exhibitor defendant in the case and the immediate competitor of the plaintiff.

"8. Plaintiff further states in support of its motion that it requires the information 'to check the accuracy of the information furnished by the defendant distributors in their interrogatory answers.' If this is honestly what plaintiff desires, appropriate methods of limited inquiry are available to it without the broad scale demands for discovery which, by their very area, disclose themselves as improper utilization of the Federal Rules.

"Wherefore defendant Balaban & Katz Corporation by its attorneys respectfully moves that the motion for discovery be denied, or, in the alternative, that it be limited solely to film rentals and admission revenues in the theatres in the immediate competitive area of the Ridge Theatre, which theatres the plaintiff be required to name."

Attached to the Objections is an affidavit of counsel for the defendant Balaban & Katz Corporation, wherein he says:

"1. He is counsel for Balaban & Katz Corporation, one of the defendants in the above-entitled matter and as such is charged with the preparation of its defense.

"2. He has read the motion of plaintiff for discovery, to which motion objections have been filed by Balaban & Katz Corporation and has read the objections of Balaban & Katz Corporation to said motion; that in his opinion said motion is improperly based on the facts and the law for the reasons set forth in said objections.

"3. He has read the objections to said motion filed on behalf of said Balaban & Katz Corporation and that the statements therein are true and correct."

Subsequently, the plaintiff filed another paper which it entitled "Plaintiff's reply to Objections of Defendant Balaban & Katz Corporation to Plaintiff's Motion for Order on said Defendant to Produce for Inspection and Copying or Photographing Designated Documents, Papers, Books, Accounts and Records," wherein it said:

"Counsel for Balaban & Katz Corporation (herein called 'B & K'), conceded in oral argument that the data requested by plaintiff with regard to theatres in the immediate competitive area of plaintiff's theatre, the Ridge, was relevant. This data is meaningless, however, unless plaintiff is given the opportunity to determine whether bookkeeping entries showing film rentals paid by B & K theatres in the immediate competitive area of the Ridge represent *bona fide* film rentals paid. B & K operates a large circuit of theatres and buys the same pictures from the same distributors for most of these theatres. It would be a simple matter, therefore, for B & K and the distributors to show as matters of bookkeeping record that B & K theatres around the Ridge paid certain prices for film and at the same time grant film rental rebates to other B & K theatres or license film to other B & K theatres at reduced rentals or at prices which bore an unreasonably low relation to the gross receipts of such other B & K theatres. That is a simple matter of taking it out of one pocket and putting it in another. To check whether this was done, plaintiff is required to examine the film rentals paid by all B & K theatres and the admission receipts of those theatres.

"Plaintiff feels that prior to the trial of this case the 'precaution' of making an examination to determine whether bookkeeping entries in the defendants' books represent *bona fide* film rentals must be taken, particularly in view of the recent comments of the United States Supreme Court in *U. S. v. Paramount Pictures, et al.*, 68 S. Ct. 915, about the character and integrity of the defendants in that case, who are also defendants in this action.

"The Supreme Court said at 68 S. Ct. 925, in referring to the defendant film companies:

'Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law.'

"Again, at 68 S. Ct. 924, in denying the defendants, in granting clearances, the right to take into consideration what is reasonably necessary for a fair return to the licensor, the Supreme Court said:

'That is too potent a weapon to leave in the hands of those whose proclivity

to unlawful conduct has been so marked.'

"Again, at 68 S. Ct. 932, the Supreme Court referred to the defendants as 'those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals.'

"That is the principal reason plaintiff requests the opportunity to examine the books and records of B & K and its subsidiaries containing entries with respect to admission revenues, film costs and modifications, adjustments, rebates and allowances of film rentals. In addition, this examination will enable the plaintiff to check the accuracy of certain film rental figures which have already been furnished by way of interrogatory answer, and will enable the plaintiff to show that, as the plaintiff contends, it is to the economic advantage of a motion picture distributor to encourage a large number of theatres in a given area to play its pictures on an early run instead of limiting that run to a small number of B & K theatres as they have done heretofore.

"In addition to the examination outlined above, plaintiff is requesting permission to make an audit of the records of 25 specifically named B & K theatres in Chicago and suburbs adjacent to Chicago. Counsel for plaintiff is certain that the defendants, at the trial of this case, will attempt to show that even though the plaintiff has been deprived of the opportunity of obtaining first run pictures, it has not been damaged by such deprivation. The audit requested with respect to the specifically named theatres will answer this defense by showing that the earlier a theatre plays pictures in relation to other theatres in its vicinity, the more money that theatre makes. In addition, counsel for plaintiff feels certain that the defendants will attempt to justify their practice of licensing early and preferred runs of pictures to B & K on the theory that B & K was a splendid customer which paid them generous film rentals. Plaintiff expects that the audit it desires to make will show that B & K was not a good customer, but rather, a very poor customer, and that its theatres which played on early and preferred runs enjoyed exorbitant profits in which the distributors were not permitted to share because the monopoly position of B & K forced the distributors to sell B & K at film rentals which bore no reasonable relation to the profits which B & K was able to make from the showing of their pictures. Finally, plaintiff expects to show by this audit of the records of the specifically named theatres that B & K was able, because of its monopoly, to juggle runs in its various theatres to best suit its arrangements with its landlords. That is, a theatre which was leased by B & K at a percentage rental was played in a position inferior to the playing positions of theatres which B & K owned or which B & K leased at a straight rental figure.

"B & K objects to this examination because it covers theatres on the south and west sides of Chicago. We have already been through that argument once in this case in connection with the objections of the defendant Paramount, which is represented by the same counsel as B & K, to interrogatories propounded by plaintiff relating to south side theatres, and Your Honor ruled that the information requested was relevant and ordered the defendants to answer the interrogatories. The answers to those interrogatories, which have since been submitted, show what counsel for plaintiff at the argument on the objections to the interrogatories predicted they would show, namely, that Paramount as a distributor gets more film rental from the first run exhibition of its pictures on the south side of Chicago by licensing them to the Tivoli, Jackson Park and Piccadilly Theatres to play simultaneously, than Paramount got prior to the entry of the Decree in this Court in the *Jackson Park* case, when it limited the first run license on the south side to the Tivoli Theatre. For example, the highest film rental Paramount received from the Tivoli Theatre in the year 1947 was $4,364.00 on the picture CALIFORNIA. In the year 1948, the combined film rental it received from the Jackson Park and Tivoli on UNCONQUERED was $6,159.00 and the combined film rental it received from the Tivoli, Jackson Park and Piccadilly on EMPERORS WALTZ was $7,186, and on SORRY, WRONG NUMBER, $7,324. The interrogatory answers filed by the other defendant distributors show the same thing, namely, that the Decree which this Court entered in the *Jackson Park* case was to the economic advantage rather than the economic disadvantage of the distributors. It at least partially freed them from the shackle-hold of the B & K monopoly and permitted them to sell their pictures on early runs on the south side to other exhibitors than B & K. Yet, on the north side of Chicago, to which the Decree in the *Jackson Park* case does not apply, the defendant distributors continue to do business in the same old way and at the same old stand. On the north side, they still limit the early run of pictures to the B & K theatres.

"Much has been said by counsel for B & K, both in oral arguments and in

their written objections, about the motives of counsel for plaintiff in presenting this motion. As a matter of fact, the charges made by counsel for B & K, if true, might even warrant disciplinary action by this Court against counsel for plaintiff, and it therefore surprises counsel for plaintiff that attorneys who have as eminent and respected a standing at this Bar as counsel for defendants, would make such charges, particularly under oath, without mature and careful consideration, and without well-founded proof. The charges are not only vicious untruths, but also are absurdly unrealistic.

"In the oral argument, counsel for B & K stated that the purpose of the motion was to harass his client into making a settlement of this matter. In view of this statement, it is only fair to advise the Court that counsel in this matter have discussed settlement at great length, and approximately two weeks ago all counsel agreed that there was no possible basis for settlement and that the case would have to be tried. Counsel for plaintiff, having already spent considerable time in settlement discussions, does not expect to devote any more time to such discussions, since such time would be at the expense of his trial preparation.

"Then, counsel for B & K claim that the purpose of the examination which plaintiff seeks to make is so that plaintiff's counsel will be aided in the prosecution of other suits which have been filed in this district or which plaintiff's counsel threatens to file. The examination which plaintiff is requesting permission to make will require the employment of trained accountants at considerable expense. Those accountants have already been engaged by plaintiff, subject to the Court's ruling on this motion, and they are being paid by plaintiff. It is not absurd to believe that plaintiff would go to the expense of employing accountants to make an examination of defendants' books for the purpose of assisting plaintiff's counsel in the prosecution of other matters in which plaintiff has no interest?

"Sometime ago the defendants requested that their accountants be permitted to examine the plaintiff's books and records. Counsel for plaintiff, knowing your Honor's desire that the parties to an action be given access by discovery to all matters which may reasonably be required in preparation for trial or to be offered in evidence, did not feel warranted to taking the time of the Court to object to the request, and, therefore, consented to the examination. For the past two weeks, plaintiff's books have been made available to those accountants and working space has been provided for them in plaintiff's office. Plaintis desires that its counsel be as thoroughly and carefully prepared to present its case and to meet all defenses which may be raised, as are counsel for defendants. For that reason, we desire to make the inspection requested in advance of trial, so that it will be unnecessary for plaintiff at the trial to request the production of the same records and then take the time of this Court and counsel and the parties to make an examination of them in the Courtroom."

Finally, the defendant Balaban & Katz Corporation filed a paper which it entitled "Defendant Balaban & Katz Corporation Answer to Plaintiff's Reply to Objections of Balaban & Katz Corporation to Plaintiff's Motion for Order for Inspection," wherein it said:

"Plaintiff has filed a reply to the objections of defendant Balaban & Katz Corporation to plaintiff's motion for an order on said defendant to produce for inspection and copying or photographing designated documents, papers, books, accounts and records. Because of the manner in which Balaban & Katz Corporation's original objections were presented to this Court, it is necessary to assume that plaintiff has stated in its reply its position in support of its motion.

"Plaintiff first argues in support of its demand for all film rentals that it seeks to determine whether or not the film rentals paid by the theatres 'around the Ridge' represent *bona fide* film rentals. To determine this, plaintiff argues, it must see what other Balaban & Katz theatres paid for film and must determine whether or not any rebates were granted by the distributors. Such an argument is merely an admission by plaintiff that the information which it demands by way of examination of Balaban & Katz' books, its exhibitor competitor, could be as readily obtained by interrogatories to the distributor defendants. As pointed out in the objections of Balaban & Katz already filed with the Court, the distributor defendants have been interrogated as to the film rentals paid by Balaban & Katz in most of the theatres in the period in question.

"Plaintiff flatly states, at page two of its reply, 'that is the principal reason plaintiff requests the opportunity to examine the books and records of Balaban & Katz and its subsidiaries containing entries with respect to admission revenues, costs and modifications, adjustments, rebates, and allowances of film rentals.' Such a 'principal reason' does

not in any way sustain plaintiff's right to examine the books and records of its competitor.

"In support of both its claim for the right to inspect film rental figures and the further claim of right to make an audit of twenty-five theatres, plaintiff also argues that it will show 'it is to the economic advantage of a motion picture distributor to encourage a large number of theatres in a given area to play its picture on an earlier run instead of limiting that run to a small number of B & K theatres as they have done heretofore.' (Reply, p. 3.) This argument directly negatives the argument plaintiff has previously made, based upon certain language of the Supreme Court in its opinion in *U. S. v. Paramount Pictures, Inc., et al.*, 334 U. S. 131 to the effect that clearances may be granted solely for the protection and economic advantage of the exhibitor. Moreover, the evidence which plaintiff cites in support of its claim for right to audit is misleading, since it attempts to compare one theatre in one year to two or more theatres in a second year. Plaintiff fails to take into account the subsequent runs that would otherwise have been enjoyed by the distributors in the theatres which, in the second year, played on earlier runs. Obviously, the economic complications of motion picture distribution and exhibition cannot be simplified by a comparison of two or three pictures in two or three theatres in any limited period. If the profits of the distributors are to be the test of reasonableness of clearance and runs, then it must be the totality of receipts from all runs of all theatres rather than the receipts from any single run in any one or more theatres.

"It is difficult to determine from plaintiff's reply what are the supporting reasons for its claim of right to make a detailed audit of twenty-five theatres operated by its competitor Balaban & Katz throughout the City of Chicago and its suburban areas. If plaintiff intends to support its outrageous demand by relying upon the plaintiff's right to prove that 'the earlier a theatre plays pictures in relation to other theatres *in its vicinity*, the more money that theatre makes.' (Reply, p. 3), it has admitted the point made by Balaban & Katz Corporation in its objections. Clearly, the complications of motion picture exhibition are such that at most a theatre can only be compared in terms of revenue potentials with other theatres 'in its vicinity' which are similar to it in size, appointments, ease of access, etc. Plaintiff's demand for a broad scale audit of twenty-five theatres covering the entire area of the City of Chicago and its suburbs stamps such motion as an unwarranted intrusion into the privacy of the business operation of its exhibitor competitor. As was pointed out in the objections of Balaban & Katz Corporation, plaintiff must be limited in its demand for information from its competitor to those theatres which are in substantial competition with plaintiff's theatre and whose appointments, location and ease of access are at least comparable.

"Plaintiff further relies, in support of its outrageous demands, upon this Court's ruling in connection with certain interrogatories directed to distributor defendants. The interrogatories directed to distributor defendants did not in any way raise the same question that is squarely presented to this Court by the broad scale demand for investigation into the books and records of a competitor contained in the instant motion. A court must be jealous to guard a business against unwarranted excursions into the privacy of its operations by a competitor, particularly where other sources are available for all of the information that may in any way be material and relevant for the instant case, or even may be considered to lead to the acquisition of material and relevant information. So a court might direct a distributor to disclose film rentals from theatres far removed from the plaintiff's theatre but refuse to permit that plaintiff to make a broad scale audit of its competitior's books when it admittedly seeks by such audit only confirmation of the data already obtained.

"All of the other points set forth in plaintiff's reply have already been covered. It may be pertinent to note that the argument concerning the rentals paid by Balaban & Katz for the use of its theatres is so obviously an excursion into the privacy of the Balaban & Katz operation by a competitor as to stamp clearly the nature of this motion. By no stretch of the imagination can the relations between Balaban & Katz and its landlords effect the rights of the plaintiff in the instant case. It could only aid the plaintiff as a competitor of Balaban & Katz, or other competitors of Balaban & Katz."

Law suits such as that at bar almost invariably promptly become bitter controversies wherein everything that either side asks for by way of preparation for trial is strenuously opposed by the other side. Since these suits do become bitter and since the bitterness does not become less with the age of the controversy, it behooves the court to dispose of the suit as speedily as possible consistent with the real rights of the parties.

Such opportunity of observation as the writer has had has convinced him that a liberal construction of the Federal Rules of Civil Procedure providing for pre-trial discovery brings about a speedy disposition of law suits. A liberal construction of the rules not only saves the time of the court, of counsel and of the parties by shortening the time required for trials but also contributes to bring about settlements. After the evidentiary facts have been spread upon the record and both sides have had opportunity to consider them, the parties, knowing how much or how little they really have to quarrel about, are more likely to settle their controversy.

By the motion now before the court the plaintiff asks for the discovery of many facts. But the mere fact that it does ask for the discovery of many facts is no reason, in and of itself, why it should be denied the discovery of all or any part of the facts requested. That the discovery of many facts is sought is a reason that the motion should have careful consideration by the court. It has had that careful consideration. The court has considered the complaint and the answers and other papers that have been filed, together with the papers and arguments above recited at length.

The real question before the court under the rule is, Has the moving party made a showing that the facts requested are relevant? The court thinks it has. Many facts are relevant because of the magnitude of the defendant Balaban & Katz Corporation. If the defendant owned and operated but one theatre the facts which might be relevant and which, accordingly, could be compelled to be disclosed would be relatively few. The fact that the plaintiff must be compelled to pay someone to make the examinations sought is, in a sense, a guarantee that needless investigations will not be made. But even if this were not so, the court would be constrained to grant the discovery requested for the simple reason that the facts sought are relevant.

The plaintiff's motion may be granted. Such an order has this day been made.

[¶ 62,451] United States v. Universal Milk Bottle Service, Inc. et al.

In the United States District Court for the Southern District of Ohio, Western Division. No. 7399 Cr. June 30, 1949.

Sherman Antitrust Act

Retail Milk Business—Price-Fixing Agreements—Instrastate Conspiracy Affects Interstate Commerce.—In a criminal action charging dairy companies with conspiracy to fix milk prices in violation of the Sherman Act, motions to dismiss the indictment for failure to state an offense were denied. It was held that the allegations of the indictment set forth facts to show a substantial economic effect on interstate commerce. The court further held that if the conspiracy with which the milk distributors were charged resulted in reducing the quantity of milk purchased by consumers, thus reducing the quantity of milk purchased by distributors from producers outside the state, then there was no question but what interstate commerce might be affected by what may have been a purely intrastate matter.

See the Sherman Act annotations, Vol. 1, ¶ 1630.201.

For the plaintiff: Robert H. Winn, Special Assistant to the Attorney General; Ray J. O'Donnell, United States Attorney; Robert E. Marshall, Assistant United States Attorney.

For the defendants Universal Milk Bottle Service, Inc., The Coors Brothers Co., The J. Weber Dairy Co., H. Miller Dairy Co., Inc., The J. H. Fielman Dairy Co., H. Woebkenberg Dairy Co., The Hyde Park Dairy Co., Cincinnati Milk Exchange: Robert N. Gorman of Gorman, Silversteen & Davis, Cincinnati, Ohio.

For the defendant The Matthews-Frechtling Dairy Co.: Nichols, Wood, Marx and Ginter, John J. Luhrman, of counsel, Cincinnati, Ohio.

For the defendant The Cooperative Pure Milk Ass'n: Orville A. Troy, Kenneth D. Troy, of Basler, Strauss & Troy, Harry S. Kasfir, S. Arthur Spiegel, all of Cincinnati, Ohio.

For the defendant The J. H. Berling's Dairy Products Co.: Michael Lacinak, Cincinnati, Ohio.

For the defendant Cedar Hill Farms, Inc.: Robert G. McIntosh, Cincinnati, Ohio.

[*Review of Proceedings*]

NEVIN, Chief Judge: At the April term, 1948, the Grand Jury of the United States District Court for the Southern District of Ohio (Western Division) returned an indictment (filed September 24, 1948) against the above-named defendants charging them with having violated the provisions of Section 1, Title 15 U. S. C., commonly known as the Sherman Anti-Trust Act.

On October 12, 1948, the several defendants, each represented by its own counsel, filed motions to dismiss the indictment for the various reasons and upon the various grounds set forth in each motion respectively. Separate motions were also filed on the same date for a "Bill of Particulars."

At the same time some of the defendants severally filed a motion "For Inspection of Documents" and on September 24, 1948, the Government filed an "Application for Order Impounding Certain Documentary Evidence." The (several) motions for inspection of documents and the Government's "Application" have heretofore been disposed of, in the one instance by agreement of counsel, and in the other by an Order of the Court.

The cause is now before the Court, therefore, on the motions of the respective defendants to dismiss and for a Bill of Particulars.

I.

The Several Motions To Dismiss the Indictment

Briefs in support of and *contra* the granting of the motions to dismiss, as well as affidavits and documentary evidence have been filed and submitted. In addition, counsel have presented their views somewhat extensively by way of oral argument.

At the outset of the oral arguments, Judge Gorman [1] stated:

> "Every defendant has filed a motion to dismiss and they are all practically upon the same ground, that is, that the indictment doesn't state an offense against the laws of the United States and more particularly you might say on the ground that the indictment alleges a purely intrastate conspiracy but it does not show any substantial economic effect on interstate commerce. We contend that under the Sherman Act there must be a showing of a substantial economic effect on interstate commerce where it is alleged that only an intrastate conspiracy existed."

Defendants further contend that the indictment runs counter to the Order of the Secretary of Agriculture and for that reason the Court has no jurisdiction; that there is no allegation of intent, that the indictment is contradictory and ambiguous to such an extent that trial on it would deprive defendants of their rights under the Fifth and Sixth Amendments; that it is wholly lacking in the clarity and particularity requisite to inform defendants of the nature of the cause as required by the Fifth and Sixth Amendments to the Constitution of the United States; that the motions to dismiss should be sustained because the indictment only charges a conspiracy to raise, fix and maintain the retail and wholesale price of milk in Hamilton County, Ohio, and that the indictment fails to state facts constituting a conspiracy to restrain interstate commerce in that the interstate commerce "comes to rest" and hence the continuing commerce is intrastate, and therefore, the commerce involved is purely intrastate.

The Government submits its argument and authorities based on what it terms as two "doctrines" under either one or both of which it asserts the Motions to dismiss should be overruled insofar as they relate to or depend upon the premise either that "there must be a showing of a substantial economic affect on interstate commerce" or that the interstate commerce referred to in the Indictment "comes to rest." These "doctrines" are (a) The "affecting commerce" or "affectation" doctrine and (b) The "flow of commerce" or "in commerce" doctrine.

The "Affecting Commerce" Doctrine

In support of their contention that "there must be a showing of a substantial economic

[1] All told, there are thirteen defendants. Judge Gorman and his associate counsel are counsel for nine of the defendants, to-wit: Universal Milk Bottle Service, Inc., The Coors Brothers Company, The J. Weber Dairy Company, H. Miller Dairy Co. Inc., The J. H. Fielman Dairy Company, G. H. Berling, Inc., H. Woebkenberg Dairy Co., The Hyde Park Dairy Company, and Cincinnati Milk Exchange.

effect on interstate commerce where it is alleged that only an intrastate conspiracy existed" (which defendants assert is the fact here) all of the defendants rely upon the case of *U. S. v. French-Bauer, Inc., et al.*, 48 Fed. Supp. 260. That case arose in this district. Defendants submit that as it stands unreversed, it is binding upon, or at least, should be followed by this Court in its determination of the present motions.

With reference to the foregoing case, counsel for defendant, The Matthews-Frechtling Dairy Company, say:

> "There is, as Judge Ford said, no allegation of fact to indicate a direct and substantial restraint upon interstate trade. We, therefore, submit as controlling authority the case of *United States v. French-Bauer, Inc., et al.*, 48 Fed. Supp. 260. This decision by Judge Ford is, to our minds, unanswerable by the United States of America."

Counsel for defendant, The Co-operative Pure Milk Association, submit that the indictment does not allege any fact or any act which directly or substantially affects interstate commerce or the avowed intention, purpose or necessary effect of which was the accomplishment of that result and that the Court in the *French-Bauer* case held that such allegations were absolutely necessary if the indictment was to stand as against a Motion to Dismiss, such as we have here.

Counsel for defendant, Cedar Hill Farms, Inc., after citing *Industrial Association v. U. S.*, 268 U. S. 64, as bearing decisively upon the question of "Impact upon Interstate Commerce" or the "affecting commerce" doctrine adopts and approves (without further discussion) the arguments presented by Judge Gorman in his brief.

Counsel for defendant, The J. H. Berling's Dairy Products Company, states that in his opinion "the indictment in *The United States v. French-Bauer* case was more far-reaching and more in particular detail than the indictment now under attack and that upon the authority of that case "this (present) indictment should be dismissed."

In the *French-Bauer* case, French-Bauer, Inc., and others were indicted for engaging in a price-fixing conspiracy in violation of the Anti-Trust Laws. The cause came on before the Court on a Motion to Quash the Indictment, which motion the Court sustained. In the course of the Decision, the Court stated: (Page 260)

> "The conspiracy charged in this indictment is directed to the fixing of prices upon fluid milk which is not moving or intended to move in interstate commerce. The authorities teach that the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1-7, 15 note may reach such a conspiracy, but only if the acts charged are such as directly and substantially affect the commerce in the commodity between the states,"

and the Court held that there were no factual allegations in the indictment before it sufficient to show direct and substantial impact upon Interstate Commerce.

It is agreed that the indictment in the instant case is identical with the one before the Court in the *French-Bauer* case, except that in the present indictment there has been inserted Paragraph 24, which was not in the indictment in the *French-Bauer* case. As to this, the record shows:

> "The Court: (addressing Mr. Winn, of Counsel for the Government) I was interested first to know whether you agree with the statement that this indictment is identical, at least, to all intents and purposes, with the one before Judge Ford, (in the *French-Bauer* case) excepting the insertion of this paragraph 24. Mr. Winn: I think that is a fair statement. I wouldn't say the indictment was identical with the prior indictment except for paragraph 24. However, the indictment is to all intents and purposes—The Court: Is it true it is identical so far as any application of the law is concerned? Mr. Winn: I think it is identical with the 1942 indictment but for the provisions of paragraph 24."

Paragraph 24 of the present indictment reads as follows:

> "24. Increases in prices charged by distributors in the Cincinnati Area for milk sold to consumers and other purchasers have had and have the effect of reducing the volume of milk purchased by said consumers and other purchasers, thus reducing the quantity of milk purchased by said distributors from producers in Kentucky, Indiana and Ohio."

Defendants assert that this allegation is nothing more than a legal conclusion and that in law it adds nothing to the indictment that was before the court in the *French-Bauer* case; that even with this addition, the present indictment does not charge an offense against any of the defendants.

The Government, on the other hand, submits that it is a factual allegation, that the factual statement is that the increases charged by the distributors for milk sold to consumers have had, and have the effect of reducing the volume of milk purchased by such consumers and other purchasers "thus reducing the quantity of milk purchased by said distributors from purchasers in Kentucky, Indiana and Ohio."

Counsel for the Government point out that the indictment in the *French-Bauer* case alleged no effect upon interstate commerce as a result of an alleged intrastate conspiracy and urge that by the inclusion of paragraph 24 the objection which the Court found to the indictment in the *French-Bauer* case is overcome.

The Court agrees with the Government's contention that the allegations of Paragraph 24 are factual and are not mere legal conclusions. Under the familiar rule the facts as alleged are admitted, on the pending motions, to be true, for the purposes of this decision.

The "affecting commerce" or "affectation" doctrine was first enunciated by Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1.

In *Wickard v. Filburn,* 317 U. S., 111 (decided shortly after the *French-Bauer* case) the Court says (PP. 120-123):

> "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden,* 9 Wheat. 1, 194-195. * * * It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder. When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.,* 156 U. S. 1. * * * Not long after the decision of *United States v. Knight Co., supra,* Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co. v. United States,* 196, U. S., 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

In support of their contention that the indictment must show that a claimed intrastate conspiracy had a direct and substantial effect on interstate commerce, some (but not all) of the defendants cited and relied upon *U. S. v. Womens Sportswear Manufacturers Association,* 75 Fed. Supp. 112. As to this Judge Gorman states:

> "Briefly our principal point is that a purely intrastate conspiracy is alleged, and not an interstate conspiracy. Under the law an intrastate conspiracy can only be prosecuted under the Sherman Anti-Trust Act when there is a showing that the intrastate conspiracy had a direct and substantial effect on interstate commerce. Facts must be alleged setting forth the impact on interstate commerce and not merely conclusions of law. First, this indictment does not show such a direct and substantial effect as is necessary to base a valid charge. Such allegations are essential it has been held in many cases, including the recent one of *United States v. Sportswear Mfg. Assn.,* 75 Fed. Supp. 112 (D. C. Mass.) decided December 10, 1947, and now on appeal to the Supreme Court of the United States."

Other counsel, notably counsel for the Cooperative Pure Milk Association, assert that they at no time relied upon the *Womens Sportswear* case, saying:

> "We believed that the case was clearly distinguishable at the time when the ruling was adverse to the Government and we still feel that the case is distinguishable now that the courts have decided in favor of the Government."

The District Court in the *Womens Sportswear* case held that the prayer for injunction and other relief should be denied, with judgment for the defendants.

In the course of its decision, the court stated (pages 117-118):

"In summary, there is no evidence of any intent on the part of the defendants who had no direct and immediate connection with or control over interstate commerce, to burden interstate commerce. There was no evidence of any direct and immediate restraint upon interstate commerce resulting from the defendants' activities, from which an illegal intent can be inferred."

That is the way the case stood at the time the briefs and arguments were submitted in the instant case. Since that time, the *Womens Sportswear* case has been decided by the Supreme Court of the United States and by that court, reversed. *U. S. v. Womens Sportswear,* 336 U. S., 460.

In its opinion, the Court, (pages 463-64) say, among other things:

"It seems clear that the intent and effect of the agreement is substantially to restrict competition and to control prices and markets. * * * The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

If, as alleged in Paragraph 24 of the indictment, the conspiracy with which the defendants are here charged results in "reducing the volume of milk purchased by said consumers and other purchasers thus reducing the quantity of milk purchased by said distributors from producers in Kentucky, Indiana and Ohio," then there can be no question but what "it is interstate commerce that feels the pinch."

The indictment herein specifically states (Par. 27) that the defendants conspired to raise, fix and maintain prices; that (Par. 28) they agreed upon and fixed prices; that they agreed to uniform discounts and allowances to wholesale purchasers; that they adhered to the prices and discounts agreed upon; that (Par. 24) increases in prices have had the effect of reducing the quantity of milk purchased by defendants from producers in Indiana and Kentucky; and that (Par. 30) the conspiracy has had the effect of restraining trade and commerce in milk among the several states.

Price fixing is illegal *per se. U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150. The fixing of prices as alleged in the indictment necessarily operates as a direct and substantial restraint on the interstate commerce herein involved and in the indictment referred to.

"Substantial economic effect on interstate commerce" does not mean the effect on a specific amount of interstate commerce. It does not run to the quantity that is involved, though in some given case that might be an added factor to be taken into consideration.

As claimed by the Government in argument, the interstate commerce involved may be ever so small. It is not the substantial quantity; it is the substantial effect on interstate commerce. The question is not how much money may be involved or how little the price to the purchaser may be affected.

As stated by the Court in the *Filburn* case (Page 127) "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. *Labor Board v. Fainblatt,* 306 U. S. 601, 606 et seq.; *United States v. Darby, supra,* at 123."

Basing its conclusion on the alllegations of the indictment presently before it, the Court is of the opinion and so finds that it does allege facts, even assuming, a "purely intrastate conspiracy" (as claimed by defendants) to show a "substantial economic effect" on interstate commerce and upon the ground, asserted by all of the defendants, that it does not, their respective motions to dismiss are each and all not well taken, and should be overruled.

The "Flow of Commerce" or "In Commerce" Doctrine

The Government contends that the sales by the defendants occur in the course of interstate commerce, saying:

"The flow of fluid milk from producers in Kentucky and Indiana through the defendants to consumers in the Cincinnati Area, described in the indictment, is a

continuous day by day flow. Being a perishable commodity, fluid milk cannot be stored or warehoused until a ready purchaser happens along. Immediate sale is essential. It is obvious that the milk on hand must be sold and delivered each day by the distributors to make room for the milk going through the defendants' plants on the following day. Since 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business' (*Swift and Co. v. U. S.* (1905) 196 U. S. 375, 398), it would seem that the mere description of the flow establishes its interstate nature until it has been delivered by the distributors to consumers in the Cincinnati area. The pertinent decisions of the Supreme Court fully support this view. *Swift and Co. v. U. S. Supra.* * * * The intention and expectation of a seller and a buyer that the commodity sold would be shipped in interstate commerce is a valid test in determining whether or not the sale is a transaction in interstate commerce, even though completed before the actual physical interstate transportation occurs. *U. S. v. Reading Co.,* 226 U. S. 324, 367; *Lemke v. Farmers Grain Co.,* 258 U. S. 50, 53, 54; *Interstate Natural Gas Co. v. Federal Power Commission,* 331 U. S. 682, *Mandeville v. Crystal Sugar Co.,* 334 U. S. 219. * * * Sales of milk by producers in Kentucky and Indiana to the defendant distributors are made with the intention and expectation of both parties that the milk would be transported to Ohio and there immediately sold by the distributors. The price to be paid to the producers by the distributors depends upon the amount of that milk which is resold by the distributors to wholesale and retail customers in Ohio, and the price is not determined until after that resale. The resale in Ohio is as integral a part of the interstate commerce as is the sale by the Kentucky and Indiana producers to the distributors."

The Government asserts that the Interstate Commerce alleged in paragraphs 21, 22, 23 and 25 of the indictment, is the flow of interstate commerce which was originally intended to and does continue through the processing plants of the defendants and their distributors, to the stores and to the purchasers and consumers of milk and that such a price fixing conspiracy affecting the price of milk at wholesale and retail, as here alleged, is a conspiracy in connection with the flow of that commerce and is *per se,* a violation of the Sherman Act.

In the course of the oral argument, counsel for the Government stated "I am basing my appeal to this court to uphold this indictment under the commerce theory more on the cases that have been decided since the *French-Bauer* decision than anything else" and in this connection, counsel cited *U. S. v. St. Louis Dairy Co.,* 77 Fed. Supp. 853, (decided May 14, 1948) and *U. S. v. Happy Valley Farms, Inc., et al.,* (unreported) but decided by the District Court of the Eastern District of Tennessee on July 20, 1948. Later, counsel called attention to *Standard Oil Co. v. Federal Trade Commission,* — Fed. (2d) —, (C. C. A. 7, decided March 11, 1949.)

In its decision in the *St. Louis Dairy* case, the court states, (page 859):

"We are not unaware of the apparent conflict in our conclusion with that of the District Court for the Southern District of Ohio in *United States v. French-Bauer,* D. C. 48 F. Supp. 260. * * * The *French-Bauer* opinion apparently disagrees with the rule, as we understand it, that price-fixing is *per se* a violation of the Sherman Act."

In the *Standard Oil* case the court says:

"It is not disputed that the petitioner is engaged in commerce, but it is vigorously insisted that commerce ended at the River Rouge plant and the bulk plants in the Detroit area and that the petitioner's transactions from there on, were wholly intrastate. With this, we are unable to agree. The break that occurred at River Rouge was a break in transportation but not in the constant stream of commerce that flowed from the Whiting Refinery to the petitioner's customers in Michigan. * * * The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across State lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. *Walling v. Jacksonville Paper Co.,* 317 U. S. 564; *Binderup v. Pathe Exchange,* 263 U. S. 291, 309; *Mid-Continent Petroleum Corporation v. Keen,* 157 Fed. 2d 310, 314; *Republic Pictures Corporation v. Kappler,* 151 F. 2d 543, 545; *Walling v. American Stores Co.,* 133 Fed. 2d 840."

Defendants insists that the cases relied upon by the Government do not support its claim that sales to consumers in Hamilton County, Ohio, are interstate commerce and that the Government's "in commerce" argument "is not sustained by the decisions."

Counsel for defendants point out in some detail wherein, in their opinion, the cited cases are distinguishable from the instant case, saying:

> "The Government cites *Swift & Co. v. United States,* 196 U. S. 375. That decision is based on the fact that the cattle which were shipped in from various states to the Chicago stockyards had not come to rest in Chicago but were still in the stream of interstate commerce because there was an 'expectation' that the meat would continue on its interstate journey and would be sold in states other than the State of Illinois. The word 'expectation,' is the language of the Supreme Court in the opinion. The decision is based on the fact that it was expected that the cattle would continue on their interstate journey. * * * In the instant case the Government is not trying to 'reach back' to steps 'prior' to the transportation; instead it is trying to reach ahead to steps after the transportation. It is trying to reach a processed article at a time when there is no purpose of transporting the product in interstate commerce,"

and further that the recent (*Standard Oil*) case, for the reasons which they assign, is "not applicable."

The Court, however, agrees with the claim of the Government that today's practical concept of interstate commerce dictates that commodities in interstate commerce remain in that status until they reach the point where the parties originally intended that the movement should finally end. If, as contended by the Government, the distribution and sale of milk at wholesale and retail by the defendants is in interstate commerce, or is an integral part of the interstate flow from the farms of Kentucky and Indiana producers to consumers in Ohio, the point where the parties originally intended that the movement should end, then there can be no doubt but that the conspiracy of the defendants to fix prices at which such sales shall be made constitutes a violation of the Sherman Act.

The Government is correct in its contention that a "practical concept" of interstate commerce must and does lead to the conclusion that the distribution of milk in the Cincinnati area both from the standpoint of time and continuity is so closely and directly related to the interstate flow of milk and so much an inseparable part thereof as to bring this alleged conspiracy within the condemnation of the Sherman Act.

In view of all of the foregoing, the Court is of the opinion and so finds that both upon reason and under the decisions, the Government's "flow of commerce" or "in commerce" argument is sound and sustained. Under this "doctrine" also, therefore, the indictment is immune as against defendants' motions to dismiss.

Other Grounds Asserted by Defendants in Support of Their Motions To Dismiss

As heretofore stated in addition to their contention that "under the Sherman Act there must be a showing of a substantial economic effect on interstate commerce, where it is alleged that only an intrastate conspiracy existed" defendants set out other grounds on which they submit their motions to dismiss should be sustained.

In his brief (pages 2-3) Judge Gorman says:

> "Secondly, milk purchased by dealers or handlers from producers is regulated by the provisions of Order No. 65 promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (U. S. Code Title 7 Sec. 601 *et seq.*). This court is required to take judicial notice of that Order No. 65, which is attached to the motion to dismiss. Under that Order No. 65 the Secretary of Agriculture so regulates milk, exempting the price paid to producers from the provisions of the Sherman antitrust act, that an examination of the order will show that the statements in paragraph 24 of the indictment are palpably false and untrue. * * * In addition, the indictment fails in several other respects to state an offense. There are inconsistent averments which if given an ordinary construction rebut the inference that an offense was committed."

In this connection, defendants insist that the Court does not have jurisdiction to consider the charges made in the present indictment because of the Order of the Secretary of Agriculture, claiming that the action upon the part of the Secretary of Agriculture "cannot be impeached or infringed upon in these proceedings" and that any "challenge to the findings of the Secretary of Agriculture must be addressed to him."

Defendants contend that the Government is here asking "the court to intervene in a field which has already been pre-empted by the Secretary of Agriculture — a field reserved for him by Congressional Act."

As asserted by the Government, according to the foregoing claims of the defendants, the Order of the Secretary of Agriculture serves as a buffer which insulates the defendants from any possibility of violating the Sherman Act. This is not, and cannot be true.

It is true, as the Government points out, that the stated purpose of the Order is to "insure" an adequate supply of milk, but nothing contained in the indictment is inimical to, or runs against, or attempts to impeach or infringe upon this Order.

This Order affects and relates to prices paid to the producers, and has nothing to do with prices charged by distributors to wholesale and retail customers. These prices should be determined by competition and not by conspiracy.

The charge in the instant case is a conspiracy to fix prices, contrary to the Sherman Act. Nothing in the Order or the Act upon which the Order is based, authorizes or grants immunity from the Sherman Act for a conspiracy to fix prices of fluid milk sold at retail and wholesale in the Cincinnati area.

The Secretary of Agriculture has authority to determine and adjust minimum producer prices so as to promote and provide for an adequate supply of milk but he has no authority to take any action concerning a conspiracy to increase distributors' selling prices, with a resultant lessening of demand for fluid milk.

The Court has jurisdiction of this cause.

Finally, defendants claim that the indictment is wholly lacking in the clarity and particularity requisite to inform them of the nature of the charge made against them.

The indictment pleads the charge in sufficient detail to inform defendants that they are charged over a two-year period, which is the period referred to in the indictment, with having "engaged in a combination and conspiracy to raise, fix and maintain prices for the sale in the Cincinnati area of milk produced in the States of Kentucky, Indiana and Ohio, which combination and conspiracy in fact has been, and is now, in restraint of the herein before described trade and commerce."

In the (unreported) case of *U. S. v. Happy Valley Farms, Inc.,* (herein above referred to) the indictment was couched in practically the same language as the one here under consideration.

In that case in response to the same contention as have asserted by defendants, the Court made the following statement:

> "Suffice to say, the indictment is adequate, both as to form and substance. It states adequately the venue of the crime charged, as being within the jurisdiction of this court. The crime is adequately alleged to have been a continuing conspiracy. The criminal participation of the defendants is sufficiently averred in the indictment. The elements of the crime are not only charged substantially in the language of the statute, but the means whereby the conspiracy is and has been formed and carried on and the details thereof adequate to identify the specific combination and conspiracy, and to enable the defendants to prepare for trial, and to protect them against a new prosecution in event of an acquittal are likewise all set forth with particularity and definiteness. 'Now, specifically, the indictment is not vague and indefinite; it is not duplicitous. As I say, it clearly charges a restraint of interstate trade and commerce, and an offense under the Sherman Act.'"

The foregoing statements are applicable in the instant case and the court adopts the language there used, as its decision on the question of lack of clarity and particularity in the indictment. The indictment under consideration is neither vague nor indefinite.

Upon consideration of the motions of the several defendants to dismiss the indictment, the Court is of the opinion and so finds that each of the motions is not well taken and that each and all of them should be, and they are each and all, overruled.

II

Motions for Bill of Particulars

Motions were filed on October 12, 1948, by and on behalf of each of the several defendants for Bill of Particulars. It is claimed by defendants that a Bill of Particulars should be granted to enable them to prepare for trial; to sustain a plea of former jeopardy, and in order that "the ends of justice and orderly procedure may best be served."

It is a well established rule that it is not the function of a bill of particulars to provide evidence, nor will such a bill be ordered where the information sought is within the knowledge of the defendants, or is information which they have equal opportunity with the Government, to discover.

It appears from the briefs and arguments in support of the respective motions for Bill of Particulars, that all of the defendants' requests are for data or information that fall within the foregoing rule.

Upon consideration of the motions for Bill of Particulars, together with the allegations of the indictment itself, the Court is of the opinion and so finds that defendants' motions for "Bill of Particulars" are each and all not well taken and that they should be and they are, each and all, overruled.

The Court has caused to be entered in this case appropriate Orders overruling the Motions to Dismiss and the Motions for Bill of Particulars with regard to each and all of the defendants respectively.

[¶ 62,452] United States v. Maryland & Virginia Milk Producers Association, Inc., et al.

In the United States Court of Appeals for the District of Columbia Circuit. No. 10045. Argued April 18, 1949. Decided June 17, 1949.

Sherman Antitrust Act

Combination of Milk Producers and Distributors—Indictment Sufficient—Price-Fixing Agreement.—An indictment charging an association of milk producers, its secretary-treasurer and seven milk distributor corporations with conspiracy to eliminate and suppress competition in the sale of milk was held to state a cause of action under Section 3 of the Sherman Act and an order dismissing the indictment was reversed. The Court ruled that the indictment which contained, among others, allegations that distributors had agreed to buy their full supplies from the association and that the price at which distributors bought and resold milk had been fixed by agreement, need not contain allegations as to the amount of interstate trade affected by the conspiracy or that prices were maintained at non-competitive levels.

See the Sherman Act annotations, Vol. 1, ¶ 1630.201.

For the appellant: Herbert A. Bergson, Assistant Attorney General and George Morris Fay, United States Attorney, of Washington, D. C.

For the appellees Maryland and Virginia Milk Producers Ass'n, Inc., and B. B. Derrick: William E. Leahy, of Washington, D. C., with whom Elwood H. Seal, William J. Hughes, Jr., of Washington, D. C., and Robert R. Smyers were on brief.

For the appellee Safeway Stores, Inc.: Arthur B. Hanson, of Washington, D. C., with whom Elisha Hanson, of Washington, D. C., was on brief.

For the appellee Chestnut Farms-Chevy Chase Dairy Company: Roger J. Whiteford, John J. Wilson, and Jo V. Morgan, Jr., all of Washington, D. C., were on the brief.

For the appellee Thompson's Dairy, Inc.: Samuel O. Clark, Jr., of Washington, D. C., was on the brief; Raymond Sparks and Wm. V. T. Justis, of Washington, D. C., entered appearances.

For the appellee Richfield Dairy Corporation: W. Gwynn Gardiner, of Washington, D. C., was on the brief: James M. Earnest, of Washington, D. C., and Edgar A. Wren entered appearances.

For the appellee Simpson Bros., Inc., t/a Wakefield Dairy: John F. Hillyard, of Washington, D. C., was on the brief.

For the appellee Alexandria Dairy: William Blum, Jr., of Washington, D. C., was on the brief.

For the appellee Harvey Dairy, Inc.: Ralph W. Powers, of Washington, D. C., was on the brief.

For the National Cooperative Milk Producers Federation as *amicus curiae:* Marion R. Garstang and Harry J. Scharnikow were on the brief.

Before EDGERTON and WILBUR K. MILLER, JJ., and JAMES W. MORRIS, District Judge sitting by designation.

EDGERTON, J.: The government appeals from an order dismissing an indictment charging conspiracy to restrain trade in milk and milk products in the District of Columbia, and between the District and adjoining States, in violation of Sec. 3 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 3. The government first appealed directly to the Supreme Court, which remanded the case to this court pursuant to 34 Stat. 1246, as amended, 18 U. S. C. § 3731. *United States v. Maryland & Virginia Milk Producers Ass'n, Inc., et al.*, 335 U. S. 802.

The paragraphs of the indictment indicated by the figures in parentheses make substantially the following statements. The appellees are an incorporated Association, the members of which are about 1,500 Maryland and Virginia milk producers who supply 80 per cent of the milk sold to distributors in the Washington metropolitan area (20); the Secretary-Treasurer of this Association (9); and seven corporations that distribute milk and its products to consumers and other purchasers in the District of Columbia. These distributors buy and resell 86 per cent of all milk supplied to the Washington metropolitan area (21). Appellees have conspired to eliminate and suppress competition in the sale of milk to these distributors, in its purchase by them, and in its resale by them to consumers and other purchasers (35). For those purposes (36, 37) appellees have done these things. Appellee distributors have contracted with appellee Association that they will buy no milk from producers or others who are not members of the Association, but will buy only from the Association, as far as it is able to supply their needs, which it agrees to do as far as it can (36 (a) (b)). Appellees have agreed to fix the prices at which the distributors will buy milk (36 (g)) and also the prices at which they will resell it (36 (m)). They have agreed on a classification of milk for price purposes according to use (36 (f) (g)). They have agreed that appellee distributors will remove from the market "excess" milk, *i. e.* any milk the Association has for sale in excess of the amount these distributors can resell at the prices agreed upon (36 (n) (o)). They have agreed that the Association will prevent and eliminate competition from distributors not parties to the conspiracy by inducing them not to cut prices, attempting to deprive price-cutters of adequate supplies of milk, interfering with the transportation of milk to them, furnishing milk to appellee distributors at reduced rates for use in taking away contract business from price-cutters, and driving them out of business (36 (p)). They have agreed that the Association will not supply milk, to any distributor not agreeing to buy his full supply from the Association, at prices as low as those charged to appellee distributors (36 (d)). The conspiracy has been successful: "the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do." (37)

> "Price-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. . . . If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition . . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes belond the pale . . ."

Accordingly the government need not show or allege that prices have been "raised and maintained at 'high, arbitrary and non-competitive levels.'" *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 221, 222. "Also it is unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co. v. United States*, 332 U. S. 392, 396. Therefore "full supply contracts", however legal they may be in other circumstances, *cf. Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3, are illegal when made for the purpose of eliminating and suppressing competition. Complete monopoly is of course unnecessary; "the amount of interstate trade . . . affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint." *United States v. Yellow Cab Co.*, 332 U. S. 218, 225.

Although the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. 291, and the Clayton Act, 38 Stat. 730, 731, 15 U. S. C. 17, give some privileges to combinations of agricultural producers, a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged. *United States v. Borden Co.*, 308 U. S. 188; *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 808. "Congress, as a part of its Agricultural Marketing Agreement Act, authorizes the Secretary of Agriculture to issue orders regulating the handling of several agricultural products, including milk . . . As to milk, it sets up, § 8c (5), 7 U. S. C. § 608c (5), a rather complicated system of fixing prices to be paid to producers . . ." *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 541. And the same Act, 50 Stat. 246, as amended, 7 U. S. C. 601 *et seq.*, provides in § 608b (U. S. C. Supp. I) that with certain limitations "the Secretary of Agriculture shall have the power . . . to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof" and "The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful." But these provisions expressly involve orders of the Secretary of Agriculture and agreements to which he is a party. Since neither the fixing of prices according to use nor any other feature of the conspiracy charged in this indictment is covered by any such order or agreement, these statutory provisions are immaterial. *United States v. Borden, supra*, at 199-202.

In our opinion, therefore, the court erred in dismissing the indictment as not setting forth sufficient facts to constitute a conspiracy in violation of the Sherman Act.

Reversed.

WILBUR K. MILLER, J., *dissents.*

[¶ 62,453] Fifth and Walnut, Incorporated and Albert J. Hoffman v. Loew's Incorporated et al.

In the United States Court of Appeals for the Second Circuit No. 192, October Term, 1948. Docket No. 21206. Argued March 14, 1949, Decided July 19, 1949.

Appeal from the United States District Court for the Southern District of New York.

Sherman Antitrust Act, Clayton Antitrust Act

Motion Picture Exhibition Business—Refusal to License First-Run Pictures—Treble Damage Suit Dismissed.—A suit for treble damages, brought by successive owners of an independent theatre alleging that they sustained operating losses because major distributors had refused to license first-run films to them, was dismissed and the dismissal affirmed on appeal when it was found that the troubles of the theatre were due more to its location, condition and quality of patronage than to any acts of the distributors. Maintaining exclusive outlets for the exhibition of their films and participating in a move-over arrangement for first-run films was held not in itself illegal unless a conspiracy to keep the independent operator out of the business of exhibiting first-run motion pictures was found by the jury to exist. But the jury did not so find, and the alternative they chose was properly offered to them in the court's charge.

Section 5 of the Clayton Act—Final Termination of Litigation—Previous Findings of Illegality Inadmissible.—Evidence to prove a conspiracy, consisting of findings and conclusions of a district court in a previous government action condemning the joint interests of the distributors, was held inadmissible as not a final judgment or decree as defined by Section 5 of the Clayton Act. Although basic findings of illegality made by the district court had been accepted by the United States Supreme Court, that Court had remanded the case for further relief, so that the litigation had not reached final termination as required by the statute.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1640.291, 1640.435, 1640.527, 1640.644, 1640.647, and the Clayton Act annotations, Vol. 1, ¶ 2032, 2025.12.

Affirming a decision of the United States District Court for the Southern District of New York; motion to dismiss reported at ¶ 62,219.

For the appellants: Monroe E. Stein, of New York City (Rogge, Fabricant, Gordon & Goldman, Herbert J. Fabricant, Murray A. Gordon, and Maurice A. Gellis, all of New York City, on the brief).

For appellees Loew's Inc., Marcus Loew Booking Agency, Inc., United Artists Corp., and United Artists Theatre Circuit, Inc.: Edward C. Raftery, of New York City (O'Brien, Driscoll, Raftery & Lawler, J. Robert Rubin, George A. Raftery, Edward J. Toner, Jr., Benjamin Melniker, and Earle L. Beatty, all of New York City, on the brief).

For the appellees Twentieth Century-Fox Film Corp., Paramount Pictures, Inc., and RKO Radio Pictures, Inc.: John F. Caskey, of New York City (Dwight, Harris, Koegel & Caskey, Austin C. Keough, Gordon E. Youngman, Charles F. Young, Sam Boverman, and T. Latta McCray, all of New York City, on the brief).

For the appellees Warner Bros. Pictures Distributing Corp.: Abraham L. Freedman, of New York City (Robert W. Perkins and Howard Levinson, both of New York City, on the brief).

For the appellees Columbia Pictures Corp.: Louis D. Frohlich, of New York City (Schwartz & Frohlich, Everett A. Frohlich, and Max H. Rose, all of New York City, on the brief).

[*Syllabus*]

Action by Fifth and Walnut, Incorporated and Albert J. Hoffman against Loew's Incorporated, Marcus Loew Booking Agency, Inc., RKO Radio Pictures, Inc., Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, Columbia Pictures Corporation, United Artists Corporation, and United Artists Theatre Circuit, Inc., for damages and injunctive relief for violations of the Sherman Antitrust Act, 15 U. S. C. A. §§ 1, 2, 15, 26, injuring plaintiffs in their operation of the National Theatre in Louisville, Kentucky. From a verdict and judgment for the defendants, plaintiffs appeal. Affirmed.

[*Grounds of Appeal*]

CLARK, Circuit Judge: This appeal by plaintiffs from a defendants' verdict and judgment in a private action for damages and injunctive relief under the antitrust acts, 15 U. S. C. A. §§ 1, 2, 15, 26, comes to us on quite narrow issues of law. Plaintiffs claim two grounds for reversal: (1) the court's refusal of certain requests to charge, and certain language in the charge itself; and (2) the exclusion of certain of the adjudications in *United States v. Paramount Pictures, Inc.*, D. C. S. D. N. Y., 70 F. Supp. 53, affirmed in part and reversed in part, 334 U. S. 131, which are alleged to be admissible under § 5 of the Clayton Act, 15 U. S. C. A. § 16. The basis of the action is the loss sustained by plaintiffs in the operation of the National Theatre in Louisville, Kentucky, by reason of the claimed conspiracy among defendants to refuse to this theatre the licensing of desirable moving picture films for show there. Jurisdiction was obtained in the Southern District of New York over the nine defendants now parties, and thereafter they moved for dismissal on the ground that Louisville was the more convenient place for trial. This motion was denied, D. C. S. D. N. Y., 76 F. Supp. 64, largely because of the delay in seeking the relief. There followed the lengthy jury trial whose unsuccessful outcome brings the plaintiffs here on appeal.

[*Review of Facts*]

The individual plaintiff, Albert J. Hoffman, and the corporate plaintiff, Fifth and Walnut, Incorporated, successively operated the National Theatre, in Louisville, from September 3, 1943, to December 9, 1943, and from December 10, 1943, to July 11, 1946, respectively. There were four regular first-run theatres [1] operating in that city during the period in suit: the Rialto, the Strand, the Loew's-United Artists, and the Mary Anderson. The Fourth Avenue Amusement Co. operated the Rialto and the Strand, which were the only first-run outlets in Louisville for feature films distributed by defendants RKO Radio Pictures, Inc.,

[1] "Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management." *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 144, note 6.

Twentieth Century-Fox Film Corporation, and Paramount Pictures, Inc. The Loew's-United Artists Theatre was operated by the Louisville Operating Co., a corporation indirectly controlled, in equal shares, by defendant Loew's Incorporated and defendant United Artists Theatre Circuit, Inc. This theatre exhibited practically all the first-run features released by Loew's Incorporated and by defendant Columbia Pictures Corporation, and the majority of the first-run features distributed by defendant United Artists Corporation. (There is no connection between the two defendants United Artists Theatre Circuit, Inc., and United Artists Corporation other than the similarity of name.) The People's Theatre Company operated the Mary Anderson Theatre. It was the exclusive first-run outlet for pictures distributed by defendant Warner Bros. Pictures Distributing Corporation. A fifth theatre, the Brown Theatre, served as a move-over first-run theatre [2] under a joint agreement of the Fourth Avenue Amusement Co., the Louisville Operating Co., Inc., and the Broadway and Fourth Avenue Realty Co., which last organization owned the theatre. The profits from its operation were divided equally among the parties to the agreement, which also provided that "the same admission price shall be charged for such films as the price charged * * * in the first run theatres of such parties at the times when such films shall be exhibited at the Brown Theatre."

[*Argument on Appeal*]

The evidence dealing with the move-over arrangement is the basis for plaintiff's exception to the charge and to the denial of certain requests to charge. This arrangement was alleged to be one of the constituent conspiracies involved in the general conspiracy between and among the named defendants, and the exhibitors, who were not so named, since they were not amenable to the process of the district court.

It is of the essence of plaintiffs' argument that "but for the fact that a Jury had to pass upon the question of damages," a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 159, 160, but rather the discriminatory fashion in which move-over privileges were accorded by distributors to "large affiliated and unaffiliated circuits" and not to "small independent exhibitors." Plaintiffs make no claim here that they were denied the opportunity to move what first-run pictures they did receive over to the Brown.

[*Practices Held Legal Apart from Conspiracy*]

Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in *United States v. Paramount Pictures, Inc.*, D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made. Nor did the price-fixing clause in the agreement require any special attention from the judge in his charge or afford any basis for a recovery of damages in the present action. Not only was the testimony of the plaintiffs' manager Janecky that he fixed his own prices, but the only complaint was that plaintiffs were deprived of first-run pictures by a conspiracy against them among the defendants. We cannot see how price-fixing in this case between some of the defendants and the owner of the Brown Theatre if it involved any illegality—which may be doubted—af-

[2] "A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre." *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 160, note 13.

fected the plaintiff's claim to damages for failure to obtain pictures.

Lastly, there was no inherent wrong in the uniform practice at the Brown Theatre of taking the picture that had earned the highest gross on its first run in Louisville and arranging standard terms (20 per cent of box-office receipts up to $3,250, and 50 per cent of receipts above that figure) with all distributors. Although the operating agreement required that no better terms be given any other distributor than were accorded to Loew's, it cannot be assumed that such an agreement would restrain competition among the distributors for the move-over facilities of the Brown. All of the pictures simultaneously on first-run exhibition in Louisville competed for the move-over privilege on the basis of their comparative box-office records.

[*Charge to Jury by Trial Judge*]

Plaintiffs stress the fact that use of the Brown Theatre, which had been standing vacant for some time before it was reopened under the move-over arrangement, decreased, *pro tanto*, the demand for first-run exhibition space, since by taking the more popular pictures from first-run theatres before their first-run potentialities had been exhausted, the move-over made possible more frequent changes in the first-run bills. But so to hold is not to condemn the arrangement as in restraint of competition. The district court correctly assessed the significance of the evidence with regard to the move-over when it said in the charge:

> "There has been considerable testimony in this case regarding:
>
> 'a) The move-over pictures to the Brown Theatre from Loew's and the Rialto theatres;
>
> 'b) The alleged uniform terms paid by the operator of the Brown move-over theatre to the various distributors;
>
> 'c) The licensing of a second run in Louisville to the Kentucky Theatre by most of these defendants; and
>
> 'd) The licensing of a third run to the Uptown Theatre by most of these defendants.'
>
> "This evidence was admitted solely to show the uniform conduct of the defendant distributors in licensing their pictures in Louisville, which the plaintiffs contend was another phase or part of the alleged combination and conspiracy of the defendants to monopolize and control the exhibition of pictures in the City of Louisville."

The court then went on to charge, in the language specifically objected to here by plaintiffs:

> "Each distributor had a right acting independently and not in concert, or pursuant to any combination or conspiracy in violation of the anti-trust laws, to license a move-over run to the operator of the Brown Theatre.
>
> "Illegality would only arise if you found from the evidence that the plan and method of operating the Brown Theatre as a move-over theatre, put into effect in 1936, was part of a plan or scheme among certain of the defendants and certain operators of first-run theatres in Louisville to monopolize the showing of first-run pictures or to restrain or control the business of exhibiting first-run pictures in Louisville."

Plaintiffs' objection to this portion of the charge is based on the notion that by participating in the move-over arrangement, to which only one of the defendants was a formal party, the distributor defendants all joined in a conspiracy in restraint of competition. But unless the move-over arrangement was intended, by itself or as part of a more inclusive plan, to keep plaintiffs out of the business of exhibiting first-run motion pictures, it was not in itself illegal and any or all the defendants were entitled to participate in it. This is not to say that the jury could not have found, particularly against the background of the motion picture industry as it is now known,[3] that the move-over arrangement was part of such a conspiracy. But the jury did not so find, and the alternative which they chose was properly offered to them in the court's charge.

Having correctly indicated the applicability of the evidence on the move-over, the district court was justified in rejecting plaintiffs' disputed requests to charge. Certain of these are erroneous; the others are superfluous in the light of the charge actually given. Thus of the six in issue, the first four are instinct with the notion that the move-over arrangement might offend against the antitrust laws without regard to its ef-

[3] As shown in *United States v. Paramount Pictures, Inc., supra; United States v. Griffith,* 334 U. S. 100; *Schine Chain Theatres v. United States,* 334 U. S. 110; and other cases. See also McDonough and Winslow, *The Motion Picture Industry: United States v. Oligopoly,* 1 Stanford L. Rev. 385, 1949.

fect, actual or potential, on plaintiffs' theatre. This is shown by the first one, as follows:

"I charge you, as a matter of law, that if you find that Exhibits 87 and 87-A which are the agreements between Fourth Avenue Amusement Co., Broadway and Fourth Avenue Realty Co., and Louisville Operating Co., Inc. for the operation of the Brown Theatre and the renewal thereof restrain competition in first-run exhibition in Louisville, that this is direct evidence and not circumstantial evidence of an illegal conspiracy between the parties to it."

That "direct" is intended to have greater force than merely as a contrast to "circumstantial," to mean at least "convincing," if not "complete," is shown by the next charge to the effect that, if the distributor defendants participated in the move-over arrangement and it constituted a restraint of competition in first-run exhibition in Louisville, then "this is direct evidence and not circumstantial evidence of an illegal conspiracy and if you should find such illegal conspiracy to have been put into effect you are to return a verdict for the plaintiffs and against all of the defendants who participated therein." And the next two requests have the same vice of seeming to foreclose jury consideration, and to direct the verdict, as to the most important and decisive issue in the case.

If, however, less was contemplated by the writer of these charges, and they were designed only to state the rather obvious proposition that, if the agreement was an unlawful restraint of competition, then it was evidence from which an inference of an illegal conspiracy could have been drawn against those having knowledge and participating—as appears to be the intent of the remaining two in dispute—then the matter was amply covered in the charge. Thus the following adequate and succinct statement to the jury puts the matter better than these not overclear requests:[4]

"If you find that the defendant distributors each had its first-run customer in Louisville and made no effort to license its pictures on a first-run to any other theatre in Louisville, and if you find that the operators of the Rialto, Loew's-United Artists, Mary Anderson, Strand and Brown theatres in Louisville each had a fixed source of supply of first-run pictures from certain of the defendant distributors and did not seek to license the pictures of any other distributor on a first-run, then from such circumstances you may infer that this arrangement was the result of an unlawful conspiracy to monopolize the exhibition of first-run pictures and restrain trade or commerce in the exhibition of first-run pictures in the City of Louisville, to the exclusion of the plaintiffs from the exhibition of first-run pictures in Louisville."

[*Section 5 of the Clayton Act*]

The second ground on which plaintiffs appeal raises an important and interesting question of law. Section 5 of the Clayton Act, 15 U. S. C. A. § 16, provides:

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

Under the provisions of this section, plaintiffs made an offer of proof consisting of certain of the Findings of Fact and Conclusions of Law of the Expediting District Court in *United States v. Paramount Pictures, Inc.,* D. C. S. D. N. Y., 70 F. Supp. 53,[5] and of the opinion and mandate of the United States Supreme Court, 334 U. S. 131, affirming in part, reversing in part and remanding the proceedings to the Expediting Court. The court, however, ruled the evidence inadmissible, as not a final judgment or decree within the statutory meaning.

[*Litigation Must Be Terminated*]

There is of course no question that the cases have not even yet reached their final termination. Upon remand, certain of the defendants entered into consent decrees with the government; as to the others, lengthy hearings and deliberations are being had.[6]

[4] The last request here in issue—No. 47—is particularly unclear and seems to suggest again that the Brown Theatre move-over arrangement must be found inherently illegal.

[5] For a full record of the case, reference should also have been made to the extensive opinion for the Expediting Court, D. C. S. D. N. Y., 66 F. Supp. 323.

[6] Thus see McDonough and Winslow, *supra* note 3, at 401, 404-408.

The strongest position of the plaintiffs is that the Supreme Court has accepted the basic findings of illegality and has sent the cases back for more complete relief; in short that the error found was of the nature to make the final result more favorable than otherwise to the plaintiffs' position. Several questions are suggested by the issue thus framed, such as whether the material is in reality relevant to the local controversy here presented (*i.e.*, whether the estoppel between the parties which determines the *prima facie* character of the evidence has a legal bearing on the Louisville situation) or, if any of the proceedings are admissible, how much and what portion of them are to be set before the jury. We do not consider these, however, since upon as careful consideration as we can make we find ourselves in agreement with the trial judge that the government suit has not reached the stage where it can properly be considered within the statutory terms. We think this answer is indicated upon both legal and practical grounds.

While the issue has not been finally and authoritatively determined, yet both the statutory wording and the existing precedents require a definite terminus of the litigation. Thus the statute explicitly requires "a final judgment or decree" and does not refer, for example, to a final decision—a point of contrast made recently in the Supreme Court with respect to appealable orders. *Cohen v. Beneficial Industrial Loan Corp.*, June 20, 1949, 69 S. Ct. —.[7] It must obviously be so far final that the rules of estoppel by judgment apply. Restatement, Judgments, § 41 and comments a, d, and e, § 68 and comment s, 1942. And since a second sentence of the statute provides that when such a proceeding is instituted by the United States the running of the statute of limitations on private rights of action based on any matter therein complained of "shall be suspended during the pendency thereof," it would seemingly follow that the suit should no longer be "pending." Acting on these principles and in the light of the statutory history Judge Nordbye ruled in a persuasive opinion that a decree in a case on appeal is not admissible, *Twin Ports Oil Co. v. Pure Oil Co.*, D. C. Minn., 26 F. Supp. 366. He has made a similar ruling as to this very *Paramount* case after the original opinion below, D. C. S. D. N. Y., 66 F. Supp. 323, had been filed. *Duluth Theatre Corp. v. Paramount Pictures, Inc.*, D. C. Minn., 72 F. Supp. 625. See also *Dickinson v. Twentieth Century-Fox Film Corp.*, D. C. W. D. Mo., No. 4728, March 7, 1949; *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, D. C. E. D. Wis., 32 F. Supp. 308. And we have held, in a fairly analogous case, that a decision of the Federal Trade Commission which had not become automatically the judgment of the Court of Appeals was not admissible. *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*, 2 Cir., 150 F. 2d 69,[8] certiorari denied 326 U. S. 757, citing *Proper v. John Bene & Sons*, D. C. E. D. N. Y., 295 F. 729. While the statute is broadly remedial, yet it is obviously drastic in its consequences. It cannot too fairly be applied to cases where the action of the court may still remain in doubt. Amended F. R. 54(b), F. R. C. P., now emphasizes the tentative nature of district court rulings which are subject to revision up to their final determination. Here we have not yet even a tenative ruling after the remand.

The practicalities of the situation also point the same way. The problem will of course appear in acute form only in jury cases. In non-jury cases—and even in jury cases so far as the law is concerned—the decisions of the Supreme Court, whether or not affirming final judgments, will be controlling precedents, even though practically it may not be easy to separate law and fact. At any rate, sophisticated lawyers and judges will understand what the status of the government case is. But it will certainly not be easy to explain that (as in all fairness would be necessary, were the evidence to be admitted) to a jury of laymen. Thus, it may be substantially true that the government was more successful than its opponents in the appeal to the Supreme Court, and yet the question of how much

[7] Stressing the language of 28 U. S. C. A. § 1291, allowing appeals "from all final decisions of the district courts," Mr. Justice Jackson says: "It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable." 69 S. Ct. at page —.

[8] Thinking that the amended Federal Trade Commission Act, 15 U. S. C. A. § 45(g), applied to make the Commission order effective without the entry of an enforcing decree of the Court of Appeals, a majority of the court first ruled the evidence admissible, 150 F. 2d at page 72; but when it was shown that this statute did not affect the Commission's orders in enforcing the antitrust acts, all the court agreed in the exclusion of the evidence. 150 F. 2d at page 74.

and to what extent still remains. For example, the Supreme Court struck out the District Court's requirement that films be licensed on a competitive bidding basis, although it said, "The competitive bidding system was perhaps the central arch of the decree designed by the District Court." 334 U. S. at page 166. And since the elimination of this feature might affect the cases in ways other than those expressly mentioned, it declined to limit the freedom of the District Court on remand to reconsider the adequacy of the decree to only those parts it had specifically indicated. Under the circumstances the wisdom of limiting admissibility to a final and definitely settled decree seems clear. While it may be that some cases might arise in which the action of an appellate court had gone so far as clearly to dispose of practically all the issues involved in a suit by the United States against defendants who are later being sued by a private party, and that in such an extreme situation the decree and findings in the latter suit would be admissible, the issues here left open by the Supreme Court seem to us so complex and vague that the District Court was justified in not allowing in evidence the decree or findings sought to be introduced by the plaintiffs.

[*Conduct and Result of Trial Upheld*]

We conclude that the trial was fair and the result, while not a necessary one, was nevertheless quite within the evidence. The plaintiffs offered evidence justifying inferences of joint action among the defendants, but the defendants offered vigorous controverting evidence as well as testimony to indicate that the troubles of plaintiffs' theatre were due more to its location, condition and quality of patronage than to their acts. The plaintiffs had chosen to submit their case to a distant tribunal where jurors could be as little influenced by matters of local prejudice as would be possible anywhere. Having so chosen and received a full and proper trial, they must abide by the result.

Affirmed.

[¶ 62,454] Cinema Amusements, Inc. v. Loew's Inc., et al.

In the United States District Court for the District of Delaware. Civil Action No. 891. June 10, 1949.

Sherman Antitrust Act

Treble Damage Action Transferred—Physical Location of Theatre Considered—Location of Head Office Not a Controlling Factor.—A treble damage suit brought by an independent exhibitor of motion pictures against major film producer-distributors was transferred to a Colorado forum where the business of both parties was actually carried on. An important part of the case, that of assessing the theatre's size, equipment and location, could best be carried out if the trial were held in Colorado. Although the film companies' head offices were not in Colorado oral testimony would be taken from company employees staffed near the particular theatre involved.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291.

For the plaintiff: John Van Brunt (Killoran & Van Brunt) of Wilmington, Delaware, and Thurman Arnold and L. A. Nikoloric (Arnold, Fortas & Porter) of Washington, D. C.

For the defendants Loew's, Inc. and RKO Pictures, Inc.: Richard F. Corroon (Southerland, Berl & Potter) of Wilmington, Delaware, and Richard P. Heppner, Roy W. McDonald and C. Stanley Thompson (Donovan, Leisure, Newton, Lumbard & Irvine) of New York City.

For the defendant Twentieth Century-Fox Film Corp.: Daniel O. Hastings and Ayres J. Stockly (Hastings, Stockly, Walz & Wise) of Wilmington, Delaware.

[*Nature of the Action*]

RODNEY, District Judge: The nature of this suit was indicated in a previous opinion upon objections to interrogatories. See *Cinema Amusements v. Loew's, Inc., et al.*, D. C. Del., 1947, 7 F. R. D. 318. Subsequent thereto both parties have made certain motions. Plaintiff has moved under Rule 15(d), Federal Rules of Civil Procedure, 28 U. S. C. A., for leave to serve and file a supplemental complaint. Defendants have moved under Rule 30(b) to vacate or mod-

ify a notice of the taking of certain depositions made by plaintiff.

Subsequent to the above motions but prior to their disposition by the court, the defendants moved pursuant to 28 U. S. C. A. Sec. 1404(a) to transfer this action to the United States District Court for the District of Colorado. Disposition of the previous motions mentioned above has been withheld because if the defendants' motion to transfer were granted it would seem preferable that such motions be determined by the court trying the case. The disposition herein of the motion to transfer therefore renders unnecessary any further consideration by this court of the previous motions.

Plaintiff, suing civilly for treble damages under the Sherman Anti-trust Act and the Clayton Act, is an independent exhibitor of motion pictures in Denver, Colorado, operating in particular in that city the Broadway Theatre. Plaintiff substantially alleges that defendants, along with other major producer-distributors, have unlawfully conspired and combined to monopolize the exhibition of all desirable feature motion pictures in the United States by acquiring ownership or control of the vast majority of first and subsequent run theatres in the major cities of the United States and giving lower film rentals and priority of "runs" and exhibitions to such theatres and by using their power over copyrights to force independents to transfer control or profits of their theatres to the major producers. Plaintiff complains more particularly of the alleged conspiracy as it affects plaintiff in the operation of its Broadway Theatre in Denver, Colorado.

A jury trial has been demanded by plaintiff in accordance with the Rules. The action is at issue and counsel for both sides are apparently ready for early trial except for additional preparation which might be required by the disposition of the motion to serve and file the supplemental complaint and the motion to vacate or modify the taking of depositions.

The Supreme Court of the United States has determined, in *United States v. National City Lines*, 1949, — U. S. —, 17 U. S. L. W. 4459, that a civil action under the anti-trust laws, such as the instant action, may be transferred by the United States District Courts pursuant to 28 U. S. C. A. Sec. 1404(a) upon a finding by such courts that the conditions of said section have been met. See also *United States v. E. I. duPont de Nemours and Co.*, D. C. D. C., 1949, 83 F. Supp. 233; Note, 58 Yale L. J. 482 (1949).

Section 1404(a) provides that "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. A. Sec. 1404(a).

Plaintiff does not dispute that the instant action could have been brought in the District of Colorado. Nor is it disputed by defendants that venue may be properly laid in the instant action here in the District of Delaware.

The venue section of the anti-trust laws provides that suit thereunder against a corporation "may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." 15 U. S. C. A. Sec. 22. Two of the corporate defendants are organized and existing under the laws of the State of Delaware and are found and transacting business in the State of Delaware. The other corporate defendant is organized and existing under the laws of the State of New York but is found and transacts business in the State of Delaware. All three of the corporate defendants transact business and may be found in the State of Colorado. Plaintiff is a corporation organized and existing under the laws of the State of Colorado.

If transfer is otherwise authorized and warranted, therefore, it is clear that the District of Colorado is a proper district to which this action may be transferred under Section 1404(a).

Plaintiff urges first that transfer may not be had where the corporate defendants are domiciled in the state of the forum or where plaintiff sues in a forum which satisfies all three alternative requirements of the venue section of the anti-trust laws[1] as to a majority of the defendants. Plaintiff's contention is predicated upon the assumption that Section 1404(a) is merely a codification of the doctrine of *forum non conveniens,* under which doctrine plaintiff urges its contentions are correct.

It is true that the criteria in Section 1404(a) justifying transfer are substantially

[1] Section 12 of the Clayton Act, 15 U. S. C. A. Sec. 22.

identical with those which justify dismissal under the doctrine of *forum non conveniens.* Section 1404(a) authorizes transfer "for the convenience of parties and witnesses, in the interest of justice;" *forum non conveniens* required dismissal when the convenience of the parties and the ends of justice necessitated such action.[2] The Reviser's Notes to Section 1404(a) state that it was "drafted in accordance with the doctrine of *forum non conveniens,* permitting transfer to a more convenient forum, even though the venue is proper." And it has been judicially stated that consideration of a motion under Section 1404(a) by the district court would be had in the light of the rules for the application of the doctrine of *forum non conveniens* as laid down by the United States Supreme Court. See *Schoen v. Mountain Producers Corp.,* 3 Cir., 170 F. 2d 707, 715, cert. denied, 336 U. S. 937.

While the substantial factors to be weighed in determining a motion under Section 1404(a) may be similar to those involved in a consideration of *forum non conveniens,* yet it seems clear that transfer under Section 1404(a) is something more than and somewhat different from dismissal under *forum non conveniens.* In the first place, the procedure to be followed in affirmatively invoking the two remedies is drastically different. Under Section 1404(a) a case is not dismissed but merely transferred to the more convenient forum; under *forum non conveniens* a case is dismissed and must be instituted anew in the more convenient forum, carrying with it the inherent and jeopardous hazard of being barred therein by the statute of limitations. The danger of having the action barred in such a manner was one of the principal reasons for Mr. Justice Black's dissent in *Gulf Oil Corp. v. Gilbert,* 1947, 330 U. S. 501, 516.

The doctrine of *forum non conveniens* has been held inapplicable to cases instituted under "special venue" statutes, such as actions arising under the Federal Employers' Liability Act and the anti-trust laws.[3] Such types of cases may be transferred under Section 1404(a), however. *Ex parte Collett,* 1949, — U. S. —, 17 U. S. L. W. 4453; *United States v. National City Lines,* 1949, — U. S. —, 17 U. S. L. W. 4459. In this respect, then, the two remedies are also different.

Forum non conveniens still exists independently from Section 1404(a), at least in connection with those cases instituted in federal courts when the more convenient forum is in a foreign jurisdiction. *DeSairigne v. Gould,* S. D. N. Y., 1949, — F. Supp. —, 17 U. S. L. W. 2435. The court in the cited case observed that if *forum non conveniens* were limited by virtue of being codified into Section 1404(a) the federal courts would be stripped of their inherent power to refuse jurisdiction in such cases. See *Canada Maltin Co., Ltd. v. Paterson Steamships, Ltd.,* 1932, 285 U. S. 413, 422-23. In this respect, therefore, the two remedies are also independent of each other.

Even if Section 1404(a) were nothing more than a codification of *forum non conveniens,* this (Third) Circuit has held that transfer under Section 1404(a) may be had where a majority of the defendant corporations are domiciled in the forum. *Schoen v. Mountain Producers Corp.,* 3 Cir., 1948, 170 F. 2d 707, 714, cert. denied, 336 U. S. 937.[4] Indeed, following the *Schoen* decision this court has ordered transfer under Section 1404(a) in a case where the defendant corporation was domiciled in Delaware. *Makela v. The Wilson Transit Co.,* C. A. 1151, Feb. 17, 1949 (opinion unreported).

Plaintiff relies principally upon *Tivoli Realty, Inc. v. Interstate Circuit, Inc. et al.,* 5 Cir., 1948, 167 F. 2d 155, cert. denied 334 U. S. 837, for its other contention that *forum non conveniens* cannot be invoked when a majority of the defendants satisfy all three requirements of the "special venue" statute of the anti-trust laws, i. e., when a majority of the defendants are inhabitants of the forum, are found in the forum, and trans-

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[2] *Koster v. Lumbermen's Mutual Co.,* 1947, 330 U. S. 518, 527. This has been the test from the earliest application of the doctrine, as is pointed out in an excellent treatment of the doctrine in Note, 34 Va. L. Rev. 811 (1948).

[3] *B. & O. R. Co. v. Kepner,* 1941, 314 U. S. 44 (Fed. Em. Lia. Act); *U. S. v. Nat. City Lines,* 1948, 334 U. S. 573 (anti-trust laws).

[4] The United States Supreme Court, in *Koster v. Lumbermen's Mutual Co.,* 1947, 330 U. S. 518, 527-528, stated:

"Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens,* which resists formalization and looks to the realities that make for doing justice."

This would indicate that domicile of defendant is not conclusive in application of *forum non conveniens.*

act business in the forum. I am of the opinion that the cited case does not entirely support this contention. In the first place in the cited case the doctrine of *forum non conveniens* was not urged upon the court of the forum but rather upon the court of another forum in support of an application there for an injunction restraining plaintiff in the original suit in the first forum from taking any further action in such suit. The attempt to invoke *forum non conveniens* for such purpose was denied in view of another well-recognized doctrine under which federal district courts are not inclined to interfere by injunction with prior suits in other federal districts where the inequity is based solely upon inconvenience. For this reason, the court in the cited case held "as a matter of comity" that no injunction should issue against the plaintiff in a suit in another forum.

It would seem that the court in the cited case went further, however, and held that *forum non conveniens* was inapplicable in any event because there were not two federal forums in which the entire group of defendants was answerable to process and because venue was laid under a "special venue" statute. In the instant case, as pointed out above, there are at least two federal forums in which all three defendants are answerable to process, and the recent *National City Lines* decision by the Supreme Court removes "special venue" as an objection to transfer. So even if Section 1404(a) were merely a codification of *forum non conveniens,* the *Tivoli* case would not appear to be controlling,[5] and the other cases cited by plaintiff in this connection go no further.

There thus appears to be no objection in law to transfer in the instant case under Section 1404(a), and it remains to be determined only whether the facts before the court in the supporting and opposing affidavits and in the statements of counsel justify transfer within the standards set forth in said section.

Convenience of Parties

Plaintiff is a corporation organized and existing under the laws of the State of Colorado with principal offices in Denver and apparently no offices in Delaware. The theatres which plaintiff owns and/or operates are located in the Denver area in Colorado, and the particular theatre involved in this case is the Broadway, which is located in "downtown Denver." Obviously the books, records and documents belonging to plaintiff would be located in Denver or its proximity.

Defendants R. K. O. and Loew's, Inc. are corporations organized and existing under the laws of the State of Delaware with their principal offices outside such State, apparently in New York City. Defendant Fox is a corporation organized and existing under the laws of the State of New York with principal offices apparently in New York City. All three defendants, doing business on a nationwide scale, maintain branch offices in Denver for the transaction of business in that area, and their records and documents concerning such transactions are virtually all located in Denver, as are, of course, their employees who transact such business.

Plaintiff points out that the "home" or "central" office of each of the defendants is in New York City, that the principal officer of each defendant in this case—the general sales manager—is located at such "home" or "central" office, that negotiations and contracts for the exhibition of films become binding only upon the approval of the principal officer at the "home" or "central" office, and that the employees of each of the defendants located in the Denver branch offices act merely as forwarding agents with respect to such negotiations and contracts and are charged only with routine administrative duties. From those facts, plaintiff contends that the really important representatives of the defendants in this case are the general sales managers located in New York City, which of course is much nearer

[5] The court in the *Tivoli* decision, 167 F. 2d 155, 157, does state that *prima facie* it is not oppressive or vexatious under *forum non conveniens* to sue a corporation within the judicial district that meets not only one but all three of the venue requirements of the "special venue" statute of the anti-trust laws. This dictum raises only a *prima facie* case in favor of plaintiff, and defendants contend that even if the statement has any materiality it does not hurt them because they naturally would have a *prima facie* burden to overcome if venue can be properly laid in this district, as they admit it can.

In the instant case, all three of the defendants may be found in and transact business in both Colorado and Delaware, so two of the "special venue" requirements are satisfied in both States. The mere fact of incorporation in Delaware is not in itself necessarily persuasive, as indicated by the Supreme Court in *Koster v. Lumbermen's Mutual Co., supra,* footnote 4.

Wilmington than Denver, and that such representatives would of necessity be the ones to speak on behalf of the defendants in this case.

Defendants agree that certain of their "top officials" are located in New York City and that technically a license application by an exhibitor for a motion picture film normally does not become a binding contract until it is approved in the Home Office. Defendants state that the Home Office officials, however, merely establish broad sales policies and that in their specific decisions they must and do rely upon the knowledge and recommendations of the employees in the field. Defendants state that approval by the Home Office of a license application rests upon and is guided and governed by the knowledge, advice and recommendation of the employees staffed near the particular theatre involved and who carry on the normal day-to-day selling and negotiating in the various localities. Defendants also state that Denver falls with their Pacific Division and it is probable that certain of their managing officials from such Division will be called.

Defendants point out that to date all discovery proceedings, which have been extensive, have taken place in Denver, have involved records and persons, including their employees, located in Denver or its close proximity, and have in at least six instances involved the United States District Court in Denver. They contend that burdening the parties with applications and appearances before two different courts results in inconvenience to both parties.

Plaintiff states that most of its evidence will be in documentary form based upon records and books which are located in Denver but which have been photostated, and the photostats are in Washington in the possession of plaintiff's counsel. Because of the documentary nature of plaintiff's case, plaintiff states that it will not need information from the general sales managers of the defendants and thus explains its failure to examine any of them in discovery proceedings. Plaintiff also points out that transfer will inconvenience it by requiring transportation of all the photostats from Washington to Denver.

Defendants urge that the importance plaintiff places upon the location of the defendants' general sales managers is destroyed by plaintiff's actual failure to examine the managers in discovery proceedings. Defendants, of course, argue that pre-trial discovery proceedings involving the managers has been unnecessary because they only acted upon the advice and recommendation of field employees in Denver and are relatively unimportant and should be so considered upon this motion.

Plaintiff, on the other hand, argues that the field employees cannot be important because defendants have examined them in only a cursory way upon pre-trial discovery proceedings. In answer to this, defendants indicate that such employees will be called in person at trial and thus extensive pre-trial procedure to obtain evidentiary matter was unnecessary as to such employees.

Of the three important representatives of plaintiff who will apparently testify at trial, two live or reside closer to Wilmington than to Denver and the third resides in Denver. There is some contradiction in the affidavits as to whether one of the first two lives or resides closer to Wilmington, but plaintiff should be in a better position to know the facts and its affidavit is accepted. The difference in distance as between Denver or Wilmington from the residence of either, however, is not great.

Defendants have estimated that trial in Wilmington will burden them with an expense of between $9,000.00 and $11,000.00 in bringing witnesses here for trial and maintaining them until they are no longer needed at trial. Defendants also point out that their pertinent records located in Denver will have to be transported here if transfer is not granted as requested.[6] It is, of course, common knowledge that anti-trust litigation involves voluminous records and documents, especially for defendants. See, e. g., *United States v. E. I. duPont deNeMours & Co.*, D. C. D. C., 1949, 83 F. Supp. 233.

The foregoing indicates that insofar as convenience of parties is concerned, transfer

[6] The expense of defending anti-trust suits, even in forums convenient to defendants, can well be appreciated. The Government, in fact, has found such expense to be a weapon in its hands which can be used with telling effect. "Indeed, it has been the unvarying experience of the Antitrust Division that a pending prosecution has the same effect in breaking up restraints of trade as a conviction—that even the acquittal makes the defendants draw a breath of relief and resolve never to undergo such an expensive hazard again." Arnold, *The Bottlenecks of Business*, (1st ed. 1940) p. 210; see Comment, 49 Yale L. J. 284, 290 (1939).

should be ordered. Denver is clearly more convenient for defendants, and no evidence indicates that plaintiff has as much connection with Wilmington as even the defendants have. The proximity of plaintiff's counsel to Wilmington would appear to be plaintiff's only real tie to Wilmington insofar as convenience is concerned.

Convenience of Witnesses

The convenience of the two respective forums to witnesses at trial necessarily is somewhat speculative at the present time, since the court is not possessed of definite information as to the precise witnesses to be called. Certain matters in this connection do seem relatively definite, however.

Of twenty-four depositions taken in this action to date, all of which have been taken in Denver, twenty-two of the deponents are residents of Denver or its surrounding area, one is a resident of Indianapolis, Indiana, and the other is a resident of San Francisco, California. If these witnesses are to testify in person, and defendants maintain that the presence of at least some of them at trial will be essential, then clearly the overwhelming majority will be greatly convenienced by trial in Denver.

It cannot be assumed that all of the depositions were taken with a view to subsequent introduction into evidence at trial. Defendants state that much of the matter elicited through the depositions was relevant for discovery purposes but not as evidential matter to be introduced at trial. Plaintiff states that its depositions were taken upon the assumption that they were to be used at trial, but it appears that many of defendants' objections of irrelevancy to questions posed by plaintiff in the depositions were met with the reply that such questions were relevant for discovery purposes.

The six new depositions which plaintiff desires to take all involve deponents who live in Denver, and the above observations seem equally applicable to them.

The defendants state that they may call the managers of their Pacific Coast Divisions as witnesses, and these persons live on the West Coast.

The only witnesses which the record indicates that the defendants might call from the East are the sales managers in the respective Home Offices in New York City, but the defendants, who are naturally in a position to know the manner of presenting their defense, have deposed that the testimony of such persons, even if used, would be largely formal as to their administrative duties. And it is stated in the affidavit that defendants have not yet decided to use these persons as trial witnesses.

Plaintiff, on the other hand, states that it will call one witness who lives in Florida, one who lives in Indianapolis, Indiana, which is only some 150 miles closer to Wilmington than to Denver, and one who lives in Denver. Plaintiff also states that it has chosen certain other persons who live near Wilmington to testify and that such persons have been chosen especially with trial in Wilmington in mind. The number or names of these latter witnesses are not given, but it is said that if the action is transferred as requested plaintiff will either have to provide transportation for these witnesses to Denver, take their depositions, or find new witnesses near Denver to testify in their stead.

The inconvenience which would be caused these few witnesses for plaintiff by trial in Denver does not appear to offset appreciably the great inconvenience which would be caused other and apparently more numerous witnesses, including some of plaintiff's, by trial in Wilmington. The record indicates that a great number of witnesses who live in the Denver area will testify at trial, and the two or three-day trip by train to Wilmington if trial is had here will be a distinct inconvenience to them which could be eliminated by trial in Denver.

It clearly appears that convenience of trial witnesses would be greatly served by transfer of the case to Denver.

Interest of Justice

Manifestly the most important criterion in determining the advisability of transfer is the "interest of justice." In most cases, if the convenience of the parties and witnesses will be served by transfer it usually follows that justice will also be served by transfer.[7] This does not necessarily follow, however, and irrespective of the convenience

[7] While the statute (1404(a)) in language provides, "For the convenience of parties and witnesses, in the interest of justice," a case may be transferred, yet it has been considered that the "interest of justice" is a reason not only separate and distinct from the convenience of parties and witnesses but a necessary resultant factor from such conveniences. See *Schoen v. Mountain Producers Corp.*, 3 Cir., 1948, 170 F. 2d 707, 714; Reviser's Notes to Sec. 1404(a).

to parties and witnesses, I am of the opinion that whether or not transfer will be ordered should be governed in large measure by the effect of transfer upon the "interest of justice."

Plaintiff has argued that because it is given a wide remedial choice of venue by Congress, its selection of venue, if within the broad limits granted by Congress, is conducive to the interest of justice and should not be disturbed unless there is a showing that plaintiff has abused its choice.

With reference to this contention, the *nisi prius* court in *United States v. National City Lines,*[8] stated that,

> "The legislative history of the revision of the Judicial Code shows that the intent of Congress was to overcome the absolute choice in cases of this character."

The purpose of the wide choice of venue given to plaintiffs in anti-trust litigation was certainly to further the interest of justice by enabling plaintiffs to obtain redress in forums in which they can afford to sue, usually that of their own residence.

The requirement in Section 1404(a) that transfer be in the "interest of justice" provides a check against possible abuse of venue without disturbing the purpose behind the wide choice of venue given by Congress to anti-trust plaintiffs. Manifestly, no court would ever find transfer to a forum which is financially out of reach of an impecunious plaintiff to be in the "interest of justice." See Note, 58 Yale L. J. 482, 489-490.

In the instant case plaintiff has not taken advantage of the wide choice of venue given to it by Congress and brought suit in the forum of its own residence and at the locale of the alleged injuries, as it could have done, but instead has sought redress in a forum a long distance therefrom.

A review of all the facts and circumstances in this action convinces me that transfer of the action to Denver would be greatly in furtherance of the "interest of justice."

It should first be observed that the cause of action asserted by plaintiff is of a federal nature and is not dependent upon any particular or peculiar local state law. No question of applying the *Erie* doctrine and no peculiar local law with which this court might be assumed to be intimately familiar appears to be involved in the action.

The controversy here involves a particular locality and area. It is true that a nation-wide conspiracy among defendants is alleged by plaintiff, but in order to recover plaintiff must also prove injury to itself as a result of action of defendants pursuant to the nation-wide conspiracy. See *Tivoli Realty v. Paramount Pictures,* D. C. Del., 1948, 80 F. Supp. 800, 805-806. On this latter phase of the case, which is the real issue in the action, the peculiar geographic and economic conditions in the city of Denver, especially with respect to the theatre situation, are extremely important.

The business and property of plaintiff which must be injured, and against which it must be shown defendants have conspired, before plaintiff can recover in this suit is located in "downtown Denver." Plaintiff contends that its Broadway theatre is comparable or superior in equipment, appointments, convenience and desirability to the largest and best first-run theatres in the Denver area and thus is entitled to first-run and similar privileges. Defendants contend to the contrary and assert that the denial of such privileges is reasonable from a business viewpoint and is not the result of any conspiracy among defendants. Manifestly an important phase of the case will be the relative suitability and desirability of the various theatres in the Denver area, and this in turn will depend upon the respective attractiveness, equipment, accessability, size, location and other similar qualities of such various theatres.

Trial in this action in Denver, with the jury composed of persons residing in the Denver area, will obviously serve the administration of justice. A view of the various premises involved may well be appropriate, and only with trial in Denver can such a view be had.

On the other hand, if trial is had in Wilmington, the necessary artificiality of the evidence in connection with the comparable superiority of the various theatres would almost make a mockery of the jury system and the purpose behind it.

"Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In

[8] 80 F. Supp. 734, 740, motion for leave to file petition for cert. denied, 1949, — U. S. —, 17 U. S. L. W. 4459.

cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the county where they can learn of it by report only. There is a local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 1947, 330 U. S. 501, 508-509.

The convenience of the parties and witnesses, and the interest of justice, will be greatly served by transfer of the case as requested. Defendants have asked for transfer from a forum distant from plaintiff's residence and the locale of the alleged injuries to a forum which is the plaintiff's residence and includes the locale of the alleged injuries. Indeed, it would seem that defendants have sought to give to the plaintiff what Congress gave to it in the broad venue provisions of the anti-trust laws, viz., a forum within easy financial reach of plaintiff.

An order may be submitted transferring the action as requested.

[¶ 62,455] Opinion of the Attorney General of Georgia.

Addressed to Alan Kemper, Director of the State Department of Public Welfare, by the Attorney General, June 14, 1949.

Robinson-Patman Act

Applicability to Governmental Body—State Institution Acting in Proprietary Capacity.—The proposed operation of a Factory for the Blind by the Government of the State of Georgia, where products would be manufactured which later would be sold to other states, to the federal government, and to private persons in interstate commerce, is considered a proprietary or business function of the state, as contrasted with a governmental function, and would constitute a legislative divestiture of the state's sovereignty making it subject to the restrictions of the Robinson-Patman Anti-Discrimination Act in the same manner as though it were a private person engaged in such manufacturing and selling.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.445 and the Sherman Act annotations, Vol. 1, ¶ 1640.261.

[*Questions*]

I am pleased to acknowledge Honorable J. M. Forrester's letter of May 26, 1949 in which he requests by opinion as follows:

"This Department has set up and plans to begin operations immediately at the Factory for the Blind, as provided for in an Act of the General Assembly approved March 30, 1937 and as amended by an Act approved February 14, 1949, and the question has arisen: Are the operations of this State Institution when engaged in interstate business activities subject to regulatory measures by which the Federal Government controls and regulates business activities such as the Fair Labor Standards Act and the Robinson-Patman Act. Also, will you please advise in what particulars this Institution is subject to provisions of the Georgia Workmen's Compensation Act."

The request involves three specific questions which divide themselves as follows:

1. Is the Factory for the Blind subject to the provisions of the Georgia Workmen's Compensation Act?

2. Are the operations of the Factory for the Blind, when engaged in interstate business activities, subject to regulatory measures by which the Federal Government controls and regulates business activities, such as the Fair Labor Standards Act?

3. Are the operations of the Factory for the Blind, when engaged in interstate business activities, subject to regulatory measures by which the Federal Government controls and regulates business activities, such as the Robinson-Patman Act?

[The portion of the opinion concluding that the Factory for Blind Persons is subject to the Workmen's Compensation Act of Georgia and excluded from the Fair Labor Standards Act is omitted here, as not pertinent to the scope of these reports.]

[*Applicable Law*]

In regard to question three, I assume that you have reference to Section 13 of Title 15 U. S. C. A. which provides:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of

like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in Sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima-facie* case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526."

[*Divesting of Sovereign Immunity*]

In the case of *Lowenstein v. Evans, et al.*, 69 Fed. Rep. 908, the Fourth Circuit Court of Appeals held:

"The act of July 2, 1890 (26 Stat. 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors. . . . A state is neither a 'person' nor a 'corporation' within the meaning of the act of Congress.

"Where a person brings an action under section 7 of the anti-trust law of July 2, 1890, against the officials of a state, to recover damages for acts done under authority of a state statute, which gives the state an entire monopoly of the traffic in intoxicating liquors, the state itself is a necessary party thereto, and consequently the federal courts would have no jurisdiction of the action."

In the case of *State of Georgia v. Evans*, 62 S. Ct. 972; 86 L. Ed. 1346, the Supreme Court of the United States held:

"The state of Georgia was a 'person' within sections 1-7 of this title, and could maintain action for treble damages for injuries sustained as result of alleged combination to fix prices and suppress competition in sale of asphalt which the state purchased for use in constructing public highways."

The Supreme Court further held in this case:

"The sovereignty of the state no longer exists with reference to the United States anti-trust Acts because they apply only to interstate commerce. U. S. Const. Art. 1 Sec. 8; *Addyston Pipe & Steel Co. v. United States;* 175 U. S. 211, 44, L. ed. 136, 20 S. Ct. 96; *Northern Securities Co. v. United States,* 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; *Southern R. Co. v. King,* 217 US 524, 54 L. ed. 868, 30 S. Ct. 594; *West v. Kansas Natural Gas Co.,* 221 US 229, 55 L. ed. 716, 31, S. Ct. 564, 35 LRA (NS) 1193; *United States v. International Harvester Co.* (DC) 214 F 987; *United States v. Reading Co.* (DC) 226 F. 229; *Philadelphia, B. & W. R. Co. v. Shubert,* 224 US 603, 56 L. ed. 911, 32 S. Ct. 589, 11 NCCA 892; *United States v. Hill,* 248 US 420, 63 L. ed. 337, 39 S. Ct. 143; *Truax v. Corrigan,* 257 US 312, 66 L. ed. 254, 42 S. Ct. 124, 27 ALR 375.

"A state may specifically divest itself of its sovereignty by its own legislation under which it assumes to act in a proprietary capacity. *Bank of United States v. Planters' Bank,* 9 Wheat. (US) 904, 6 L. ed. 244; *Davis v. Gray,* 16 Wall (US) 203, 21 L. ed. 447; *Murray v. Charleston,* 96 US 432, 24 L. ed. 760; *Hall v. Wisconsin,* 103 US 5, 26 L. ed. 302; Ga. Code 1933, Secs. 91-405; *Alexander v. State,* 56 Ga. 479.

"When a state has divested itself of its sovereignty it must bear the burdens of individuals and is entitled to their remedies. *Pennsylvania ex rel. Schnader v. Fix* (DC) 9 F. Supp. 272; *Ohio v. Helvering,* 292 U. S. 360, 78 L. ed. 1307, 54 S. Ct. 725; *South Carolina v. United States,* 199 US 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; *United States v. California,* 297 US 175, 80 L. ed. 567, 56 S. Ct. 421; *Allen v. University System,* 304 US 439, 82 L. ed. 1448, 58 S. Ct. 980; *Helvering v. Powers,* 293 US 214, 79 L. ed. 291, 55 S. Ct. 171; *Honduras v. Soto,* 112 NY 310, 19 NE 845, 2 LRA 642, 8 Am. St. Rep. 744."

If the Factory for the Blind confined its activities to the manufacture and sale of supplies to the departments of the State, its sub-divisions, and institutions, I am inclined to the view that it would not be subject to the provisions of Section 13 of Title 15 U. S. C. A. However, if the Factory for the Blind manufactures and sells products to the Federal Government, other States, and to individual and corporate dealers in said supplies, it would be my opinion that they would be engaging in interstate commerce in competition with private enterprise and would fall within the provisions of the above cited act for the reason that if the word "person" is to include a State as plaintiff, it must equally include a State as defendant, and for the further reason that the State divested itself of the sovereignty by its own legislation under which it assumes to act in a proprietary capacity. In other words, when the General Assembly enacted Section 6 of the 1937 Act authorizing the Factory for the Blind to manufacture and sell products beyond the borders of the State to other States, and to individual and corporate dealers in such supplies, it then left the field of governmental activities and entered the field of private enterprise through interstate transactions.

[¶ 62,456] **Fred S. Kogod and Max Burka, individually and as co-partners, doing business as K-B Amusement Co. v. Stanley Co. of America.**

In the United States District Court for the District of Columbia. Civil Action No. 2508-48. June 29, 1949.

Sherman Antitrust Act

Illegal Contracts—Enforcement of Agreements Contrary to Public Policy.—An amusement company attempting to enforce the agreement of a film exhibitor to accept a lease on a theatre building to be erected by the amusement company, is denied the aid of the court since the contract embodying the film exhibitor's obligation is part of a combination previously found to be in restraint of trade. The law gives no aid to agreements made contrary to public policy. Likewise, a real estate firm which entered the case to demand that the amusement company itself take up the lease under the terms of a separate contract, is denied its motion for summary judgment since the amusement company's obligation was by the terms of the contract conditioned upon certain acts of the film exhibitor which, by operation of law, that exhibitor is now forbidden to perform.

See the Sherman Act annotations, Vol. 1, ¶ 1220.503, 1660.101.

Memorandum

MATTHEW F. MCGUIRE, Judge: The plaintiffs' motion for summary judgment and that of the intervenor are both denied. What the plaintiffs seek here is to enforce the term of an agreement which is part and parcel of what has been held by the Supreme Court to be an unlawful combination in restraint of trade and illegal, therefore *per se.*

In such case the aid of the court is denied "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Continental Wall Paper Co. v. Voigt & Sons,* 212 U. S. 227, 262, 263, etc.

The motion of the intervenor Kass Realty Company, Inc. for summary judgment is denied as indicated for the same reason, and for the further reason that even if the contract in question were not tainted with the same illegality as that of the original one between the plaintiffs and the defendant Stanley, there is no obligation on Kogod under its terms to *designate any site,* and Stanley is incapable of doing so either alone or in conjunction with Kogod by operation of law.

Nor can it be argued that under paragraph 5 of the so-called Kass agreement, that in case of Stanley's inability to participate in the taking of the lease on the theatre to be erected, that K-B shall have the power and the privilege not only to take the lease but to designate the site, for the language is plain and unambiguous that K-B, with reference to the site has no rights except those it might exercise in connection with Stanley and since Stanley cannot function, then any exercise of right on the part of K-B would be invalid under the terms of the instrument —which in addition is purely executory.

This is the nub of the matter as I see it. All of the parties in this case it appears to me are hoist with their own petard: This leaves the matter in this posture. The motions for summary judgment as stated are denied, Stanely is left to comply with the terms of the New York decree, and both complaint and counter-claim are dismissed by the Court *sua sponte.*

[¶ 62,457] **United States v. Cement Institute, et al.**

In the United States District Court for the District of Colorado. Civil No. 1291. July 18, 1949.

Sherman Antitrust Act

Delivered Prices in the Cement Industry—Delivered Prices as a Restraint on Interstate Commerce—Effect of Prior Cease and Desist Order.—In an action brought under the Sherman Antitrust Act against fifty-seven corporations alleging that they conspired to fix high, unreasonable, identical and non-competitive prices in the sale of cement by selling on a delivered price basis, a motion to dismiss the complaint, on the grounds that the controversy had already been decided by the issuance of a Federal Trade Commission cease and desist order enjoining the same practices as set out in the complaint, was denied.

It was held that the Court had jurisdiction by virtue of the Sherman Act and that the existence of the Commission order which declared that quoting delivered prices was an unfair method of competition could not prevent the enforcement of the Sherman Act in this action the purpose of which was to declare that such practice constituted a restraint of interstate trade.

See Sherman Antitrust Act annotations, Vol. 1, ¶ 1610.208, 1610.222.

For the plaintiff: Peter J. Donoghue, Chief, Mountain States Office, Department of Justice, Antitrust Division; Max M. Bulkeley, United States Attorney, both of Denver, Colorado.

For the defendants: Grant, Shafroth & Toll; Lindsey, Larwill & Wolfe; Hughes & Dorsey; John R. Moran; Kenneth W. Robinson; Van Cise & Van Cise; George A. Crowder; Erskine R. Myer; Dines, Dines & Holme; Bannister, Weller & Friederich; Lewis, Grant Newton, Davis & Henry; all of Denver, Colorado.

Memorandum on Motion to Dismiss

J. Foster Symes, District Judge: This action was filed June 28, 1945 under § 4 of the Sherman Anti-Trust Act (15 USCA § 4), investing the district courts with jurisdiction to prevent and restrain violations of §§ 1 to 7 of that Act.

The matter is now before the court on the motion of 57 corporate defendants—including the Cement Institute—to dismiss the complaint for lack of jurisdiction as a court of equity, and that the action or controversy has become moot, and further, because defendants have forever been restrained by court decree and administrative order from committing the offenses charged in the complaint.

This reference is to a decree entered by the Circuit Court of Appeals for the 7th Circuit on July 27, 1948, in *Aetna Portland Cement Co. v. Federal Trade Commission et al.*, and an order to cease and desist of the Federal Trade Commission dated July 17, 1943, in the matter of the Cement Institute et al., which became final on July 9, 1948.

[*Asserted Mootness of Question*]

In support of the motion it is argued that the controversy is ended, and is no longer within the jurisdiction of the court, relying upon the holding of this court in *Walling v. Shenandoah-Dives Mining Co.*—affirmed in 134 Fed. (2d) 395, CCA 10th. In that case the Circuit Court of Appeals said, p. 396:

> "When in the course of a trial the matter in controversy comes to an end, either by an act of one or both of the parties, or by an operation of law, the question becomes moot and the court is without further jurisdiction in the matter."

Also upon the rule that upon a challenge to the jurisdiction of the court the burden of establishing jurisdiction is upon the Government.

On June 9, 1948 the Supreme Court of the United States issued its mandate to the Circuit Court of Appeals for the 7th Circuit, sustaining the order of the Federal Trade Commission, dated July 17, 1943. Later the Circuit Court of Appeals for the 7th Circuit entered its final decree, commanding obedience to the Federal Trade Commission order to cease and desist.

The gist of the complaint is that the defendants "have been and now are engaged in an unlawful combination and conspiracy to fix and maintain high, unreasonable, identical, and non-competitive prices on the sale by them of cement;" that they accomplish this by an agreement to sell, and by selling, "all the cement produced by them on a so-called multiple basing point system, on a delivered price basis only" on standard terms and conditions, and at net mill prices which are systematically varied "so that each may quote identical given prices at any given locality, regardless of differences in actual transportation costs."

The decree of the Circuit Court of Appeals directs that the moving defendants

> "do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:"

The defendants argue that the effect of the decree and order prohibits and stops each of the violations charged against the moving defendants in the present complaint.

The complaint, however, charges that the defendants "threaten to continue such offenses and will continue them," unless relief

is granted, in spite of the fact that the Commission's order and the Circuit Court of Appeals decree both direct the moving defendants to "forthwith cease and desist from entering into, continuing, co-operating in, or carrying out any" combination or conspiracy of any type, such as charged in the complaint; that the decree and order have removed the threat of, or the continuance of, the conspiracy or its revival in the future.

It will be observed that the prohibitions embraced within the decree and order carry a double sanction, in that the violation of either is a violation of the other, and apply not only to the corporate defendants, but to the officers, agents, representatives and assignees, etc.

It is next argued that there is a presumption that the moving defendants since the entry of the decree and order, have not and will not engage in the practices complained of in the instant action, and in the light of this legal presumption there can be no reasonable expectation or fear that the alleged violations will be repeated in the future.

California v. San Pablo & Tulare Railroad Co., 149 U. S. 308, 314, is cited as laying down the rule of mootness. It states the rule to be :

> "* * * But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

Counsel admit an injunction cannot be granted to restrain possible violations of law, and where in the course of proceedings in a litigated matter the controversy has come to an end, the question is moot and the court is not required to take any further action. *Walling v. Lacy,* 51 Fed. Supp., 1002 (Colo.) 1943.

Assuming for the purpose of the motion only that a conspiracy of a continuing nature once established may be presumed to continue until the contrary is shown, the question necessarily arises, what evidence is necessary to show abandonment, or the end of the conspiracy. It is argued that the presumption of continuance of the conspiracy in the case at bar is rebutted by the Circuit Court of Appeals decree and the Commission order enjoining the defendants from performing the practices complained of in the present action. It is a well-established principle of equity that an injunction is an extraordinary remedy and will not be granted on mere apprehension of future injury.

Counsel for the motion argue the decrees of the Circuit Court of Appeals and the Federal Trade Commission remove any danger of future violations of the kind charged against these moving defendants.

[*Source of Jurisdiction*]

The vital defect in their argument is that this action is brought under § 4 of the Sherman Act (15 USCA § 4), while the so-called Federal Trade Commission case—which is the basis of the Federal Trade Commission order, and decree of the Circuit Court of Appeals for the 7th Circuit—charges violation of § 5 of the Federal Trade Commission Act, and § 2 of the Clayton Act.

In that proceeding the Federal Trade Commission issued a cease and desist order, ordering defendants to forthwith cease and desist from entering into, continuing, co-operating in, carrying out, any planned course of action, understanding, agreement, combination, or conspiracy between or among any two or more respondents * * * to do or perform certain things therein specified. Among the things enjoined was "quoting or selling of cement in accordance with the multiple basing point delivered price system or any other plan or system resulting in identical price quotations." The record discloses the Sherman Anti-Trust Act was not invoked in that proceeding.

An appeal was taken to the Circuit Court of Appeals for the 7th Circuit, which set aside and vacated the cease and desist order. The Federal Trade Commission appealed to the Supreme Court, which on April 26, 1948, reversed the Circuit Court of Appeals, and directed that court to enforce the cease and desist order of the Commission, (*Federal Trade Comm'n, v. Cement Institute,* 333 U. S. 683).

The defendants now move to dismiss the instant case on the grounds mentioned, that this court lacks jurisdiction, because the controversy has become moot and lacks equity, and that the defendants have forever been restrained by the Commission and the Circuit Court of Appeals.

It is conceded that at the time this action was filed in June, 1945, this court had jurisdiction by virtue of § 4 of the Sherman Anti-Trust Act. Further, the Federal Trade Commission Act provides that jurisdiction

granted to the Commission shall not prevent or interfere with the enforcement of the Sherman Act. See § 5 (e), 15 USCA § 45 (e) and § 11 of the Federal Trade Commission Act (15 USCA § 51). These statutory provisions seem to indicate authority on the part of the Government to carry on simultaneous proceedings under both acts. See *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, at p. 694:

> "We find nothing to justify a holding that the filing of a Sherman Act suit by the Attorney General requires the termination of those Federal Trade Commission proceedings."

The jurisdiction of this court in this case is derived directly from § 4 of the Sherman Act (*supra*), which not only confers jurisdiction, but imposes the duty to hear and determine the case. We find no authority holding that jurisdiction of this court depends on any presumption of continuance of the conspiracy, or that presumption of continuance of the conspiracy can be overcome by presumption that the defendants will fully comply with the cease and desist order. In other words, the net result is that the jurisdiction of this court is based solely upon a congressional mandate and not upon a balancing of presumptions.

True, the Government must establish by proof the jurisdictional allegations of the complaint, and every other material and essential fact, and at this stage of the proceedings it appears the complaint contains the necessary allegations to confer jurisdiction. Otherwise the defendants by mere charge of mootness, based on presumption, could require the court to try this case piecemeal, and compel production of proof of the continuance of the conspiracy before the Government was afforded opportunity to produce its proof of the formation and existence of the alleged conspiracy. See *U. S. v. Sinclair Refining Co.,* 126 Fed. (2d) 827 (CCA 10th), and the following from *Walling v. Helmerich & Payne,* 323 U. S. 37, at p. 43, where the Supreme Court said:

> "* * * Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." Citing cases.

To put it another way, we might observe that the Federal Trade Commission proceeding adjudicated the conduct charged in its complaint constituted unfair methods of competition under § 5 of the Federal Trade Commission Act, while the object of this proceeding under the Sherman Act is to obtain an adjudication that the defendants' conduct constitutes a restraint of interstate trade and commerce, in violation of § 1 of the Sherman Act.

Very briefly, the cease and desist order prohibits the respondents from concerted action among themselves, or with others, to use the multiple basing point system in the sale of cement, etc., while the relief sought in the case at bar is not only for an injunction against continued agreements among the defendants, but seeks a decree declaring that the quoting or selling of cement *as* prices calculated or determined pursuant to the multiple basing point system, constitutes a violation of the Sherman Act. It seeks the dissolution of the Cement Institute, and a *prohibition* against the organization of any other association with similar functions. In fact the *Cement* case, 333 U. S. 683 (*supra*), makes frequent reference to the Cement Institute as being one of the prime movers in the conspiracy in the Federal Trade Commission case.

[*Nature of Relief Sought*]

Much of the relief requested here has not been afforded to the Government in the cease and desist order, which does not in any way hold that the Sherman Act has been violated.

Next, the prayer for relief in the present case asks that the activities of the defendants be adjudged a violation of the Sherman Act, and will give rise to liabilities which are different from those imposed in the Federal Trade Commission proceeding. In fact an examination of the Commission's findings of fact and conclusions of law in the so-called *Cement* case, 333 U. S. 683 (*supra*), at p. 735 (set out in part in Mr. Justice Burton's dissent), shows that the defendants were found guilty of violation of the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act, and not the Sherman Act.

It would seem the Federal Trade Commission Act was not designed to interfere with, or detract from the exercise of the authority and duty of the Attorney General to seek enforcement of the Sherman Act, as it especially provides that no order of the Commission, or judgment, shall in any wise

relieve or absolve any person from liability under the anti-trust acts, which are defined as including the Sherman Act. See 15 USCA § 44, and § 11 of the Trade Commission Act (15 USCA § 51).

We therefore conclude that the Attorney General was acting within his authority when he directed the filing of the complaint pending in this court.

The Federal Trade Commission has no jurisdiction over, and cannot afford relief from, Sherman Act violations. Only Federal Courts have that authority.

[*Motion Denied*]

The motion to dismiss the complaint should be, and is, hereby denied.

[¶ 62,458] Fifth and Walnut, Inc. and Albert J. Hoffman v. Loew's, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. 36-736. April 1, 1948.

Sherman Antitrust Act

Subpoenae *Duces Tecum*—Discovery—Reasonable Scope of Request for Production of Documents.—Stipulations entered into between a motion picture booking agency and an exhibitor limiting the use of and withdrawing certain motions for discovery of documents do not provide sufficient grounds to deny the issuance of subpoenae *duces tecum*, the purposes of the two devices being complementary but not identical. Objections to subpoenae are upheld where the theory of the complaint does not support or make reasonable a request for documents covering business operations over a great period of time.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1640.568, 1640.593, 1640.624.

Memorandum

RIFKIND, D. J. This is a motion by Marcus Loew Booking Agency as a defendant and by Louisville Operating Co., Inc., as a witness to quash subpoenae served upon them by plaintiffs to procure the production, at a deposition, of certain papers.

[*Demands Not Inconsistent*]

1. The first ground of objection is that the subpoenae are inconsistent with certain stipulations made between the plaintiffs and the defendants on the basis of which certain motions under Rule 34 were withdrawn. The subpoena under Rule 45 (b) and the discovery under Rule 34 serve complementary but not identical purposes. A stipulation concerning the first does not curtail the use of the second. 2 Moore's Federal Practice, § 34.01.

2. According to plaintiffs' counsel, the gist of the amended complaint is that the nine defendant motion picture distributors and the operators of the Loew's-United Artists Theatre, Rialto, Strand, Mary Anderson and Brown Theatres, all located in Louisville, Kentucky, have conspired to deprive plaintiffs as operators of the National Theatre of the opportunity to show first-run pictures. The scope of the subpoena *duces tecum* will be judged in relationship to the allegations supporting such a complaint.

[*Reasonableness of Demands*]

3. The subpoena addressed to the Marcus Loew Booking Agency, Inc.: Item 1. The objections to item 1 are without merit. Item 2. The showing made by plaintiff why the documents requested should extend back to the year 1927 is inadequate. On the basis of plaintiffs' affidavit it would appear that 1936 is a more reasonable and supportable date. Item 3. Plaintiffs' affidavit makes no showing why the requested documents should be produced for a period prior to January 1943. Item 4. No showing is made why the requested documents should be produced for a period prior to January 1943. Item 5. A subpoena is the appropriate means to secure the production of documents in existence and not for the preparation of new papers. Such information may be secured by interrogatories or by deposition.

4. The subpoena addressed to Louisville Operating Company: Item 1 fails to specify what years are demanded. As such it is too broad. Items 2 and 3. Plaintiffs' affidavit does not support the requested production for as long a period as 1927 to date; 1936 to date is a more reasonable and supportable period. Item 4. No showing is made why

the requested papers should relate to the period prior to January 1943. Item 5. The objections to this item are without merit.

[*Subpoenae Modified*]

The subpoenae will be modified accordingly. Settle order on notice.

[¶ 62,459] Opinion of the Attorney General of Minnesota.

Addressed to James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. July 5, 1949.

Minnesota Unfair Trade Practices Act

Unfair Trade Prices—Effect of Tax Statute in Determination of Cost of Doing Business.—A Minnesota statute imposing an additional tax upon the sale of cigarettes, and declaring that such additional tax shall not be considered part of the cost of doing business as that phrase is used in the state unfair practices act, does not have the effect of amending that act, being so limited by virtue of the constitutional provision that laws shall encompass only one subject, which is to be set forth in the title of the act. Since the title of the tax statute contains no reference to unfair trade practices, the statute does not in any manner alter the computation of costs of doing business required in arriving at a fair resale price for cigarettes.

Unfair Trade Practices—Evidentiary Effect of Eight Per Cent Mark-up Rule.—Language in the unfair trade statute stating that sale of an article by a retailer at less than net invoice price plus eight per cent shall be *prima facie* evidence of a violation of the act, does not impose a requirement that the eight per cent mark-up be applied in arriving at a fair price, but merely establishes an evidentiary rule, permitting a complainant, by showing a sale at a lesser price, to place upon the retailer the burden of proving compliance with the law.

See the Minnesota Unfair Practices Act, Vol. 2, ¶ 8428, law text sections 325.01, 325.52.

Retailers and wholesalers engaged in business in Minnesota are prohibited by M. S. A. 325.04 from selling goods at less than cost for the purpose or with the effect of injuring competitors and destroying competition. Sec. 325.01, Subd. 5, defines cost to mean:

> "(1) The actual current delivered invoice or replacement cost, whichever is lower, not including customary cash discounts, plus the cost of doing business at that location by the vendor;
>
> "(2) Where a manufacturer publishes a list price and discounts, in determining such 'cost' the manufacturer's published list price and discounts then currently in effect plus the cost of doing business by the vendor shall be *prima facie* evidence of 'cost.'"

Subd. 6 of the same section defines customary cash discounts. Subd. 7 defines cost of doing business or overhead expense. That definition specifies that such cost of doing business includes taxes.

L. 1947, C. 619, Sec. 14, M. S. A. 297.02, imposed a tax on cigarettes. The 1949 law increased the tax. Sec. 297.02, *supra,* Subd. 5, reads:

> "The tax imposed by this section shall not be construed as a cost of doing business or an overhead expense under Minnesota Statutes 1945, Section 325.01, Subdivision 7."

You have for consideration these

Facts:

On the five popular brands of cigarettes, the manufacturer's list price is $7.78 per thousand. The trade discount is 10%. This leaves a net cost of $7.002 per thousand. One thousand cigarettes are put up in fifty packages, or five cartons of ten packages each. The United States tax is $3.50 per thousand. Such tax is included in the manufacturer's list price. The tax imposed by the 1947 act on ordinary cigarettes is $1.50 per thousand. The additional tax imposed by the 1949 act is $.50 per thousand.

The 1947 act in Sec. 1, Subd. 7, defines distributor to mean:

> "Any person engaged in the business of selling cigarettes in this state who

brings, or causes to be brought, into this state from without the state any packages of cigarettes for sale;

"Any person who makes, manufactures, or fabricates cigarettes in this state for sale in this state;

"Any person engaged in the business without this state who ships or transports cigarettes to retailers in this state, to be sold by those retailers;

"Any person who engages in this state in the business of selling packages of cigarettes which he purchases unstamped from a licensee under this act."

The distributor who sells to independent retailers includes the state tax in the invoice price, the same as the manufacturer includes the United States tax in the manufacturer's price.

Some distributors sell direct at retail to the public.

You call attention to N. S. A. 325.52, the first paragraph of which reads:

"Any sale made by the retail vendor at less than eight per cent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price; or, in the absence of such a list price, at less than eight per cent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors or destroying competition, shall be *prima facie* evidence of the violation of sections 325.2 to 325.07."

You submit to the Attorney General for his consideration the

Question:

"Does the invoice price charged by the State of Minnesota for the evidentiary stamps to be affixed to the cigarettes before they can be sold constitute an additional cost of those cigarettes to the licensed distributor, which must be added to the manufacturer's list price, (less trade discounts), before computation of the mark-up required by the Unfair Trade Practices Act, Section 325.52, Minnesota Statutes, 1947?"

In commenting thereon, you restate the question as follows:

"The question resolves itself to this: Should the retail selling price of a carton of cigarettes having a manufacturer's list price less trade discounts, of $1.40 per carton, be $1.40 plus 40¢ state tax, plus 8% mark-up, or should it be $1.40 plus 8% mark-up plus 40¢ state tax in order to comply with the *prima facie* requirements of the statute. The difference, by carrying all fractions to the next cent, is 3¢ per carton or 3/10 cent per package."

Opinion:

Necessarily, we must first dispose of L. 1947, c. 619, Sec. 2, Subd. 5, M. S. A. 297.02, Subd. 5, *supra.* That subdivision states that the tax shall not be construed as a cost of doing business, or an overhead expense, under M. S. A. 325.01, Subd. 7. But when we refer to the title of the act, we find no suggestion of any amendment to Sec. 325.01, Subd. 7. The title of the act states that the act relates to a tax on the sale of cigarettes and then states some details in connection therewith, but there is not a remote suggestion that it relates in any manner to the law which prohibits the selling of goods below cost or the definition of the term "cost" as applied thereto.

The Minnesota Constitution in Art. IV, Sec. 27, states:

"No law shall embrace more than one subject, which shall be expressed in its title."

So, we have at the outset for consideration the question whether or not we are to consider Subd. 5, *supra,* as stating a rule for construction. If it is not law, we do not consider it.

The subject matter of C. 619, *supra,* is to impose and provide the machinery for the collection of a tax on cigarettes. It is not an act relating to fair trade practices. The enforcement of the fair trade act is not even remotely connected with the duties of the officers who enforce the cigarette tax law. The amendment of the fair trade law has no relevancy to the imposition of a tax on cigarettes and the collection thereof. See *State v. Madson,* 43 Minn. 438.

In *Sverkerson v. City of Minneapolis,* 204 Minn. 388, on page 393, the court said:

"* * * An amendatory act, as here, must remain not only within the title but also germane to the subject matter of the amended act."

In support of that proposition, the court cited *Egekvist Bakeries, Inc., v. Benson,* 186 Minn. 520. The conclusion is that Subd. 5, *supra,* must be disregarded in arriving at a conclusion on this problem. So, again reading Sec. 325.01, Subd. 7, to determine the cost of doing business, we see that included in such cost must be taxes paid.

We have two situations to consider. One situation is that the retailer buys from the distributor. The distributor pays the cigarette tax before he sells the cigarettes to the retailer. In that case the cost of the merchandise that the retailer pays is the invoice price of the goods, plus the tax. The eight per cent provision in Sec. 325.52 applies thereto. The other case to be considered is where the distributor buys the cigarettes from the manufacturer and the distributor himself is the retailer. The purchase price which the distributor pays to the manufacturer does not include the state tax, but the distributor pays the state tax before he sells the cigarettes to the consumer. In that case, the distributor's cost is the amount that he pays the manufacturer and the state tax on the cigarettes is taxes under Subd. 7, *supra*. So, in that case the distributor who is also a retailer has a smaller invoice cost (Sec. 325.01, Subd. 5) than the retailer who buys from a distributor. When a distributor is a retailer, the eight per cent is computed before the tax is added.

The question submitted contains an assumption which is not justified. The fair trade law does not require an eight per cent mark-up by the retailer. N. S. A. 325.52.

As has been stated in previous opinions, Sec. 325.52 is a mere rule of evidence. It is not a hard and fast rule. It shifts the burden of going forward with the evidence. It merely establishes a *prima facie* evidence rule. The real thing prohibited is selling below cost with the effect mentioned in the statute. See *McElhone v. Geror*, 207 Minn. 580.

[¶ 62,460] Fred Martin and Max Lanier v. Albert B. Chandler, individually and as Commissioner of Baseball, et al.

In the United States District Court for the Southern District of New York. Civ. 49-358. July 8, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Parties—Claimed Indispensability of Joint Tort-Feasor.—Baseball clubs and associations, which are sued in an action for damages and injunction, are denied their motion for dismissal wherein it is argued that the baseball commissioner, whose decision they are bound to abide by in regard to the eligibility of the plaintiffs to play professionally, is thereby an indispensable party but has not been served with process and is not before the court. One tort-feasor cannot claim the indispensability of another joint tort-feasor as a party to a suit in equity. A contrary rule would result in the self-immunization of parties to tortious agreements by the simple device of including as a party to such agreement a person outside the reach of the courts.

For the plaintiffs: John L. Flynn; James A. McKaigney and William R. Ferris, of counsel.

For the defendants: Willkie, Owen, Farr, Gallagher & Walton for Ford C. Frick et al.; Baker, Hostetler & Patterson for the Boston American League Baseball Co. et al.; Edgar P. Feeley for the National Exhibition Co.

[*Nature of Action*]

RIFKIND, D. J. This is a motion by some, but not all, of the named defendants to dismiss the first cause of action stated in the complaint upon the ground that "the defendant Albert B. Chandler is an indispensable party, has not been served * * * and may not be sued * * * in this District without his consent."

The complaint, filed on March 8, 1949, is in two counts. The first is brought under 15 U. S. C. A. § 26; the second is founded on 15 U. S. C. A. § 15. Together they seek to enjoin alleged violations of the anti-trust laws and to recover treble damages for the injuries sustained by plaintiffs by reason of such violations.

[*Background*]

More specifically, the complaint alleges that "the defendants have by entering into the Major League Agreement, the Major-Minor League Agreement and the National Association Agreement and by their concert of action in adopting and enforcing said Agreements and the Rules concomitant therewith engaged, knowingly and continu-

ously, in a wrongful and unlawful conspiracy to monopolize and restrain trade and commerce among the States in violation of sections of the Sherman and Clayton Anti-Trust Laws, 15 U. S. C. A. §§ 1, 2, 3, 13 and 14, and the defendants by reason of said conspiracy and concert of action have denied and continue to deny the plaintiffs herein the opportunity to earn a livelihood in their profession and are causing the plaintiffs immediate and continuing and progressively irreparable damage." (Paragraph 47).

It is further alleged in the complaint that "The Major League and the Major-Minor League Agreements and the Rules adopted and enforced in accordance therewith prohibit any other than a standard or uniform contract to be entered into between the constituent clubs and players." (Paragraph 28.) "The said standard or uniform contract in both the Major and Minor Leagues must contain provisions (hereinafter referred to as the 'reserve clause') whereby a player in signing his contract for the ensuing season or seasons agrees not to sign a contract with or play for any Club at the expiration of the period of said contract other than with or for the Club which contracted with him, or its assignee. The infraction of this Rule is banishment from Organized Baseball." (Paragraph 29.)

Plaintiffs have been professional baseball players, the one from 1933, the other from 1935, until 1946. "In or about May, 1946, the plaintiffs were declared ineligible by the Commissioner to play in Organized Baseball for a period of five years because of their alleged disregard of the provisions of the Major League Agreement and the Major League Rules and particularly for violating the reserve clause of their respective contracts and for engaging in competition with ineligible players." (Paragraph 44.)

Subsequent to their suspension from organized baseball the plaintiffs sought to earn a livelihood by utilizing their professional ability as baseball players. In this object they failed because the Commissioner employing the powers vested in him under the provisions of the Major League Agreement, the Major-Minor League Agreement, the National Association Agreement and the concomitant Rules persuaded, induced and coerced clubs and players of Organized Baseball to refrain from engaging in performances to which the plaintiffs participated, under threat of suspending such clubs and players from Organized Baseball if they did so engage in such performances. (Paragraph 46.)

[*Decision*]

In substance the moving defendants contend that Chandler, the Commissioner of Baseball, is indispensable because they are bound, by the very agreements here challenged, to abide his decisions with respect to plaintiffs' eligibility to pay. That, however, is rather curious circular reasoning. It is hornbook law that one tort feasor, defendant in an action, may not claim that another, a joint tort feasor, is an indispensable party. 30 C. J. S. § 147; *Kidd v. New Hampshire Tract. Co.*, S. Ct., N. H., 1903, 56 A. 465; *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, C. C. D. Nev., 1871, 6 Fed. Cas. No. 2989.

That one charged as a member of a conspiracy to violate the anti-trust laws may not successfully claim the indispensability of his fellow conspirators is implicit in *United States v. National Lead Company, et al.*, S. D. N. Y., 1945, 63 F. Supp. 513, affirmed, 1947, 332 U. S. 319, where but three of a total of twenty-two conspirators were made defendants, most of them being foreign corporations without the jurisdiction.

Broadly stated, the question presented by the motion is whether those conspiring to violate the anti-trust laws may immunize themselves against injunctive relief by vesting the power of direction and decision in an arbiter or industrial czar who is inaccessible to service of process. Such inaccessibility might be achieved, for instance, by locating his office and residence across the nation's borders. I know of no rule of law and no principle of equity which produces so bizarre a result.

In view of this conclusion it is unnecessary to decide whether jurisdiction may or may not be obtained of Chandler in this district.

[*Dismissal Refused*]

The motion to dismiss is denied. Defendants will answer in ten days.

[¶ 62,461] U. S. v. Kohler Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 8947. Filed June 28, 1949.

Sherman Antitrust Act

Plumbing Fixtures and Fittings — Requirements Attached to Sales — Information Obtained from Customers Privileged.—In a civil action to enjoin a manufacturer of plumbing fixtures and fittings from requiring dealers who purchased fixtures from it to buy fittings as well, it was held that statements, invoices, records of sales and letters relating to the manufacturer's practices, given by the manufacturer's customers to agents of the Federal Bureau of Investigation were privileged statements and need not be disclosed by the Government in response to interrogatories.

See the Sherman Act annotations, Vol. 1, ¶ 1610.341.

For the plaintiff: Stanley E. Disney, W. Wallace Kirkpatrick, Special Assistants to the Attorney General, both of Washington, D. C., Gerald A. Gleeson, United States Attorney, of Philadelphia, Pa., John H. D. Wigger, Baddia J. Rashid, Special Attorneys.

For the defendant: Charles I. Thompson, Lucius P. Chase, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa.

***Sur* Plaintiff's Objections to Interrogatories and *Sur* Defendant's Motion to Compel Answers**

[*Nature of Action*]

KIRKPATRICK, Ch. J.: This is a civil action brought by the United States, based upon the antitrust laws. The gist of the complaint is that the defendant, a manufacturer of vitreous china and enamel plumbing fixtures and sanitary brass fittings, has restrained commerce by requiring dealers and others purchasing fixtures from it to buy its fittings as well. The prayer is for injunctive relief only.

[*Objections to Interrogatories*]

The defendant has filed interrogatories and supplemental interrogatories, 22 in all. The plaintiff has answered all but three, to which it has filed objections, (5, 16 and part of 22). The objections are now before the Court together with a motion by the defendant, to compel answers.

[*F. B. I. Investigation*]

It appears that before the suit was brought the government through agents of the Federal Bureau of Investigation made a nationwide investigation of the manner in which the plaintiff conducted its business, interviewing a large number of customers and other persons with whom the defendant dealt and obtaining from them and from other witnesses statements, both written and oral, together with originals and copies of invoices, records of sales and letters relating to the defendant's practices and business transactions. In substance, this is the information which is asked for in Interrogatory 5 and which the plaintiff objects to giving.

It is an important consideration that in the present case the government is not asserting a proprietary or financial claim, or resisting one as it was in *O'Neill v. United States*, 79 F. Supp. 827, and, therefore, the investigation was for a purpose entirely different from that in the *O'Neill* case. The United States brought the present suit in its sovereign capacity seeking to enforce the antitrust laws and the sanctions in these laws. The gist of the action is the alleged violation of a criminal statute.

The question of procedure raised by these objections has already been decided adversely to the plaintiff's contention by this Court, as has its objections based upon *Hickman v. Taylor*, 329 U. S. 495. See *O'Neil v. United States, supra.*

A fundamental issue is whether the information withheld is privileged matter within the meaning of Rule 26(b).*

* The interrogatories, of course, were filed under Rule 33 but that rule incorporates Rule 26 (b) by providing "Interrogatories may relate to any matters which can be inquired into under Rule 26 (b)." The language of Rule 26 (b) is "Unless otherwise ordered by the court . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter," etc.

[*Privileged by Public Policy*]

It is unnecessary to deal with the plaintiff's contention that the information withheld is privileged by virtue of the Department of Justice's Order No. 3229 of May 2, 1939, issued under the authority of R. S. 161. In my opinion its disclosure is forbidden by much broader considerations of public policy, which Wigmore (Sec. 2374) calls a genuine privilege. This policy cannot be better stated than it was in an opinion of Attorney General Jackson, 40 Op. Atty. Gen., No. 8, April 30, 1941, as follows:

> "Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants—sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency."

Wigmore's statement is that the privilege "must be recognized for the communications made by informers to official prosecutors, because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out immunity from a compulsory disclosure of the informant's identity."

In *Arnstein v. United States,* 296 Fed. 946, the Court, holding that the trial court had properly refused to require an Assistant District Attorney to produce signed statements made to him by a defendant who testified on behalf of the government, said,

> "The principle laid down . . . was that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws, and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

If the answers of the plaintiff to the interrogatories to which it has responded be read it would seem that the government has already furnished the defendant with all the information, obtained through its investigation, that it could without encroaching upon the field protected by the rule of policy above stated. It will be noted that Interrogatory 5 specifically asks for the names and addresses of the persons contacted as well as their statements and documents furnished by them. These persons it may be assumed are confidential informants and directly within the scope of the policy.

I, therefore, rule that Interrogatory 5 need not be answered.

While I think the information asked for comes within the meaning of privileged matter as that expression is used in Rule 26(b) I also believe that, even if that expression did not cover it the Court, upon the broad ground of public policy stated above whether or not strictly a privilege, should still refuse to order the disclosure asked for.

There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout to leave their application to the discretion of the trial court—not, of course, an absolute discretion but one controlled and governed, not only by statutory enactments and the well established rules of the common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand.

What has been said applies generally to Interrogatories 16 and 22 as well as to 5. In addition, 16 asks for "copies of any and all invoices, correspondence, and other documents procured from Kohler purchasers or any other person . . .". Although the originals are not asked for, it should be noted that the rule adopted by this Court and first stated in *De Bruce v. Pennsylvania R. Co.,* 6 F. R. D. 403, requiring copies of witnesses' statements to be produced in answer to interrogatories under Rule 33, has never been extended to copies of documents of this kind which are integral parts of the *res gestae* of various business transactions. It was pointed out in the *De Bruce* case that while the statement of a witness about the facts of the accident might answer to the description of a "document," what was really asked for was a disclosure of facts and an identification of the source from which they have been obtained and that giving a copy of the statement is merely the most satisfactory way of disclosing the facts.

[*Motion to Compel Answers Denied*]

The ruling in this case does not conflict with that in *O'Neill v. United States, supra,* first, because the government is not asserting a proprietary or financial claim and, second, because the *O'Neill* case was decided chiefly on the basis that the Suits in Admiralty Act abrogated the privilege asserted in that case.

The plaintiff's objections are sustained.

The defendant's motion to compel answers is denied.

[¶ 62,462] United States v. Sand Spun Patents Corporation, American Cast Iron Pipe Company, Florence Pipe Foundry and Machine Company, and Warren Foundry & Pipe Corporation.

In the United States District Court for the District of New Jersey. Civil Action No. 125-49. Filed July 22, 1949.

Sherman Antitrust Act

Pressure Pipe Industry—Consent Judgment—Patent Holding Company Ordered Dissolved.—In a civil suit charging conspiracy to monopolize and restrain trade in the cast iron pressure pipe industry, four corporations consented to a judgment which ordered a patent holding company dissolved after it had dedicated its patents to the public. The decree also terminated patent license agreements to limit the production, grades and quality of pipe. The companies were enjoined from entering any contract which would allocate customers or markets, restrict the import or export of pipe, or condition a license upon the understanding that the licensee not engage in research.

See the Sherman Act annotations, Vol. 1, ¶ 1530.50, 1590.

For the plaintiff: Herbert A. Bergson, Assistant Attorney General; Alfred E. Modarelli, United States Attorney, by John J. Barry. Morton H. Steinberg, Sigmund Timberg, Special Assistants to the Attorney General; Maurice Silverman, Special Attorney.

Final Judgment

FORMAN, District Judge: Plaintiff, the United States of America, having filed its complaint herein on the 16th day of February, 1949; the defendants having appeared and filed their answers herein to the complaint, denying the substantive allegations thereof; and all parties hereto by their attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

The Court has jurisdiction of the subject matter herein and of all of the parties to this judgment, and the complaint states a cause of action against the defendants, and each of them, under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act (15 U.S.C. Sec. 1)

[*Terms Defined*]

II

As used in this judgment, the following terms have the meaning assigned respectively to them below:

A) "Sand Spun" means the defendant Sand Spun Patents Corporation;

B) "License agreements" means each, every and all agreements and contracts, existing and by the terms thereof in full force and effect as of the date of this judgment, between defendant Sand Spun and other defendants, whereby licenses have been granted to manufacture, use and sell pipe under Sand Spun patents;

C) "Pipe" means centrifugally cast cast-iron pressure pipe for use in the conveyance of liquids and gases under pressure;

D) "Patent" or "patents" means United States Letters Patent and all reissues and extensions thereof;

E) "Sand Spun patents" means the United States Letters Patent and applications therefor, listed in Exhibit A attached hereto and made a part hereof, all of which are owned by Sand Spun.

[*Application of Judgment*]

III

The provisions of this judgment applicable to any defendant herein shall apply to each of its subsidiaries, successors, and assigns engaged in the production of pipe, and to each of its officers, directors, agents, and employees, and to each person acting under, through or for such defendant.

[*Termination of License Agreements*]

IV

The license agreements, as defined in this judgment, are, and each of them is, hereby terminated; and the defendants are hereby jointly and severally enjoined and restrained from any further performance in whole or in part of such license agreements, and from any further performance of any of the obligations assumed under or in furtherance of any such agreements. The defendants are hereby jointly and severally enjoined and restrained from, directly or indirectly, maintaining, reinstating or enforcing such license agreements.

[*Attaching Conditions to License Enjoined*]

V

The defendants herein are individually and jointly restrained from conditioning:

(1) a license or immunity granted under any patent; or

(2) a disclosure made of technical information or data; for the manufacture of pipe, upon the requirement that the other party to such transaction shall agree:

(a) to manufacture only pipe of specified kinds and sizes;

(b) to maintain any standards, grades or qualities of pipe;

(c) to cross license or assign any patent or patents or any inventions, or to disclose technical information or data developed, owned or controlled by said other party to any defendant;

(d) not to dispose of any invention, patent, mechanical device or process without first offering it to any defendant;

(e) not to engage in research or not to investigate or develop any invention, process, product, machine, mechanical device or any plan or method of manufacture, or to engage in any such research, investigation, or development only with the permission of any other person, or to forego any such research, investigation, or development if any other person agrees to undertake it;

(f) to maintain or adhere to any restrictions as to quantity of pipe produced;

(g) To pay a greater per tonnage or any other per unit royalty on any quantity of pipe produced than is provided for any smaller quantity;

(h) to maintain or adhere to any restrictions which limit the export of pipe from the United States;

(i) to pay any charge, royalty, or rental for the use of patents on pipe, based on the number of machines used in manufacturing such pipe;

(j) to sell any machine, mechanical device or other property, the sale of which to such other party has either been consummated, or, if not consummated, has been initiated by a person other than the granting or disclosing defendant, at the direction of, or only after first offering it to, any defendant, or only to specified persons;

(k) to assign only upon the consent of any person other than the licensor or only as an appurtenance to other property not related to the use of any such license or immunity.

[*Restrictive Contracts Enjoined*]

VI

The defendants are severally and jointly restrained from entering into, executing, maintaining or adhering to any contract, agreement, understanding or arrangement, directly or indirectly, with any manufacturer of pipe;

(a) to control, restrict, or allocate the production or distribution of pipe;

(b) to allocate customers, markets or fields for the manufacture, sale or distribution of pipe in the United States, its territories or possessions;

(c) to prohibit or restrict the sale of pipe for export from or import into the United States, its territories or possessions;

(d) to restrict or attempt to restrict the manufacture of pipe to any specified standards, sizes, grades or qualities;

(e) to assign exclusive rights to patents, not in existence at the time of assignment, relating to the production of pipe;

(f) to provide for the inspection of any records, files or other documents and papers of any manufacturer of pipe, except that an independent public accountant may be employed for the purpose of determining amounts of royalties or rentals due.

[*Dissolution Ordered*]

VII

Defendant Sand Spun is ordered to be dissolved within sixty (60) days from the date of entry of this judgment. There shall within ten (10) days after such dissolution be delivered to the Court, after notice to the Attorney General, adequate proof of such dissolution.

[*Dedication of Patents Ordered*]

VIII

Defendant Sand Spun is hereby ordered and directed to dedicate to the public, withing thirty (30) days from the date of entry of this judgment, all of the Sand Spun patents listed in Exhibit A.

[*For Purposes of Compliance*]

IX

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and upon reasonable notice to any defendant herein made to the principal office of such defendant be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding such matters. Upon written request of the Attorney General, or an Assistant Attorney General, on reasonable notice to any defendant herein made to its principal office, such defendant shall submit such reports as might from time to time be reasonably necessary to the enforcement of this judgment. No information obtained by the means provided in this Section shall be divulged by the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

[*Jurisdiction Retained*]

X

Jurisdiction of this action is retained by this Court for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for, and for the Court to make, such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the modification or termination of any of the provisions thereof, or for the enforcement of compliance therewith, and for punishment of violations thereof.

Exhibit "A"

Number	Date	Inventor	Title
1,873,176	8/23/32	Clarence D. Barr	Flasks
1,873,227	8/23/32	Murphy D. Smith	Body Pattern Extractors
1,906,511	5/ 2/33	Clarence D. Barr Stephen D. Moxley Frank S. Houghton	Charging Machines
1,916,296	7/ 4/33	Clarence D. Barr Stephen D. Moxley	Centrifugal Casting Machines
1,927,467	9/19/33	Walter Morgan	Centrifugal Casting Machines
1,958,672	5/15/34	W. D. Moore Walter Morgan	Certifulgal Casting Machine and Methods
1,959,227	5/15/34	Clarence D. Barr Stephen D. Moxley	Sand Ramming Equipment Stations for Flasks

Exhibit "A"—Continued

Number	Date	Inventor	Title
1,960,366	5/29/34	Clarence D. Barr Stephen D. Moxley Jacob L. Cooper	Apparatus for Freeing and Removing Hollow Castings from Flasks
1,983,431	12/ 4/34	Clarence D. Barr Stephen D. Moxley	Centrifugal Casting Machines for Casting Hollow Metal Bodies
2,015,776	10/ 1/35	Clarence D. Barr Stephen D. Moxley	Charging, Weighing and Controlling Mechanism for Casting Machines
2,043,956	6/ 9/36	Louis A. Camerota	Improvement in Centrifugal Casting Machines
1,897,951	2/14/33	Louis A. Camerota	Methods and Apparatus tor Blasting Pipe
1,902,301	3/21/33	Louis A. Camerota	Chucks for Centrifugal Casting Machines
1,911,106	5/23/33	Louis A. Camerota	Flask Handling Apparatus
1,912,361	6/ 6/33	Louis A. Camerota	Mold Disintegrating Stations
1,919,199	7/25/33	Louis A. Camerota	Conveyors for Cylindrical Objects
1,926,034	9/12/33	Louis A. Camerota	Stuffing Boxes for Blow Pipes
1,936,376	11/21/33	Louis A. Camerota	Centrifugal Casting Apparatus
1,944,168	1/23/34	Louis A. Comerota	Centrifugal Casting Machines.

[¶ 62,463] U. S. v. Scophony Corporation of America, et al.

In the United States District Court for the Southern District of New York. Civil Action No. 34-184. July 6, 1949.

Sherman Antitrust Act

Consent Judgment—Television Industry—Divesting of Ownership Ordered. — The remaining defendant in an action charging television equipment manufacturers with violating the Sherman Act consented to a decree which terminated licenses and agreements and enjoined such practices as allocating markets, excluding any person from the manufacture of television equipment, limiting the importation or exportation of installations, refraining from competition, or exchanging technical information exclusively. The judgment required the television company to divest itself of ownership interests in a holding and licensing defendant company.

See the Sherman Act annotations, Vol 1, ¶ 1220.211, 1530, 1530.10, 1590.

For the plaintiff: Herbert A. Bergson, Assistant Attorney General; John F. X. McGohey, United States Attorney; Manual M. Gorman, J. Francis Hayden, Special Assistants to the Attorney General; Sigmund Timberg, Mervin C. Pollack, Special Assistants to the Attorney General; Wm. D. Kilgore, Jr., Special Attorney

Final Judgment

Henry W. Goddard, District Judge: Plaintiff, United States of America, having filed its complaint herein on December 18, 1945; all defendants except defendant Scophony, Limited having severally filed answers to the complaint denying the substantive allegations thereof; defendants, Scophony Corporation of American, General Precision Equipment Corporation and Television Productions, Inc., having severally consented to the entry on January 12, 1949 of a final judgment herein; the complaint herein having been dismissed on stipulation and order duly filed and entered on January 12, 1949 as against defendants Arthur Levey, Earle G. Hines and Paul Raibourn; defendant Scophony, Limited having unsuccessfully moved to dismiss this action and to quash service of process as to it for lack of jurisdiction over said defendant herein; defendant Scophony Limited being now in all respects

in default herein; defendant Scophony, Limited being the only defendant as to whom this action is now pending; and defendant Scophony, Limited having consented to the entry of this final judgment without admission by said defendant with respect to any issue of fact or law,

Now, therefore, no testimony or evidence having been taken herein except the deposition of W. G. Elcock by plaintiff used on the motion of defendant Scophony, Limited, hereinabove mentioned, and without any trial or finding or adjudication of any issue of law or fact herein, and upon consent of plaintiff United States of America and defendant Scophony, Limited.

It is hereby ordered, adjudged and decreed:

[*Jurisdiction*]

I

That this Court has jurisdiction of the subject matter of this action and of the parties thereto; and that the complaint states a cause of action under Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and acts amendatory thereof and supplemental thereto.

[*Applicability of Provisions*]

II

That the provisions of this judgment applicable to defendant Scophony, Limited shall apply with equal force to its successors and assigns, its directors, officers, agents, representatives or employees, and to any person or corporation acting or with authority to act under, through, or for such defendant.

[*Agreements Terminated*]

III

That the following licenses and agreements and all amendments, modifications, or supplements of the same, having heretofore been terminated and cancelled as to defendants Scophony Corporation of America, General Precision Equipment Corporation and Television Productions, Inc. are hereby terminated and cancelled as to defendant Scophony, Limited as of December 18, 1945, and said defendant is hereby enjoined and restrained from the performance, observance or enforcement of any of the terms or provisions thereof, and from directly or indirectly adopting, adhering to or furthering any course of conduct for the purpose or with the effect of maintaining, reviving, or reinstating the terms and provisions of said licenses and agreements:

A. Agreement dated July 31, 1942, between Scophony, Limited, William George Elcock, General Precision Equipment Corporation, and Television Productions, Inc., a copy of which is annexed to the complaint herein as Exhibit 1;

B. Agreement dated August 11, 1942, between Scophony, Limited, William George Elcock and Scophony Corporation of America, a copy of which is annexed to the complaint herein as Exhibit 2;

C. Agreement dated August 11, 1942, between Scophony Corporation of America, General Precision Equipment Corporation and Television Products, Inc., a copy of which is annexed to the complaint herein as Exhibit 3.

[*Acts Enjoined*]

IV

That defendant Scophony, Limited is hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any agreement, combination, plan or program with defendants Scophony Corporation of America, General Precision Equipment Corporation, and Television Productions, Inc. or any of them:

(a) To allocate, divide or restrict territories, customers, or markets for the manufacture, use or distribution of processes, products, apparatus or installations for, or relating to television;

(b) To exclude any person from or to restrict or limit any person in the manufacture, use or distribution of any process, invention, product, apparatus or installation for, or relating to television;

(c) To limit, restrict or prevent the importation into, or exportation from the United States, its territories or possessions, of any process, invention, product, apparatus or installation for, or relating to television;

(d) To refrain from competition or to leave any person free from competition in any territory or market in the manufacture, use or distribution of processes, products,

inventions, apparatus or installations for, or relating to television;

(e) To exchange exclusively among said defendants, or any of them, patent licenses or technical information with respect to the manufacture, use or distribution of any process, product, invention, apparatus or installation for, or relating to television.

[*Dispossession of Ownership*]

V

(A) That defendant Scophony, Limited divest itself of any and all stock or ownership interests in defendant Scophony Corporation of America as soon as possible, but in no event to exceed two years from the date of this judgment. During said period, defendant Scophony, Limited shall submit to the Attorney General a report every six months setting forth in detail the efforts made by it to dispose of said stock and ownership interests.

(B) That defendant Scophony, Limited be enjoined and restrained from directly or indirectly:

(a) Acquiring any stock or ownership in defendant Scophony Corporation of America;

(b) Having any officer, director, representative, agent or employee who is at the same time an officer, director, representative, agent or employee of defendant Scophony Corporation of America;

(c) Dominating, controlling or interfering with, or attempting to dominate, control, or interfere with, the business, financial or promotional policies, practices, operation, management, expansion or other activities of defendant Scophony Corporation of America.

[*For Purposes of Compliance*]

VI

For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to defendant Scophony, Limited be permitted, subject to any legally recognized privilege, (a) reasonable access, during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment, and (b) subject to the reasonable convenience of said defendant, and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this judgment, and for no other purpose, said defendant, upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as may from time to time be necessary for the purpose of enforcement of this judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

VII

Jurisdiction of this action is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment of violations thereof.

[¶ 62,464] Reynolds Metals Co. v. Metals Disintegrating Co. Inc.

In the United States Court of Appeals for the Third Circuit. No. 9840. Argued March 25, 1949. Decided June 27, 1949.

Appeal from the United States District Court for the District of New Jersey.

Sherman Antitrust Act

Illegal Contracts—Enforcement of Agreements Contrary to Public Policy.—New Jersey law does not permit a court to afford relief to either party upon a contract void as against

public policy and the antitrust laws. An aluminum manufacturer who, upon offer of an amendment to the contract curing such illegality, rejected the proposed change because it did not also contain provisions for repayment to him of royalties supposedly collected illegally thereunder, is thus denied the aid of the court in procuring such a result.

Illegal Contracts—Reformation of Illegal Contracts—Parties in *Pari Delicto*.— A manufacturer of metal products who asks the court for reformation to cure the illegality of a license contract whereunder he manufactures patented products, and for return of royalty payments made by him pursuant to the illegal provisions thereof, is held to be in *pari delicto* and is denied such relief where it appears that he cooperated with the patentee in the original drawing up of those provisions and continued to operate thereunder for some time after the Supreme Court had declared such provisions illegal, before he called the patentee's attention to the defect and requested an amendment thereto

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1220.503.

Federal Civil Procedure—Pre-Trial Practice—Motion to Delete Sham Allegations.— Motions, supported by affidavits, which seek the deletion of certain allegations of an opponent argued to be sham pleadings, should not lead to adjudication of the truth or falsity of those allegations in pre-trial proceedings, since to do so would lead beyond the mere clarification and fixing of the issues, which is the proper scope of such practice.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1640.616, 1640.619.

For the appellant: Raymond F. Adams, New York City.

For the appellee: James D. Carpenter, Jersey City, N. J.

Affirming a decision of the United States District Court for the District of New Jersey, 8 F. R. D. 349.

Before MARIS, O'CONNELL and KALODNER, Circuit Judges.

Opinion of the Court

O'CONNELL, J., Circuit Judge: The instant complaint seeks reformation of a license agreement between plaintiff ("Reynolds") and defendant ("Metals Disintegrating") and the refund to Reynolds of certain royalty payments made in connection therewith to Metals Disintegrating. After extensive and prolonged pretrial proceedings at which all the available information was stated to have been adduced, the court below granted the motion of Metals Disintegrating to dismiss the complaint as legally insufficient. 8 F. R. D. 349 (D. C. N. J., 1948). Both litigants have expressed the desire that the record on this appeal be treated as though it had been made at trial rather than in the preparatory stages of the case.

Diversity of citizenship being the basis of federal jurisdiction here, we refer to the law of New Jersey wherever applicable. *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).

[*Facts*]

The pertinent facts may be briefly summarized. In 1934, Reynolds began the installation of a ball mill for the manufacture of flake aluminum powder and paste. This activity led Metals Disintegrating, holder of patents involving like products, to file in 1938 a suit charging patent infringement. Negotiations ensued, during the course of which several drafts of licenses were presented for the consideration of Reynolds. That to which Reynolds eventually agreed, in 1939, included provisions purporting to fix the price and limit the sublicensing of dry aluminum bronze powder, which was unpatented.

In 1946, Reynolds advised Metals Disintegrating that this price-fixing attempt was apparently in violation of the anti-trust laws. Metals Disintegrating thereupon offered an amendment calculated to cure that defect. Rejecting the proposed change because there was no allowance made for rebate of what Reynolds deemed to have been improperly paid royalties, Reynolds filed the complaint at bar.

The district judge, after candidly noting his disagreement with the views we expressed in *Frederick Hart & Co. v. Recordgraph Corporation*, 169 F. 2d 580 (C. A. 3, 1948), nevertheless decided in conformance with that opinion and refused to strike the instant complaint as sham. He further found, however, that the contract was not severable and that the illegality of that price-fixing

provision permeated the contract as a whole, and also that neither contracting party could obtain equitable relief because both were *in pari delicto.* He thereupon ordered judgment in favor of Metals Disintegrating.

[*Purpose of Pre-Trial Practice*]

The comments of the learned district judge directed to the advantages of permitting a "speaking motion," whereby a litigant might obtain the involuntary deletion of an allegation by his opponent through the medium of a motion reinforced by affidavits, merit an answer by us. He has ably presented the view contrary to that which we recognized as correct in the *Frederick Hart* case, *supra,* and to which we adhere. It seems to us that the Federal Rules of Civil Procedure were designed to facilitate correlation, and not duplication, between the pre-trial and trial proceedings. If the truth or falsity of allegations in pleadings may be adjudicated in advance of a trial through the technique of filing affidavits, it is to be expected that eventually the courts will have to develop pre-pre-trial procedures; for pre-trial proceedings such as those favored by the court below are likely to inspire all too many carefully-drafted written statements escaping the clarifying processes of cross-examination and delaying prompt disposition of cases. We are satisfied that pre-trial proceedings are intended to determine what the issues are, and not to invade the trial function of resolving those issues. The rule limiting the scope of motions to strike pleadings as sham, as exemplified in *Bates v. Clark,* 95 U. S. 204, 205-206 (1877) is, we think, a salutary one which Rule 11 of the Federal Rules of Civil Procedure reflected rather than altered. Consequently, we reiterate the position we expressed in the *Frederick Hart* opinion. See *Andrews v. Heinzman,* 9 F. R. D. 7, 9 (D. C. Neb. 1949).

We proceed, then, to the question whether, under the circumstances here presented, we can say as a matter of law that Reynolds is entitled to the relief requested, for, as we have stated, Reynolds affirmatively has asked that we review the material before us as though it had been adduced at a trial on the merits. We hold that the district judge did not commit reversible error.

[*Parties in Pari Delicto*]

Whether Reynolds or Metals Disintegrating was the father of the idea that the price of the dry powder be fixed cannot be definitely ascertained from the record before us. The conclusion of the court below that the parties collaborated in inserting that provision in the agreement, however, is amply supported by the evidence; and it is not inapposite to note that several years elapsed between the handing down of the *Ethyl Gasoline Corp. v. United States* decision, 309 U. S. 436 (1940) and the questioning of the price-fixing provision by the undoubtedly competent legal staff of Reynolds. We are not disposed to challenge the finding that the litigants at bar are *in pari delicto.*

It necessarily follows that the relief here requested by Reynolds cannot be granted. The law of New Jersey is perfectly clear that, with exceptions not here pertinent,[1] the courts will not assist either party to an illegal contract, but will leave them where it finds them. See Restatement, Contracts (1932 ed.), Ch. 18, Topic 12, particularly § 598 and New Jersey annotations thereto, cited in *Carhart v. Lapetina,* 137 N. J. L. 531, 61 A. 2d 49 (1948). Reynolds admits having rejected an amendment of the license which would have eliminated the illegal provision, because Reynolds thought some adjustment of past royalty payments should also be made; we fail to see any cogent public interest that the courts be used as a vehicle for permitting Reynolds to recover such payments made pursuant to a contract inimical to the spirit of legislation for public protection, when in fact Reynolds received that for which it contracted and when the evidence of negotiations indicates that Reynolds, rather than being squeezed by economic compulsion, has maintained a vigorous bargaining position.

[*Judgment Affirmed*]

Without detailing other factual conclusions of the court below, the reversal of which would be necessary for Reynolds to

[1] The exception on which Reynolds has placed reliance is that enunciated in *McCarter v. Firemen's Ins. Co.,* 74 N. J. Eq. 372, 389, 73 Atl. 80, 87 (1909) and *Cameron v. International Alliance, Etc.,* 118 N. J. Eq. 11, 20, 176 Atl. 692, 697 (1935). The latter and other similar cases are cited at § 601 of the New Jersey Annotations. Refusal to rescind the license under consideration was not shown by Reynolds, other than by bare allegation, to be likely to produce a harmful effect upon the public.

prevail upon this appeal, we need only state that our examination of the record persuades us that Reynolds has failed to prove its case. The judgment of the district court on the record before it was correct and will be affirmed.

[¶ 62,465] Opinion of the Attorney General of Minnesota.

Addressed to E. T. McEvoy, County Attorney, Ivanhoe, Minnesota, by J. A. A. Burnquist, Attorney General, Victor J. Michaelson, Special Assistant Attorney General. July 20, 1949.

Minnesota Unfair Trade Practices Act

Unfair Trade Practices—Cooperative Sales Promotion Plans—Gifts not Conditioned on Purchases.—An arrangement between a retail store operator and a general photographer, by the terms of which the photographer makes pictures of children in the retail store on a certain day and gives free copies to the parents, in a cooperative attempt to stimulate both businesses, where the gift of the picture is not conditioned upon the purchase of any item in the store, is considered not to be violative of the Minnesota Unfair Trade Practices Act when it does not appear that there is an intent to injure competitors.

See the Minnesota Unfair Trade Practices Act, Vol. 2, ¶ 8428.30.

Your letter of July 19th recites these

Facts

"'A' is a retail merchant in Minnesota; 'B', a resident of Iowa, is engaged in the business of general photography. 'A' and 'B' enter into an agreement whereby 'B' takes pictures of all infants brought into 'A's' store on a particular day, and 'B' gives a free picture to the parents of such children. This picture is given free and without obligation. The only consideration moving toward 'B' is the opportunity to make additional sales of pictures, but without any obligation on the part of the parents of the children. The purpose of the arrangement is to stimulate traffic through 'A's' store and thus increase business. There is no direct evidence that the arrangement is for the purpose or with the intent of injuring competitors or destroying competition."

and presents this

Question

"It would be appreciated if you would give me your opinion as to whether or not such an arrangement is in violation of Section No. 325.04, Minnesota Statutes."

Opinion

It does not appear from the facts stated that the proposed arrangement is to be carried on with the intent or purpose of injuring the competitors or destroying the competition of Mr. "B".

In order to sustain a conviction under the above statute, it would be necessary to establish, by evidence, that the purpose or effect of the proposed arrangement was for the purpose or with the intent of injuring competitors and destroying competition.

We enclose [omitted herein] copy of Attorney General's opinion of August 23, 1948, in which a similar question was considered.

[¶ 62,466] Ball v. Paramount Pictures, Inc., et al.

In the United States Court of Appeals for the Third District. No. 9874. Argued June 13, 1949. Decided July 29, 1949.

Appeal from the decree of the District Court of the United States for the Western District of Pennsylvania.

Sherman Antitrust Act

Motion Picture Film Distributors—Monopolization of Showings—Injunction—Modification of Decree—Burden of Proving Compliance.—An injunction issued in a private equity suit prohibiting monopolization of first-run showings of motion pictures and requiring that complainant be given an opportunity to inspect and negotiate for such films, is ordered to

be modified to give more finality to those rights to negotiate, and to place on the defendant motion picture distributors and exhibitors the burden of proving their compliance with the terms of the decree.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1021.597, 1220.273.

Modifying a decree of the United States District Court for the Western District of Pennsylvania, 81 Fed. Supp. 212; reported at ¶ 62,384.

For the appellant: Joseph W. Henderson, Philadelphia, Pa.

For the appellees: Bernard Segal, Philadelphia, Pa.

Before BIGGS, Chief Judge, and McLAUGHLIN and O'CONNELL, Circuit Judges.

Opinion of the Court

McLAUGHLIN, Circuit Judge: In this matter by our opinion in 169 F. 2d 317, we found that the appellees had conspired against appellant in violation of the Sherman and Clayton Acts. We left the form of the decree to the Court below. A decree was entered in the District Court on December 13, 1948. The form of that decree gives rise to this appeal.

[*Decree Appealed from*]

By its first paragraph, the decree states that the existence of the monopoly, of the conspiracies and attempts to bring it about "and the contracts, combinations and agreements of the defendants, among themselves or with others, resulting in such monopoly and in the restraint of interstate trade and commerce as found by the Court are declared to be illegal and are enjoined * * *." Paragraph 2 then goes on to more specifically enjoin the appellees from:

> "(a) Monopolizing or attempting to monopolize the exhibition of feature motion pictures on first run in the Borough of Ambridge, or from entering into, engaging in or consummating, directly or indirectly, expressly or impliedly, by means of discrimination in prices and terms, or by any other means or device, any such monopolization or any such restraint of interstate trade or commerce.
>
> "(b) Enforcing, continuing, performing or acting under any provisions in existing contracts or license agreements between the distributors-defendants and the exhibitor-defendants having the effect of such monopolization, and entering into, executing or performing, directly or indirectly, expressly or impliedly, any provisions in any other such license agreements, franchise or arrangements whatsoever having the same effect.
>
> "(c) Conspiring to protect or perpetuate any such monopoly in the exhibition of motion pictures on the first run in the Borough of Ambridge, or such restraint of, or agreement or conspiracy to restrain such interstate trade, or commerce in motion pictures, or entering into, engaging in, accomplishing or consummating, directly or indirectly, expressly or impliedly, and agreements or conspiracies having the effect of illegality.
>
> "(d) Licensing their feature motion pictures for first run performance in the Borough of Ambridge to any one or more of the defendants without giving plaintiff an opportunity to inspect and negotiate for said pictures equal to and in all respects the same as the opportunity afforded any other exhibitor."

[*Decree Defective in Lacking Finality*]

Appellant complains that the language of 2 (d) fails of its purpose because there is no finality to it, i. e., appellant is merely given the equal opportunity "to inspect and negotiate" for the pictures in question without any provision that he have the same equal opportunity to actually obtain the pictures. The contention is obviously meritorious. The Court below will be directed to modify paragraph 2 (d) of the decree so that it will read as follows:

> "(d) Licensing their feature motion pictures for first run performance in the Borough of Ambridge to any one or more of the defendants without giving plaintiff an opportunity to inspect, negotiate for and obtain said pictures equal to and in all respects the same as the opportunity afforded any other exhibitor."

Appellant urges that a new clause should be inserted in the decree in order to protect the playing position of the Penn Theatre with particular reference to the time for the showing in Ambridge of the pictures in question after the latter have been exhibited in Pittsburgh. Appellant is entitled to fair protection in this respect and any future change of playing position should be at the direction of the Court. Therefore the Court below will be directed to add a new sub-

paragraph to paragraph 2 of the decree, to read as follows:

"(e) From impairing, reducing or changing the playing position of the Penn Theatre which prevailed as of April 30, 1944, until the further order of the Court."

[*Burden of Showing Compliance not Unreasonable*]

Appellant also suggests that there should be a provision in the decree placing the burden of proving compliance with its terms upon the appellees. This is strenuously opposed by the appellees who maintain that the mere entry of the decree assures appellant of the relief to which he is entitled. While there may be considerable to that argument, we are interested primarily in seeing to it that the decree really works out in practical fashion as intended. Subject to appeal on the merits, the issue here has been determined and we are desirous of eliminating as far as possible, any excuse for unnecessary, harassing litigation by either side. Having appellees establish compliance with the decree will be of substantial help to that end. This will cause no undue hardship to appellees. Indeed, it can be far more easily and satisfactorily accomplished by them than by appellant. Within their own organization, nationwide statics are readily available concerning film rentals and other comparative picture and theatre data. Most of such special knowledge would be difficult if not impossible for appellant to obtain. The procedure indicated finds strong support in *United States v. Paramount,* 334 U. S. 131. In that case, with respect to clearances, the Expediting Court had put the burden of sustaining the legality of any clearance provision when attacked, upon the distributor. The Supreme Court in upholding this, said at page 148:

"To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive efforts. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law."

Though there is little, if any, question of clearance before us at this time, the analogy is very close and the reasons the appellees should here have the burden of showing compliance are identical with those given by the Supreme Court in the *Paramount* opinion, *supra,* for placing the burden on the distributor of showing the legality of clearance. Accordingly, the Court below will be directed to add a new paragraph 3 to the decree which will read:

"3. In any proceeding instituted by plaintiff in connection with the alleged violation of this decree in the future at any time by any of the defendants, the burden of proving compliance with the terms of the decree shall be upon the defendants."

The present paragraph 3 of the decree reads:

"This decree is final, but jurisdiction of this cause is retained for the purpose of enabling any party to move to modify any of the provisions of this decree other than those relating to damages or counsel fees."

The language in that paragraph referring to damages or counsel fees is inept as there is no other mention in the decree, of such items. The Court below will be directed to change the paragraph number of this paragraph from 3 to 4 and to modify the paragraph to read:

"4. This decree is final, but jurisdiction of this cause is retained for the purpose of enforcing this decree or of enabling any party to move to modify any of the provisions of this decree."

The Court below will be directed to renumber the present paragraph 4 as paragraph 5.

As modified in the above respects, the decree should give appellant the protection contemplated by our opinion, *supra.* There is no present need therefore, or passing upon appellant's remaining suggestions regarding the decree.

[*Remanded for Modification*]

The decree below will be vacated to the extent indicated by this opinion and the case will be remanded to the District Court with directions to modify the decree as outlined in this opinion.

[¶ 62,467] Bordonaro Bros. Theatres, Inc., v. Paramount Pictures, Inc., et al.

In the United States Court of Appeals for the Second Circuit. No. 227, October Term, 1948. Argued May 12, 1949. Decided August 9, 1949.

Appeal from the United States District Court for the Western District of New York.

Sherman Antitrust Act

Proof of Conspiracy—Prima Facie Case—Province of Jury.—A showing of the relative merits as to size, location and facilities of two theatres, between which there is alleged to be discrimination pursuant to a conspiracy in the awarding of first-run film leases, and introduction of evidence of negotiations between the plaintiff exhibitor and the defendant distributors for such first-run films, where plaintiff's competitor was wholly owned by one of the defendants, make out a prima facie case of unlawful conspiracy sufficient to take the case to the jury over the motions of defendants. The relativity of advantages between the two theatres is a factual issue and a decision thereon is a proper function of the jury. The fact that one of the defendants had favored plaintiff's competitor even before the alleged conspiracy, and that its policies did not, during the conspiracy, coincide with those of the other defendants, does not indicate lack of evidence justifying the removal of the case from the jury, but rather presents questions for the decision of the jury.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1220.431.

Proof of Conspiracy—Province of Jury—Quantum of Proof of Inferences.—When more than one inference of fact can be drawn reasonably from the proof adduced in a case, it is for the jury to determine which one shall be accepted, and the rule which places upon the plaintiff the overall burden of proving his whole case does not mean that the inference argued for by him need be more thoroughly proved than the other, provided both are reasonable. Since conspiracy, if well planned and operating effectively, can seldom be proved by direct evidence, reliance must be had upon the reasonable inferences drawn from the conduct of the alleged conspirators in the light of the circumstances surrounding their actions.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1220.431, 1610.316.

Private Damage Suits—Procedure and Pleadings—Inconsistency and Variance Objections not Tenable.—Inconsistency between two verdicts—one defendant being acquitted and a judgment being entered against the other—is not a valid objection to the judgment, since the question on review is not whether one verdict is consistent with the other, but whether the verdict is consistent with the evidence. Further, the objection of variance between pleadings and proof, and the judgment, is not received favorably unless the variance is harmful in tending to mislead the defendant as to the nature of the case he must defend. Defendants cannot claim they have been misled when a treble damage suit is brought in the wake of, and in an atmosphere of monopoly the same as in the prior government action against them.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1630.614.

For plaintiff-appellee: F. T. Anderson, Philadelphia (Gray, Anderson, Schaffer & Rome, Philadelphia, and Skadden, Arps, Slate & Lyon, New York City, on the brief), for Bordonaro Bros. Theatres, Inc.

For defendants-appellants: Frank G. Raichle, Buffalo, N. Y. (Raichle, Tucker and Moore, and James O. Moore, Jr., all of Buffalo, N. Y., on the brief), for Paramount Pictures, Inc., and Warner Bros. Circuit Management Corporation.

For defendant-appellee: Sidney B. Pfeifer, Buffalo, N. Y., for RKO Radio Pictures, Inc.

Before CHASE, CLARK and DOBIE, Circuit Judges.

[*Syllabus*]

Action by Bordonaro Bros. Theatres, Inc., against Paramount Pictures, Inc., Warner Bros. Circuit Management Corporation, RKO Radio Pictures, Inc., and others for treble damages and other relief for violation of the antitrust laws, 15 U. S. C. A. § 1 *et seq.*, injuring plaintiff in its operation of

the Palace theatre in Olean, New York. From a verdict of $28,500 and resulting judgment of $85,500, plus costs and attorneys' fess of $18,998.44, for the plaintiff against defendants Paramount Pictures, Inc., and Warner Bros. Circuit Management Corporation, they appeal. From a judgment setting aside a verdict against RKO Radio Pictures, Inc., plaintiff appeals.

Affirmed on the appeal of defendants Paramount Pictures, Inc., and Warner Bros. Circuit Management Corporation. Reversed on plaintiff's appeal and remanded for the entry of an appropriate judgment on the verdict against RKO Radio Pictures, Inc.

[*Nature of Action*]

CLARK, Circuit Judge: This is a treble-damage action under the antitrust laws, 15 U. S. C. A. §§ 1, 2, 15, by an independent motion picture exhibitor brought originally against thirteen defendants, including major companies engaged, with their subsidiaries and affiliates, in one or more of the various phases of the production, distribution, and exhibition of motion pictures. It comes in the wake of the recent decision of the United States Supreme Court upholding lower court findings of a nationwide conspiracy to restrain competition in and to monopolize the distribution and exhibition of motion pictures by the named defendants. *United States v. Paramount Pictures*, 334 U. S. 131; and see also *Schine Chain Theatres v. United States*, 334 U. S. 110; *United States v. Griffith*, 334 U. S. 100. The central issue here, as in our recent case of *Fifth and Walnut, Inc. v. Loew's Inc.*, 2 Cir., July 19, 1949, is whether the admitted inability of plaintiffs to obtain first-run [1] films for their theatre sprang from a conspiracy to exclude them from the first-run field or whether it was the natural result of independent business judgments as to the relative value of their exhibition facilities.

[*Facts*]

Since 1922 the City of Olean, New York, has been offered its motion picture fare in two first-run theatres, the Palace and the Haven. A second-run theatre, known as the Gem, and later as the State, is also available. The Palace Theatre has been owned and operated by the Bordonaro family, first as a partnership and later as a corporation, for some thirty years. Until 1930 the Haven theatre was independently owned and operated, and from 1922 to 1930 the two theatres were operated jointly under a local pooling agreement. The agreement was terminated in 1930, and the Haven became a member of the Warner chain. It was leased to Intrastate Theatre Corporation, a wholly-owned subsidiary of Warner Bros. Pictures, Inc., and operated by Warner Bros. Circuit Management Corporation, another wholly-owned subsidiary and one of the appellants here. Immediately after this transfer, the Haven became the exclusive first-run outlet for Warner Bros. Pictures, Inc., Radio-Keith-Orpheum Corporation, United Artists Corporation, Loew's Incorporated, Twentieth Century-Fox Film Corporation, and Universal Corporation films, and since 1931 for Paramount Pictures, Inc., as well. At various times since 1930, Loew's, Fox, and Universal began to divide their product equally between the Haven and the Palace, although plaintiff alleged that its contract contained discriminatory features. During the period complained of, plaintiff obtained none of the product of Warner, Paramount, RKO, or United Artists, and, on allegedly discriminatory terms, half the product of Loew's, Fox, and Universal, and all of the product of Columbia Pictures Corporation (not a defendant).

This action was begun in September, 1946. The complaint was dismissed as to certain of the defendants by stipulation before trial, and as to others by the court at the close of the plaintiff's case. The jury returned verdicts in favor of several of the remaining defendants, leaving in the case only Paramount Pictures, Inc., which itself and through its subsidiaries and affiliates produces, distributes, and exhibits films on a nation wide basis; RKO Radio Pictures, Inc., a distributor subsidiary of Radio-Keith-Orpheum Corporation, which is also a producer, distributor, and exhibitor for the national market; and Warner Bros. Circuit Management Corporation. Against these three defendants the jury return a verdict of $28,500. The court denied motions by Paramount and Warner to set aside the verdict and entered judgment against them for the damages trebled to the figure of $85,500, for attorneys' fees of $18,000, and for costs

[1] "Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management." *United States v. Paramount Pictures*, 334 U. S. 131, 144, note 6.

of $998.44. It did, however, set aside the verdict against RKO. Defendants Paramount and Warner appeal from the judgment against them, and plaintiff appeals from the judgment in favor of RKO.

[*Evidence Adduced at Trial*]

To prove its case plaintiff at the trial introduced a considerable mass of evidence on the relative merits, past and present, of the Palace and Haven theatres, and on the negotiations between plaintiff and the major distributors, including defendants Paramount and RKO, with regard to the distribution of first-run features. This appears to us well-designed to support a prima facie case and carry the issues beyond the defendants' motions to the jury. Obviously a conspiracy such as was here charged rarely can be proved by direct evidence from the participating parties themselves; reliance must be had upon the reasonable inferences drawn from their conduct in the light of the surrounding circumstances. Here plainiff relied primarily upon a showing of the superior facilities afforded by the Palace over the Haven theatre in location, size, and equipment, the denial by these defendants of their products to the plaintiff, and the consequent poor showing in comparison of the Palace with the smaller Haven theatre. There was supplementary evidence of various kinds, including the showing of some leniency to plaintiff's theatre on the part of certain defendants at the very time only of disputes among themselves, the endeavors to draw plaintiff into their operations on various terms, and the statements of certain agents at various times as to the difficulties and disadvantages of independent operation of movie theatres. This evidence did not apply to all the defendants or cover all the period involved, but it was submitted to the jury for the latter's evaluation under a correct charge. True, the defendants sharply controverted this view and presented evidence to show that the Haven was the more desirable theatre. But it is hard to see what function the jury is to serve in these trials if it is not to be permitted to evaluate just this kind of evidence.

Defendants, in urging that the jury should not have been permitted to draw the inferences of combined and concerted action against plaintiff which it obviously did, state a standard of proof which we have rejected even in criminal cases. Where more than one inference can reasonably be drawn from the proof, it is for the jury to determine the proper one; the burden of proof of the entire case resting upon the plaintiff does not mean that the court should so far encroach upon the province of the jury as to require that one inference should be more thoroughly proven than another if both are reasonable and rational. *United States v. Spagnuolo,* 2 Cir., 168 F. 2d 768, certiorari denied *Spagnuolo v. United States,* 335 U. S. 824, and cases cited therein; *United States v. Sherman,* 2 Cir., 171 F. 2d 619, 621. So evidence tending to show that an independent exhibitor, operating a theatre at least as desirable as the theatres of the exhibitors affiliated with the major concerns, was refused first-run films for exhibition was held to make out a prima facie case under the antitrust laws in *Bigelow v. RKO Radio Pictures,* 327 U. S. 251. Cf. *William Goldman Theatres v. Loew's, Inc.,* 3 Cir., 150 F. 2d 738. Here the additional evidence as to the sales policies of the distributor defendants and their attempt to buy out plaintiff served to strengthen plaintiff's case, at least to the extent that the jury believed it.

Damages in such a situation necessarily cannot be assessed with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, "while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted." *William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada,* 2 Cir., 42 F. 2d 152, 155, certiorari denied *Associated Bill Posters of U. S. and Canada v. William H. Rankin Co.,* 282 U. S. 864. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy.

[*Jury's Finding Held Reasonable*]

Defendants object that the jury verdict and judgment against them is inconsistent with the verdict in favor of other defendant distributors, and that it constitutes a fatal variance between the pleadings and proof, and the judgment. But "the question on review should not be whether the verdict against the corporations is consistent with the acquittal. * * * Rather it should be whether the conviction is consistent with the evidence." *United States v. General Motors Corp.,* 7 Cir., 121 F. 2d 376, 411, certiorari denied *General Motors Corp. v. United States,* 314 U. S. 618; cf. *United States v. Austin-Bagley Corp.,* 2 Cir., 31 F. 2d 229, 233, certiorari denied *Austin-Bagley Corp. v. United States,* 279 U. S. 863. And we cannot say

that a jury verdict against all the defendants remaining in the case at the time it was submitted to the jury would have been inconsistent with the evidence. As a practical matter the choice made by the jury, far from being strange, may be viewed as showing discriminating scrutiny of the evidence, in the light of the differences in conduct of the defendants pointed out above. Nor does there seem any substance in the technical objection of variance. This objection is certainly not favored in modern law; in any event it is harmless unless it serves to mislead an opponent. See Clark on Code Pleading, 739, 740, 2d ed. 1947. It is difficult to see how these defendants could have been misled, in the light of the background furnished by the *Paramount* case, *supra,* since the conspiracies clearly developed out of a general atmosphere of monopoly and restraint of competition. Even a single vertical conspiracy between Paramount, as a distributor, and Warner, as an exhibitor, would scarcely be outside the scope of the pleadings and proof, against such a background. By contrast, the variance held to be fatal in *Kotteakos v. United States,* 328 U. S. 750, a criminal case, involved an indictment charging thirty-two defendants with participation in a single general conspiracy, and proof of thirty-two quite separate and independent conspiracies. As we observed in *United States v. Austin-Bagley Corp., supra,* 31 F. 2d at page 233, "it is not a variance to fail to convict all those indicted, though strictly the agreement laid is then not the agreement proved."

In what we have just said, we have considered the case as it was submitted to the jury. Moreover, since we think the judge was in error in setting aside the verdict against RKO we have no occasion to consider the objections of these defendants to the judgment against them after RKO's removal from the case. In his memorandum the judge thought the evidence against RKO insufficient because RKO did not change its policy of preference for the Haven theatre with the advent of Warner Bros. into the exhibition field in Olean and the choice of theatres was a debatable question about which distributors might reasonably differ and further because RKO's policy did not coincide with any uniform selling policy of other distributors. But what happened under the original pooling agreement does not seeem too relevant for the later history; and, however single may RKO's policy have appeared (in this one instance as compared to its usual co-operation noted in the Supreme Court cases), it did amount in net consequence to that of the others. It appears to us that the judge has recounted factors appropriate for the jury to consider, but not for taking the case from the jury. The existence of an agreement in restraint of competition is always difficult to prove. As the agreement becomes established, not only is its operation better concealed, but its effects are more and more difficult to disentangle from the effects of business hazards outside the scope of the antitrust law. Knowing that a conspiracy to monopolize the first-run exhibition of motion pictures existed during the period in suit, and realizing also that certain theatres are necessarily better adapted for first-run showings, judges should be most circumspect in overturning a jury verdict including or excluding a particular theatre from the scope of the conspiracy.

[*Judgment Affirmed and Verdict Ordered Reinstated*]

Upon the appeal of defendants Paramount Pictures, Inc., and Warner Bros. Circuit Management Corporation, the judgment is affirmed. Upon the plaintiff's appeal, the judgment in favor of RKO Radio Pictures, Inc., is reversed and the action is remanded to the district court for the reinstatement of the verdict against that defendant and for the entry of such judgment as may be appropriate in the light of that reinstatement.

[¶ 62,468] Western Union Division, The Commercial Telegraphers' Union, American Federation of Labor v. The United States of America, et al.

In the United States District Court for the District of Columbia. Civil Action No. 3670-48. May 24, 1949.

Communications Act

Agency Agreement between Telephone and Telegraph Companies—Lessening of Competition—Antitrust Violation not Established.—The Court refused the request of a national labor union representing affected employees to annul an order of the Federal Communications Commission which granted the application of a telegraph company for authority to discontinue operation of certain offices and to substitute an agency office to be operated

by the respective local telephone company operating in each community. It was held that the arrangement between telegraph and telephone companies did not constitute a merger nor did it establish a restraint of trade. While there may be some lessening of competition, such result was not in itself prohibited by the Sherman and Clayton Acts.

See the monopoly provisions of the Communications Act, ¶ 682.

For the plaintiff: Harry L. Isikoff and Frank Bloom, both of Washington, D. C.

For the defendant: Wm. B. Hickey, Department of Justice; Max Goldman and Edwin S. Smith, both of the Federal Communications Commission.

Before PRETTYMAN, Circuit Judge, and HOLTZOFF and TAMM, District Judges.

TAMM, J.: Plaintiff, a national labor union representing affected employees, brings this action to set aside, annul and permanently enjoin the enforcement of an Order and Authorization adopted by the Federal Communications Commission on May 27, 1948 and issued on June 7, 1948, which Order and Authorization granted an application of the Western Union Telegraph Company for authority under § 214 of the Communications Act of 1934 [1] to discontinue its operation of six Class 1-B telegraph offices, and to substitute in lieu of Western Union operation, an agency office to be operated by the respective local telephone company operating in each community. The intervenor-defendant, The Western Union Telegraph Company, is a corporation engaged in furnishing public telegraph communication in the six communities in Ohio which are involved in this application, as well as at various points throughout the United States and in some foreign countries.

[*Jurisdiction of Court*]

The jurisdiction of this Court rests on the provisions of Section 402 (a) of the Communications Act of 1934, as amended,[2] incorporating therein certain provisions of the Urgent Deficiencies Act of October 22, 1913 [3] relating to the enforcing and setting aside of the Orders of the Interstate Commerce Commission and Title 28, United States, Code, Sections 1398, 2284 and 2321-2325 revising, reenacting and codifying certain provisions of said Act of October 22, 1913.

[*Pertinent Statutes*]

The statutes involved are Section 214 of the Communications Act of 1934, as amended by Public No. 4, 205; 78th Congress, 1st Session, approved March 6, 1943; 57 Stat. 11, 12,[4] and Sections 7 and 8 of the Administrative Procedure Act, 60 Stat. 241, 242.[5]

[*Contentions of Plaintiff*]

The plaintiff in its Complaint charges that the Federal Communications Commission in issuing its Order and Authorization of June 7, 1948 acted in an "illegal and void" manner for the reasons that:

"1. The Order and Authorization is contrary to the anti-monopoly laws.

"2. The Telephone Company of Ohio is not a proper agent.

"3. Plaintiff was not accorded a fair hearing, in that there was considered as evidence, by the Commission, matter not in the record.

"4. No proposed report as to certain material evidence and issues was prepared and served upon the Plaintiff by the Commission, as provided by the Administrative Procedure Act.

"5. The Commission has disregarded its own findings in order to achieve a result violative of law.

"6. The Order and Authorization are contrary to the public interest and do not meet the requirements of Section 214 of the Communications Act of 1934 as amended.

"7. The Order of the Commission of May 27, 1948 issued simultaneously with and as a part of its disposition of Exhibits 'A' and 'B' is an abuse of the Commission's discretion and is arbitrary and improper."

[*Statement of Facts*]

The intervenor-defendant, Western Union Telegraph Company, filed a motion to dismiss the Complaint on the ground that the plaintiff lacked legal capacity to maintain this action. The Government filed a motion for summary judgment on the pleadings and exhibits. Oral argument was heard by the Court on April 12, 1949, counsel having previously stipulated that the parties were in complete agreement as to the facts, and that arguments before the Court would relate

[1] 47 U. S. C. 214.
[2] 47 U. S. C. 402(a).
[3] 38 Stat. 219.
[4] 47 U. S. C. 214.
[5] 5 U. S. C. 1006 and 1007.

only to the question of law arising from the stipulated facts. Briefly stated the facts in this case are as follows:

The application which initiated the proceedings resulting in the Commission Order of May 27, 1948, was filed by Western Union with the Federal Communications Commission on December 27, 1946 and amended pursuant to motion filed May 28, 1947. In the application, Western Union requested authority to close its main office at each of six communities in Ohio aand to substitute, in lieu thereof, service through a teleprinter-operated agency office to be established in the office of, and to be operated by, the respective local telephone company operating in each community. Such telephone companies are managed by The Telephone Service Company of Ohio. Under the terms of a contract between Western Union and The Telephone Service Company of Ohio on behalf of itself and the companies under its management, the respective telephone companies, upon a grant of this application, will provide telegraph service as agents of Western Union in each of the six communities involved. In addition, it is also provided in the contract that telephone companies under the management of The Telephone Service Company of Ohio will act as Western Union agents in 116 communities adjacent to the six involved in this application.

At the time of the merger of Postal Telegraph, Inc. and Western Union in October, 1943, Postal had a number of agency agreements with telephone companies serving various communities in Ohio, functioning under the management of The Telephone Service Company. Under the terms of these agreements the telephone companies furnished 24-hour telegraph service to various Ohio communities through a combination of direct office representation and subscriber telephone stations. At certain of these places, including the six communities in the instant application, Western Union also maintained company-operated offices. Subsequent to the merger, when the operations of the Postal and Western Union were integrated, Postal's agreements with The Telephone Service Company of Ohio were kept in effect by Western Union in order to continue the rendition of 24-hour telegraph service in these communities, not then available at the Western Union offices.[6] According to the application filed with the Federal Communications Commission and testimony offered by the Western Union Telegraph Company at the hearings held on this application, the telephone companies did not realize sufficient revenue from the handling of telegraph traffic after the merger to justify continued participation in telegraph operations under the arrangements then in effect. On May 8, 1946, Western Union concluded an agreement with The Telephone Service Company, and it is to effectuate this agreement that the application was filed.

Essentially, the plan is to relocate the teleprinter and associated telegraph equipment presently in use in Western Union's company-operated offices in the commercial offices of the respective telephone companies where the equipment would be operated by personnel trained by Western Union but employed by and under the direct supervision of the telephone company.

After the filing of the application by Western Union Telegraph Company with the Federal Communications Commission a hearing upon the application was held in Mt. Gilead, Ohio, one of the communities involved, on May 14 and 15, 1947, pursuant to the Commission's Order of April 10, 1947, designating the application for hearing.

Western Union appeared at the hearing and offered evidence in support of its application. Appearances were also entered on behalf of The Commercial Telegraphers' Union (plaintiff herein), The Telephone Service Company of Ohio and the National Association of Railroad and Utilities Commissioners, who were given leave to intervene by the Commission's Order designating the application for hearing. The Hydraulic Press Manufacturing Company appeared at the hearing and was permitted to intervene upon motion before the Commission.

A motion to reopen the record for the purpose of introducing certain exhibits annexed thereto was filed by plaintiff on June 20, 1947, and subsequently withdrawn by letter dated August 7, 1947.

On June 30, 1947, Brief and Argument were filed by plaintiff and Proposed Findings of Fact and Conclusions were filed by

[6] The effect of Section 214 of the Communications Act of 1934, as amended, effective March 6, 1943, was to prevent Western Union from reducing the hours of service to these communities, unless otherwise authorized by the Commission.

Western Union. The Commission adopted a Proposed Report on February 12, 1948, in which it concluded that neither the present nor future public convenience and necessity would be adversely affected by a grant of the application. A copy of the Proposed Report was sent to the Public Utilities Commission of Ohio and by letter dated February 24, 1948, the Ohio Commission advised that it had "no specific comment to make in favor of or in opposition to the factual situations as developed" in the Proposed Report; however, comments were made with respect to jurisdictional aspects of the case. The National Association of Railroad and Utilities Commissioners also filed on February 24, 1948, a statement commenting with respect to the jurisdictional problem but did not discuss the merits of the Proposed Report. On March 4, 1948, plaintiff filed exceptions to the Proposed Report and requested oral argument. On March 9, 1948, Western Union filed comments with respect to the above-mentioned letter and statement of the Ohio Commission and the National Association of Railroad and Utilities Commissioners, respectively; and, on March 16, 1948, filed a statement in support of the Proposed Report.

Oral argument was held before the Commission *en banc* on March 22, 1948, at which time the record was reopened for the purpose of receiving two additional exhibits upon request of the plaintiff.

On April 6, 1948, plaintiff filed a motion to reopen the record and take further evidence with respect to correspondence between the Commission and the Department of Justice in regard to the application herein. Opposition to this motion was filed by Western Union on April 9, 1948; and a Supplemental Memorandum was filed by plaintiff on April 15, 1948.

On May 26, 1948, plaintiff filed a second motion to reopen the record; this time to receive in evidence the current bargaining agreement between Western Union and plaintiff. Opposition to this motion was filed by Western Union on June 1, 1948.

The motion of April 6, 1948, was dismissed in the Commission's Final Report adopted May 27, 1948, and issued June 7, 1948. The motion of May 26, 1948, was denied in a separate Order, dated May 27, 1948.

The Commission adopted a Final Report on May 27, 1948, and issued the same on June 7, 1948. A majority of the Commission found and concluded that a grant of Western Union's application would not adversely affect the present or future public convenience and necessity, and the Order and Authorization granting the application was adopted and issued at the same time. Two Commissioners dissented, and one Commissioner, who joined in the majority decision, appended additional views.

As basis for its decision and order, the Commission found in its Report that the proposed agent was capable, by reason of experience, availability of trained personnel, and financial qualifications, to render the service as proposed in the application; that the proposed telephone company-operated agency offices should provide service equal to, if not better than, that presently available through the Western Union Class 1-B offices in the six communities involved; that improved and additional services of value to those communities, as well as to 116 communities adjacent thereto, would result; that lower charges to the public for service in many instances would result; that certain savings would result to Western Union under the proposed agency operation if gross operating revenues at each of the six communities continued at present levels, and that it did not appear that a substantial reduction, if any, in telegraph revenue should result from the proposed agency operation.

With respect to the applicability of the Federal anti-trust laws, the Commission stated that its decision should not be construed as a determination as to whether or not operations pursuant to the agreement between The Telephone Service Company of Ohio and Western Union might or would result in any violation of any law relating to monopolies or unreasonable restraints of trade. However, the Commission did give consideration to the effect on competition of a grant of the application, and concluded that approval in this case would not have substantial effects on competition generally in the absence of a widespread program of such conversions and that there was no evidence before the Commission to show that Western Union contemplated such a program. The Commission also found that whatever effects there may be on competition in this situation were out-weighed by

the benefits which it had found would inure to the public from the proposal and that the incentive from commissions accruing to the proposed agency operations by Western Union, as represented by it on the record, would serve to mitigate the effects on competition from such arrangements.

Upon the basis of the above findings the Commission concluded that neither the present nor future public convenience and necessity would be adversely affected by a grant of the application.

A petition for rehearing and stay was filed by plaintiff on June 18, 1948. An opposition to the petition was filed by Western Union on June 28, 1948. Comments in support of the petition were filed by plaintiff on July 23, 1948. The petition was denied by the Commission's Order of August 4, 1948.

On August 5, 1948 plaintiff filed a motion to stay the effective date of the Commission's Order and Authorization pending institution of appropriate court proceedings to obtain judicial review. Opposition to this motion was filed by Western Union on August 10, 1948. By Order, dated August 19, 1948, the Commission suspended the operation of its Order and Authorization for a period of 30 days, and thereafter plaintiff filed its complaint in this court.

[*Violation of Antitrust Laws*]

The first grounds upon which plaintiff bases its action is that the Order and Authorization of the Federal Communications Commission is "contrary to the anti-monopoly laws." While the Federal Communications Commission made no formal finding upon the possibility of an Anti-Trust Law violation occurring from the consummation of the proposed agency agreement, it did, according to the record before this Court refer the contract between the Western Union Telegraph Company and The Telephone Service Company of Ohio to the Department of Justice. The record discloses that the Federal Communications Commission did by letter of August 17, 1947, refer to the Department of Justice the contract between Western Union Telegraph Company and The Telephone Service Company of Ohio, for study to determine if the proposed agreement would "eliminate competition and constitute a merger in violation of the Federal Anti-Trust laws." The Department of Justice, by its letters of August 29, 1947 and October 24, 1947, was of the opinion that there was no violation of the Federal Anti-Trust laws. Although the Federal Communications Commission did not consider the exchange of correspondence as evidence in the preparation of its Report, the Court has given consideration to this correspondence since it constituted a specific item in the plaintiff's complaint. The Court has reviewed this contract and Report in the light of all of the facts in this situation, as measured by the pertinent provisions of the Sherman Act[7] and the Clayton Act of October 15, 1914.[8] The proposed arrangement certainly does not constitute a "merger," nor does it establish any "restraint of trade." The public will still have available the alternate means of communication, of the telephone or of the telegraph, and the only physical change is that the members of the public desiring to send a telegram will proceed to the public office of the telephone company, instead of the public office of the telegraph company to send a telegram over telegraph-company-owned and supervised equipment, and telegraph-company-owned and operated wires. The operator of the telegraph-company equipment in the telephone company office, while paid by the telephone company, will be trained by the telegraph company. Messages will pass from the telephone company office over Western Union wires to the nearest relay office of the Western Union Telegraph Co. The Court emphasizes that the public will still be left a choice between telephone and telegraph service at the six affected communities and that the proposed change in these communities to the agency operation "will result in benefits to the public." While it is true that there may be some "lessening of competition" such results are not, *per se*, prohibited by Congress in the Sherman and Clayton Acts. The phraseology "lessening of competition" is fundamentally descriptive of a factor judicially used as a determinent in dealing with factual situations to establish whether a prohibitive statutory restraint of trade or monopoly results from a particular state of facts. The test applied by the Supreme Court in the *Columbia Steel* case[9] is whether

[7] 15 U. S. C. 1-11.
[8] 15 U. S. C. 12-27, incl.
[9] *United States v. Columbia Steel Company, et al.*, 334 U. S. 495.

the elimination of competition constitutes an "unreasonable restraint," since only unreasonable restraints are forbidden.[10]

A further factor of importance in the Court's opinion upon the matter of the applicability of the Anti-Trust laws to this case is the fact that the proposed agreement is undertaken only after formal approval by the appropriate Government agency. In fact § 214 of the Communications Act[11] requires a certificate from the Federal Communications Commission approving the proposed action before it can be legally undertaken. The Court of Appeals for the District of Columbia has ruled that transactions which might be illegal under the Anti-Trust laws "if brought about by (private) agreements or other devices" may well be legal if effectuated with (proper) government sanction. Mr. Justice Edgerton, speaking for the Court in *Mackay Radio & Telegraph Co. v. F. C. C.*, 68 App. D. C. 336 at 338, in discussing similar circumstances pointed out that "The anti-trust laws are aimed at private action, not at governmental action." The Court, therefore, rules that the proposed Order and Authorization cannot be set aside, annulled or enjoined on the grounds that it is contrary to the anti-monopoly laws."

[*Telephone Company as Proper Agent*]

Plaintiff's second ground for its action is that The Telephone Company of Ohio is not a proper agent. Plaintiff cites references in the record before the Federal Communications Commission to allegedly poor telephone service now being rendered by The Telephone Service Company of Ohio, particularly through The Ohio Central Telephone Company at Mt. Gilead, Ohio, and contends that the quality of telegraph service now being received in the area served by The Telephone Service Company of Ohio will be adversely affected by the grant of the application.

The Telephone Service Company of Ohio is an independent telephone company, unaffiliated with the Bell System. It conducts a general telephone business in the State of Ohio through various subsidiary and affiliated corporations owning and operating telephone exchanges in various cities and towns in Ohio, including the six communities involved in the subject application. Each of the local telephone companies through which telegraph service is to be rendered under the proposed agency arrangements is in a financially sound condition. The proposed agent and its operating companies have had substantial experience in rendering telegraph service as agent of the Ohio Postal Telegraph-Cable Company in a large number of communities until the merger of the latter company with Western Union in 1943, and as agent of Western Union in a number of communities since merger.

Several references appear in the record of the proceedings before the Federal Communications Commission to allegedly unsatisfactory telephone services now being rendered by the proposed agent, particularly at Mt. Gilead, Ohio, on the basis of which plaintiff argues that the Commission's conclusion that the proposed agent is qualified to provide telegraph service "is contrary to the evidence." From a consideration, however, of the evidence which is pertinent to this matter and which is entirely ignored by the plaintiff, it is apparent that the causes of such unsatisfactory telephone service do not reflect upon the telephone company's qualifications or ability to act as an agency for telegraph service as proposed in the application or otherwise indicate that the quality of telegraph service under agency operation will be affected to any greater extent thereby than under present arrangements.

The Commission heard evidence that the inability of the telephone company to provide a quality of telephone service desired by the public has been due to wartime shortages of equipment and trained personnel, and that the telephone company has been making every effort to overcome these deficiencies by the construction and installation of new facilities already on order from the manufacturers. Moreover, the Commission was advised that under the agency agreement between the telephone company and Western Union, the latter will furnish, install, and maintain in all major respects the equipment to be used in the agency offices; and, that a number of teleprinter operators experienced in telegraph operations are available to the proposed agent and that others will be trained by Western Union. Other evidence was considered by the Commission in reaching its conclusion that The Tele-

[10] *The Standard Oil Company v. United States*, 221 U. S. 1.

[11] 47 U. S. C.

phone Service Company of Ohio was a competent agent, and the dissenting opinion of two Commissioners states that "We do not challenge the finding of the majority that, under existing circumstances, the substitution of telephone company agencies for the Western Union offices will result in benefits to the public as well as to Western Union." [12]

The Court is precluded from substituting its judgment on such matters for that of the Commission.[13] The record contains substantial evidence supporting the Commission's findings that those findings are, consequently, conclusive. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." [14]

[*Consideration of Correspondence Between FCC and Department of Justice*]

Plaintiff next contends that it was not accorded a fair hearing, in that there was considered as evidence by the Commission, matters not in the record. This contention, apparently, relates to the correspondence exchanged between the Federal Communications Commission and the Department of Justice on the question of the applicability of the anti-trust laws. It appears, however, that the correspondence in question resulted from plaintiff's suggestion in its "Brief and Argument" filed with the Commission that the contract between Western Union and The Telephone Service Company of Ohio be referred by the Commission to the Department of Justice for investigation and prosecution under the anti-trust laws. In its proposed Report the Commission quoted the following excerpt from the Department of Justice letter of October 24, 1947:

> "We see no merit in the contention that a designation of telephone companies to operate 13 telegraph offices as agents of the Western Union Company would constitute a merger of the telephone and telegraph companies. We believe that the inclusion of the clause which you suggest in your letter would be adequate protection to the Government from the standpoint of the anti-trust laws in the event the Commission decides to approve the application for closure of Western Union's offices at designated points and the substitution of telephone agency offices."

It does not appear, however, that the Commission considered the above letter as evidence or that it based any findings of fact upon this correspondence either in its Proposed Report or in its Final Report. In its Final Report the Commission stated that in view of the plaintiff's objection to consideration of the correspondence it had given no consideration to the correspondence in arriving at its final decision.[15] The Court concludes that the record affords no basis for support of this contention of the plaintiff.

[*Violation of Administrative Procedure Act*]

Plaintiff next charges that no proposed report as to certain material evidence and issues was prepared and served upon the plaintiff by the Commission, as provided in the Administrative Procedure Act. In paragraph "Thirteenth" of its Complaint, plaintiff charges that the Commission "did not pass upon the evidence as to the violations of the anti-trust laws, but asserted merely that its order would not be a protection or defense against a charge of violation of said laws." The same paragraph of the Complaint states that:

> "It was only upon the insistence of plaintiff, in its exceptions and upon oral argument, that the Commission had considered the effect of the anti-trust laws, and has made findings of fact thereon, but no proposed findings on the anti-trust issues or facts were ever submitted to plaintiff, despite plaintiff's insistence at the oral argument and in exceptions, all a part of the record before the Commission, that such procedure was necessary in order to comply with the Administrative Procedure Act."

While plaintiff does not identify the specific section of the Administrative Procedure Act which it contends has been violated, the Court assumes from the record before it

[12] Dissenting opinion of Commissioners Coy and Durr.

[13] *Gray v. Powell,* 314 U. S. 402, 412; *Rochester Telephone Corp. v. U. S.,* 307 U. S. 125, 146; *Mississippi Valley Barge Line Co. v. U. S.,* 292 U. S. 282; *Western Paper Makers' Chemical Co. v. U. S.,* 271 U. S. 268, 271; *Virginia Railway Co. v. U. S.,* 272 U. S. 658, 665-6; *Georgia Public Service Commission v. U. S.,* 283 U. S. 765, 775; *Swayne & Hoyt, Ltd. v. U. S.,* 300 U. S. 297, 303, *et seq.*

[14] *Mississippi Valley Barge Line Co. v. U. S., supra; Rochester Telephone Corp. v. U. S., supra; I. C. C. v. Jersey City,* 322 U. S. 503, 512-13; *McLean Trucking Co. v. U. S.,* 321 U. S. 67, 88.

[15] Page 24, footnote 1, last sentence.

that reference is made to 5 U. S. C. 1007.[16] Section (a) requires the issuance of tentative decisions in certain cases. The Federal Communications Commission designated a presiding officer to take evidence in this proceeding. The Commission issued a "Proposed Report" on the application of Western Union Telegraph Company which report meets the "tentative decision" requirement of § 8(a) of the Administrative Procedure Act. The Commission's Proposed Report was issued in lieu of a recommended decision by the presiding officer who conducted the hearing. Prior to the issuance of the Proposed Report, plaintiff was afforded an opportunity to file proposed findings of fact and conclusions of law, but instead plaintiff filed a "Brief and Argument" which contended that the Western Union application for approval of the agency contract should be denied because it constituted an "unlawful merger" of the telegraph and telephone companies, in violation of the anti-trust laws. Plaintiff's argument in this regard was considered and rejected by the Commission.[17] Plaintiff thereafter filed a statement of exceptions to the Proposed Report, as provided in § 8(b) of the Administrative Procedure Act, these exceptions reiterating plaintiff's contention that the agency arrangement violated the anti-trust laws. Plaintiff's exceptions included a request for oral argument before the Commission *en banc,* which hearing was granted pursuant to the provisions of § 409(a) of the Communications Act.[18] At the hearing held by the Commission, plaintiff took virtually the same position contending that the Commission should withdraw its Proposed Report and issue findings on the question of whether the anti-trust laws had been violated. The Commission thereafter issued its Final Report in which it devoted several pages to the consideration of the "applicability of Federal Anti-Trust Laws." [19] The Commission, while holding that it had "no duty as to *enforcement* of the Federal Anti-Trust laws" (italics supplied), nevertheless stated that "the effect on competition of a grant of the application before us is a material consideration in applying the standard of 'public convenience and necessity' in Section 214 of the Communications Act." Thereafter the Commission enumerated the factual considerations on this point which the evidence had brought forth and which the Commission held were such as to justify it in concluding that there appeared to be no reason to deny to the public "at this time the improved and additional services of value which the subject conversions to agency operation will provide." [20]

Thus it appears that the Commission carefully considered the plaintiff's contention concerning the anti-trust laws, after affording plaintiff its statutory right to file and argue its exceptions to the Proposed Report. That the Commission did not adopt plaintiff's contention nor accede to its argument does not constitute a violation of the Administrative Procedure Act on the part of the Commission. The purpose of the cited provisions of the Administrative Procedure Act *(supra)* is to insure procedures by which parties may be fully informed of the issues and proposed grounds of decision and be afforded full opportunity to be heard upon these issues and grounds. Plaintiff was afforded all opportunities required by the Administrative Procedure Act.

[*Findings of FCC as Contrary to Evidence*]

Plaintiff further contends that the Commission disregarded its own findings in order to achieve a result violative of law. This contention set out at length but without clarity is the subject of paragraphs numbered "Eighth," "Ninth" and "Tenth," pages 3 to 6 of the Original Complaint. In essence, plaintiff charges that the findings of the Commission as to the applicability of the anti-trust laws were in direct conflict with certain enumerated sections of the testimony offered during the Commission's hearings. Plaintiff challenges the Commission's Report in which the Commission concedes a diminution of competition as reaching "directly in conflict with the basic laws of the country promoting competition and prohibiting monopolies." Plaintiff further argues on this point that the Commission's findings are in complete abrogation of the Commis-

[16] §§ 8 (a) and (b) of Administrative Procedure Act.

[17] Record of proceedings before the F. C. C., p. 683.

[18] 47 U. S. C.

[19] PP. 23 to 26 of Commission's Final Report.

[20] P. 26 of Commission's Final Report.

sion's previous position.[21] Plaintiff further charges the Commission's Report is contrary to evidence relating to Western Union Telegraph Company's proper supervision of the proposed (agency) operations.

The Court's findings upon these points are adverse to the plaintiff because the testimony cited by plaintiff is not the only or predominant testimony upon the several points specified, and as set forth, *supra,* the Court finds that there is reasonable evidence to support the Commission's findings.

[*Requirements of Communications Act*]

The sixth basis for plaintiff's action charges that "The Order and Authorization are contrary to the public interest and do not meet the requirements of § 214 of the Communications Act of 1934 as amended (*supra*)." This section provides that:

> "(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels:

Thus the standard required by the statute to be applied by the Commission is that of "public convenience and necessity" with a finding that "neither the present nor future public convenience will be adversely affected" by the proposed action. The standard of "public convenience and necessity" is to be so construed as to secure for the public the broad aims of the Communications Act.[22] The purpose of the Act as set forth in § 1 thereof is "to make available, as far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." The Commission's Report sets forth in detail the effects of the proposed agency agreement upon telegraph service and facilities in the six communities involved; it considered the probable financial effects of the proposal upon the earnings of the companies involved; reviewed the probable costs of the telegraph services to the communities in question; set forth the improved facilities which will result from the merger and, as set forth heretofore, considered as a factor in applying the standard of "public convenience and necessity" the effect on competition of the grant of the application of Western Union Telegraph Company for the authority for the agency arrangement.[23]

[21] Commission's Report on Chain Broadcasting, p. 4, footnote 3 of Complaint, that in "The absence of Congressional action exempting the industry from the anti-trust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity."

[22] *Cf. Interstate Commerce Commission v. Parker,* 326 U. S. 60, 69; *New England Divisions* Case, 261 U. S. 184, 189; *Interstate Commerce Commission v. Railway Labor Assn.,* 315 U. S. 373, 376-77; *United States v. Lowden,* 308 U. S. 225, 230; *Texas & N. O. Ry. Co. v. Northside Belt Ry. Co.,* 276 U. S. 475, 479.

[23] In its Final Report, the Commission stated: "Although we have no duty as to enforcement of the Federal Anti-trust laws, the effect on competition of a grant of the application before us is a material consideration in applying the standard of 'public convenience and necessity' in Section 214 of the Communications Act. We are appreciative of the fact that traditionally, a regulated public utility, such as Western Union,

The Court must, in view of these considerations, reject plaintiff's contention on this point.

[*Denial of Motion to Reopen Proceedings*]

The final ground for plaintiff's action is that the Order of the Commission of May 27, 1948, is "an abuse of the Commission's discretion and is arbitrary and improper." The Order of May 27, 1948, denies plaintiff's motion that the record of the Commission be reopened for the purpose of receiving in evidence the current bargaining agreement between Western Union Telegraph Company and the plaintiff. Plaintiff's motion was filed on May 26, 1948. The basis for the Commission's rejection thereof is as follows:

> "It appearing, that, pursuant to the terms of the Commission's Order of April 1, 1947, the Union intervened and participated fully in the proceedings herein; that hearings were held on May 14 and 15, 1947, and a Proposed Report was issued on February 13, 1948; that exceptions to said Proposed Report have been filed by the Union, and pursuant to the request of said Union, oral argument was held before the Commission *en banc* on March 22, 1948;
>
> "It further appearing, That the motion of the Union to reopen the record herein is not timely inasmuch as the existence of the particular contract provisions mentioned above was known by the Union throughout the proceedings herein, and the Union had ample opportunity to offer such provisions for the record;"

The pertinent portion of the contract, which plaintiff believes material and relevant to this proceeding is Article 52(R)(3): "The Company agrees it will not contract out any work which will result in loss of employment for employees covered by this agreement." The plaintiff, pointing out that the Federal Communications Commission is familiar with the contract between plaintiff and Western Union Telegraph Company, since this contract was involved in lengthy hearings before the Commission, contends that the Commission having "over-all control of the Western Union System" should have considered as a part of its action in the present case, the effect of the Commission's action upon the Western Union Telegraph Company's contractual obligations. The record before the Court discloses that the Western Union Telegraph Company filed its application with the Federal Communications Commission on December 27, 1946, amending the application on May 28, 1947. The plaintiff entered its appearance at the hearing held on May 14 and 15, 1947, and was a party to the proceedings, as set out heretofore, at all times thereafter. Under the circumstances the plaintiff had ample and adequate time; to-wit, a full year, in which to file the contract in question. Plaintiff was fully advised as to the advancing state of the proceedings; had filed exceptions to the Proposed Report, and had argued its exceptions to the Proposed Report on March 22, 1948. Filing of the motion to reopen on May 26, 1948, was not timely and the action of the Commission in not reopening the record was not an abuse of the Commission's discretion.

Reverting now to the core of the dispute, the central question is whether the Com-

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is monopolistic within its particular field of operations. However, here we have a proposal whereby the telegraph company will be turning over to a telephone company, a normal competitor, its operations in certain communities. Accordingly, it is material to consider the particular facts and circumstances which compose the arrangements in question.

"Under the arrangements between Western Union and The Telephone Service Company of Ohio, it is not unreasonable to expect a diminution in the competition as it now exists between the two carriers in the six communities involved as well as in the 116 communities adjacent to those covered by the application. On the other hand, a grant of the application herein will afford to the public improved and extended services of value which are not presently provided by Western Union in those communities. In this regard, we refer to our findings heretofore made which indicate the extent of these benefits to the public. Among these benefits is the fact that under the proposed agency arrangements, telegraph service will be available to the public 24 hours daily through a teleprinter-operated agency office in each community, in contrast to present arrangements under which service during the closed hours of the Western Union office is, for the most part, by telephone to or from open Western Union offices in nearby communities, with the telegraph patron generally paying the applicable telephone toll charges. Reduced charges through elimination of after-hour telephone tolls, in addition to billing and collection privileges and 24-hour physical delivery service, not presently available in each community, should add much to the attractiveness of telegraph service. Furthermore, the plan to provide physical representation and to make available 24-hour telegraph service for telephone subscribers through telephone company-operated agency offices at 116 communities adjacent to those covered by the application should stimulate additional telegraph traffic. * * *"

mission has power to approve an agreement between a telegraph company and a telephone company, if the effect of the agreement is to lessen competition between the companies in a given locality. The Commission says that the effect of the agreement in the present case will be a lessening of competition. We are quite mindful of the plain implications in the opinion in *McLean Trucking Co. v. United States*, 321 U. S. 67, that, absent a specific congressional permission, an administrative agency cannot validate an agreement between competitors which is otherwise invalid under the antitrust laws. But not every agreement between competitors is illegal. The question before us is whether the facts in this record reflect a lessening of competition of such substance as to be illegal under the *Columbia Steel* and similar cases. It is true that the telegraph equipment in these communities is to be in the hands of the telephone company and the initial telegraph service to the customer is to be by a telephone employee. And therein is a lessening of the competition. But the telegraph service to the public remains just as it was, both in character and in extent. It remains telegraph service, over telegraph equipment. And the companies are to retain their respective advertising efforts. The considerations which induce a person to send a telegram instead of making a telephone call, and *vice versa*, will remain exactly as they are. And the facilities for each service will remain exactly as available to the customer as they are now.

It seems to us, as it did to the Commission and to the Department of Justice, that the lessening of competition reflected by these particular facts is more theoretical than real. We do not have before us a major plan to adopt generally this same sort of agency substitution. If we did, we would have a different problem. But we think that we cannot magnify the miniature factual lessening of competition shown in this instance into a test case for the decision of a major question of law.

As a result of the Court's findings, the defendant's Motion for Summary Judgment is granted. Since the Court has considered this case upon its substantive merits, it is unnecessary to pass upon the motion of the Western Union Telegraph Company for the dismissal of the Complaint.[24]

[¶ 62,469] United States v. Max Gerber, operating as Gerber Enterprises, Kokomo Pottery Corporation, Woodbridge Sanitary Pottery Corporation, Globe Valve Corporation, and Gerber Industries, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 8946. August 10, 1949.

Sherman Antitrust Act, Clayton Act

Motion to Quash—Motion to Transfer—Convenience of Witnesses.—A motion made by a manufacturing corporation and its wholly owned subsidiaries to quash service of a complaint, which alleged unlawful agreements in restraint of trade, was denied since the venue was properly laid in the district where the non-resident corporations transact business and retain a manufacturers' representative. The motion to transfer the case to Illinois was allowed since most of the witnesses, books, records, and documents to be produced at the trial were principally located in Chicago. The Government's contention that this suit should be tried in Pennsylvania, so as to assure uniform treatment of two other suits filed simultaneously with this one, was rejected. If uniform treatment were the determining ingredient of venue, any one of three jurisdictions could have been selected rather than Pennsylvania.

See the Sherman Act annotations, Vol. 1, ¶ 1610.101.

For the plaintiff: W. Wallace Kirkpatrick, Special Assistant to the Attorney General, Washington, D. C., and with him on brief, John H. D. Wigger, Baddia J. Rashid, Special Assistants, Herbert A. Bergson, Assistant Attorney General, all of Washington,

[24] *Interstate Commerce Commission v. Railway Labor Executives*, 315 U. S. 373.

D. C., Gerald A. Gleeson, U. S. Attorney, and Stanley E Disney, Special Assistant to the Attorney General, of Philadelphia, Pa.

For the defendants: Harry Shapiro and Leonard J. Cook, for Shapiro, Conner, Rosenfeld and Stalberg, of Philadelphia, and Harry R. Begley, of Gottlieb, Schwartz and Friedman, of Chicago, Illinois.

On Defendants' Motion to Quash the Service of Process or, in the Alternative, to Transfer This Cause to the United States District Court for the Northern District of Illinois, Eastern Division

Opinion

BARD, J., District Judge: The complaint filed by the Government alleges that the defendants have entered into unlawful agreements in restraint of interstate trade, in violation of Section 1 of the Sherman Act[1] and Section 3 of the Clayton Act[2]. The case is now before me on the defendants' motion to quash service of process or, in the alternative, to transfer this cause to the United States District Court for the Northern District of Illinois, Eastern Division.

[*Parties*]

The defendant Max Gerber, a resident of Chicago, Illinois, operating under the trade name of Gerber Enterprises, has his principal place of business at 232 North Clark Street, Chicago, Illinois. The defendant Kokomo Sanitary Pottery Corporation, hereinafter called Kokomo, is an Indiana corporation which has its plant located at Kokomo, Indiana, and its principal office at 232 North Clark Street, Chicago, Illinois. The defendant Woodbridge Sanitary Pottery Corporation, hereinafter called Woodbridge, is a Delaware corporation which has its plant located at Woodbridge, New Jersey, and its principal office at 232 North Clark Street, Chicago, Illinois. The defendant Globe Valve Corporation, hereinafter called Globe, is an Indiana corporation which has its plant located at Delphi, Indiana, and its principal office at 232 North Clark Street, Chicago, Illinois. The defendant Gerber Industries, Inc., hereinafter called Gerber Industries, is an Indiana corporation which has its plant located at Delphi, Indiana, and its principal office at 232 North Clark Street, Chicago, Illinois.

Defendants Woodbridge and Globe are wholly owned subsidiaries of the defendant Kokomo. The defendant Kokomo is owned by the defendant Max Gerber. The defendant Max Gerber owns about 45% of the stock of the defendant Gerber Industries, and the remaining stock of the defendant Gerber Industries is divided among the various employees and associates of the defendant Max Gerber. All of the products of the defendants are sold subject to approval and acceptance by the defendants at their principal office in Chicago, Illinois.

[*Venue*]

Venue is properly laid within the Eastern District of Pennsylvania, for the defendants are found or are transacting business, and have an agent in this district. The corporate defendants admit in their affidavit that approximately 3.8% of their business comes from within this district. The Government's affidavit shows and the defendants' affidavit admits that the defendants retain a manufacturers' representative within this district. This representative regularly solicits and takes orders for more than 80% of the sale of the defendants' products within this district, and is paid on a commission basis. His stationery has the following legend printed on it at the bottom of the sheet: "Plumbing Fixtures by Gerber Globe Valve Corporation—Gerber Industries, Incorporated—Kokomo and Woodbridge Sanitary Potteries." In view of the interlocking control among the defendants and in view of the above averments, suit may be brought by the Government in this district. 38 Stat. 731, 736 (1914), 15 U. S. C. A. §§ 15, 22; *United States v. Scophony Corp. of America et al.*, 333 U. S. 795; *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U. S. 359; *Sure-Fit Products Co. et al. v. Fry Products, Inc., et al.*, 23 F. Supp. 610; *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784; *Katz Drug Co. v. W. A. Scheaffer Pen Co.*, 6 F. Supp. 210; *Standard Oil Co. of New Jersey et al. v. United States*, 221 U. S. 1.

[1] Act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209, as amended, 15 U. S. C. A. § 1.

[2] Act of Congress of October 15, 1914, c. 323, § 3, 38 Stat. 731, as amended, 15 U. S. C. A. § 14.

[*Motion to Quash Service Denied*]

Since venue is properly laid within the Eastern District of Pennsylvania, the non-resident corporate defendants cannot complain that service of process was made by the United States Marshals of the districts of which they are inhabitants or are found. 15 U. S. C. A. §§ 4, 5, 15, 22; *Eastman Kodak Co. of New York v. Southern Photo Materials Co., supra*; *Haskell v. Aluminum Co. of America*, 14 F. 2d 864; *Frey & Son, Inc. v. Cudahy Packing Co.*, 228 Fed. 209. The individual non-resident defendant, Max Gerber, was served in his home in Illinois.

The defendants' motion to quash service of process must be denied.

[*Convenience of Witnesses*]

The defendants also contend that Section 1404 (a) of the Revised Judicial Code[3] applies to anti-trust cases, and that it would be for the convenience of the parties and witnesses and in the interest of justice to transfer this case to the Northern District of Illinois, Eastern Division.

Section 1404 (a) is general in its application and applies to "any civil action", including anti-trust suits. *United States v. National City Lines, Inc. et al.*, 80 F. Supp. 734, certiorari denied by opinion 337 U. S. — (17 L. S. 4459); *United States v. E. I. Du-Pont de Nemours & Co.*, 83 F. Supp. 233.

It appears from the facts alleged that it would be more convenient for at least the defendants and their witnesses to try this case in the Northern District of Illinois, Eastern Division. In this case the principal office for all of the defendants is in Chicago, Illinois. Most of the witnesses, books, records, and documents which will or may become necessary to be produced at trial are principally located in Chicago. Those which are not located in Chicago, if any, will be found in Delphi, Indiana, Kokomo, Indiana, or Woodbridge, New Jersey; these places, with the exception of Woodbridge, New Jersey, are much closer and more convenient to Chicago, Illinois, than to Philadelphia, Pennsylvania. The choice of venue in the interest of justice is actually determined by a preponderance of the facts in favor of either the plaintiff or the defendant, *United States v. National City Lines, Inc., et al.*, 80 F. Supp. 734, 744. Taking this into consideration together with the facts set forth in the preceding paragraph, it seems to me that justice will best be served if this case is tried in Chicago, in the Northern District of Illinois, rather than in the Eastern District of Pennsylvania.

The Government claims that Philadelphia is more advantageously located for its witnesses. However, it fails to allege where its witnesses are from, or how much farther they will have to travel to get to Chicago rather than to Philadelphia. Moreover, the Government will probably have to rely for at least part of its case on the books, records, and documents of the defendants, all of which would have to be brought to Philadelphia if the trial were held here.

[*Uniform Treatment Argument*]

The Government states that this is one of three anti-trust suits which it filed simultaneously in the Eastern District of Pennsylvania against three groups of defendants, all of whom are in the same business, and contends that if all cases were tried in Philadelphia, they would receive uniform treatment. This is a forceful statement but, under all the facts and circumstances, not a convincing one. In the instant suit the defendants have their principal office in Chicago, Illinois. In the second suit, *United States of America v. Kohler Co.*, Civil Action No. 8947, the defendant company has its principal office in Kohler, Wisconsin. And in the third suit, *United States of America v. Briggs Manufacturing Company et al.*, Civil Action No. 8948, the defendants have their principal office in Detroit, Michigan. If uniform treatment is the determining ingredient of venue, any one of these three jurisdictions could have been selected rather than the Eastern District of Pennsylvania.

[*Motion to Transfer Allowed*]

The complaint alleges, not an illegal restraint of trade in the Philadelphia locality only, but an illegal restraint of interstate trade presumably encompassing the entire United States. The Government should not be permitted to harass the defendants by selecting some far-off place for trial which would put the defendants to unnecessary expense and travel in order to conduct their

[3] 28 U. S. C. A. § 1404 (a): "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

defense. Such harassing is an evil of the Sherman and the Clayton Acts which Section 1464 (a) of the Revised Judicial Code is intended to correct.

In accordance with this opinion, an order will be entered granting the defendants' motion to transfer this case to the United States District Court for the Northern District of Illinois, Eastern Division.

[¶ 62,470] United States v. Briggs Manufacturing Company, Abingdon Potteries, Inc., John Douglas Company and Republic Brass Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 8948. August 10, 1949.

Sherman Antitrust Act, Clayton Act

Motion to Transfer—Convenience of Witnesses.—On motion of four manufacturing corporations, a Government suit alleging unlawful agreements in restraint of trade was ordered transferred to a Michigan court where witnesses, books, records, and documents necessary for the trial of the action were more easily accessible.

See the Sherman Act annotations, Vol. 1, ¶ 1610.101.

For the plaintiff: W. Wallace Kirkpatrick, Special Assistant to the Attorney General, Washington, D. C., and with him on the brief, John H. D. Wigger, Baddia J. Rashid, Special Attorneys, Herbert A. Bergson, Assistant Attorney General, of Washington, D. C., and Gerald A. Gleeson, U. S. Attorney, and Stanley E. Disney, Special Assistant to the Attorney General, of Philadelphia, Pa.

For the defendants: Yates G. Smith, of Beaumont, Smith and Harris, of Detroit, Michigan, and Robert T. McCracken and Joseph W. Swain, Jr., of Montgomery, McCracken, Walker and Rhoads, of Philadelphia, Pa.

On Defendants' Motion to Transfer Action

Opinion

BARD, J. District Judge. The complaint filed by the Government alleges that the defendants have entered into unlawful agreements in restraint of interstate trade in violation of Section 1 of the Sherman Act[1] and Section 3 of the Clayton Act.[2] The case is now before me on the defendants' motion to transfer this action to the Eastern District of Michigan, Southern Division.

The defendant Briggs Manufacturing Company, hereinafter called Briggs, is a Michigan corporation which has all of its plants and its offices in Detroit, Michigan. The defendant Abingdon Potteries, Inc., hereinafter called Abingdon, is an Ohio corporation which has all of its plants and its offices at Abingdon, Illinois. The defendant John Douglas Company, hereinafter called Douglas, is an Ohio corporation which has all of its plants and offices at Cincinnati, Ohio. The defendant Republic Brass Company, hereinafter called Republic, is an Ohio corporation which has all of its plants and offices at Cleveland, Ohio.

Defendants Douglas and Republic are wholly owned subsidiaries of the defendant Briggs. The defendant Briggs has a controlling interest in the outstanding capital stock of the defendant Abingdon. All of the products of the defendants Douglas and Abingdon are sold to the defendant Briggs and are thereafter resold by the defendant Briggs. The products of the defendant Republic are sold either to the defendant Briggs or directly to the customers of the defendant Republic in accordance with orders and directions from the defendant Briggs.

The defendants contend that Section 1404(a) of the Revised Judicial Code[3] applies to anti-trust cases, and that it would be for the convenience of the parties and witnesses and in the interest of justice to transfer this case to the Eastern District of Michigan, Southern Division.

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[1] Act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209, as amended, 15 U. S. C. A. § 1.

[2] Act of Congress of October 15, 1914, c. 323, § 3, 38 Stat. 731, as amended, 15 U. S. C. A. § 14.

[3] 28 U. S. C. A. § 1404 (a): "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

For the reasons set forth in an opinion filed this day by me in *United States of America v. Max Gerber et al.*, Civil Action No. 8946, the defendants' motion to transfer this case to the United States District Court for the Eastern District of Michigan, Southern Division, is granted.

[¶ 62,471] Providence Fruit & Produce Bldg., Inc. v. Gamco, Incorporated.

In the Supreme Court of Rhode Island. No. 9030. August 11, 1949.

Sherman Antitrust Act

Recovery of Land—Monopolistic Practices Purely Collateral—Plea of Unreasonable Restraint of Trade Overruled.—In an action by a landlord to recover possession of certain realty, the tenant filed a plea alleging that the landlord for a long time prior to the initiation of this action had been continuously engaged with other persons in a combination and conspiracy in unreasonable restraint of trade and in monopolizing the transportation and sale of fruit and vegetable produce shipped in interstate commerce. It was further alleged that the present action was a proceeding forming a part of, and intended to further, such combination and conspiracy. On a hearing of the defendant's bill of exceptions to the lower court's holding, it was held that evidence regarding alleged monopolistic practices had been correctly rejected as collateral to the trespass and ejectment proceeding before the court.

See the Sherman Act annotations, Vol. 1, ¶1660.151.

For the plaintiff: Letts & Quinn, George R. Beane, Providence, Rhode Island.

For the defendant: Aram A. Arabian, Raphael Vicario, Providence, Rhode Island.

Opinion

[*Nature of Action*]

BAKER, J.: This is an action of trespass and ejectment brought by a landlord against its tenant to recover possession of certain realty. It was tried in the superior court by a justice thereof sitting without a jury. He rendered a decision in favor of the plaintiff, and the defendant thereafter duly prosecuted its bill of exceptions to this court.

In the writ in this case the property which is alleged to be wrongfully detained by the defendant from the plaintiff's possession is described as follows: "four certain bays or units numbered 34, 34½, 36 and 36½ in the Produce Building, so-called, situated on the southerly side of Harris and Kinsley Avenues," in the city of Providence. The combined writ and declaration also alleges that the plaintiff on January 13, 1948 by notice in writing ordered the defendant to quit, vacate and deliver upon April 15, 1948 the above-described premises to the plaintiff.

[*Defense of Conspiracy*]

In addition to the plea of the general issue the defendant filed in the superior court four additional pleas. These additional pleas were equitable in nature and in general alleged that the plaintiff for a long time prior to the initiation of this action had been continuously engaged with other persons in a combination and conspiracy in unreasonable restraint of trade and in monopolizing the transportation and sale of fruit and vegetable produce in interstate commerce from other states to Providence in this state in violation of the Sherman Antitrust Act and in violation of the common law. It was also alleged in the additional pleas that the present action is a proceeding forming a part of, and is intended to further, such combination and conspiracy. The plaintiff demurred to these additional pleas and the demurrer was sustained by a justice of the superior court, to which ruling the defendant duly excepted.

The defendant's bill of exceptions contains six exceptions, three to rulings of the trial justice admitting or rejecting certain evidence, two to his refusal to permit the defendant to make offers of proof, and an exception to his decision in favor of the plaintiff on the merits. After the case reached this court and shortly before it was heard, the defendant filed a motion that it be allowed to amend its bill of exceptions by adding thereto an exception to the ruling of the justice of the superior court sustaining the demurrer to defendant's equitable

or additional pleas. The plaintiff objected to such amendment and by our permission the motion was briefed and argued at the same time the other exceptions were heard on their merits.

[*Motion to Amend Bill of Exceptions*]

In our opinion we should dispose of the above motion before we consider the defendant's bill of exceptions as filed. By general laws 1938, chapter 542, § 5, this court may allow amendments to a bill of exceptions. That section sets out in detail the procedure to be followed by a party who desires to prosecute a bill of exceptions from the superior court to the supreme court. The statute in this respect has been strictly construed and held to be jurisdictional. *Frappier v. Frappier,* 64 R. I. 54. It has also been decided that an exception which is not in the bill of exceptions is not before the appellate court for consideration. *Rowy v. Mainella,* 68 R. I. 149; *Goff v. Lunn,* 49 R. I. 455. At the conclusion of § 5 is the following sentence upon which the defendant relies: "The supreme court may allow amendments to a bill of exceptions or transcript of testimony." The question is thus raised whether or not the addition in this court of a separate and distinct exception not appearing in the bill of exceptions as filed and allowed by the trial justice in the superior court, although properly taken in that court, may be considered as an amendment to the bill of exceptions within the meaning and intent of the above-quoted sentence of the statute.

Upon consideration and realizing that the above statutory authority to amend should be given a reasonably liberal construction, even though statutes relating to bills of exceptions are strictly construed, we are nevertheless of the opinion that such a liberal construction should not go to the extent of permitting the addition by us, over objection, of an entirely new exception not appearing in the bill of exceptions when it was presented to and approved by the trial justice and when the case reached this court. An addition of this kind does not seem to us to be an amendment in the proper sense of an existing bill of exceptions within the meaning of the statute. Such a broad application of the power of this court to allow amendments to a bill of exceptions as is urged by the defendant might well lead to careless, hasty and imperfect preparation of bills of exceptions and a reliance on the fact that amendment here would be almost a matter of form. If one exception may be added to a bill of exceptions by this court it might be difficult to prevent the addition of several others. In such circumstances an opposing party would not be certain of the exceptions he had to meet until the case was ready for argument in this court. Also the approval by the trial justice of the bill of exceptions becomes of little importance if further exceptions may be added thereto on motion before us.

In *Gladding v. Union R. R.,* 25 R. I. 122, this court, prior to the passage in 1905 of the Court and Practice Act had occasion to consider a question analogous to the one now before us. In that case the court had before it under the then appellate practice the plaintiff's petition for a new trial. He filed a motion, denied by the court, to be allowed to amend his petition. At page 124 of the opinion the following holding appears:

> "A petition for a new trial may be amended by making the assignments or error more specific, but not by adding new and additional assignments of error, of which the party had notice at the time of filing his petition."

We have examined the cases cited to us by the defendant in this connection and find that in the circumstances they are not applicable. Defendant's motion to be allowed to amend the bill of exceptions is therefore denied and its exception to the sustaining of plainttiff's demurrer to the equitable pleas is ont before us for consideration.

[*Monopoly Held Collateral to Trespass Proceeding*]

In our opinion defendant's first five exceptions relating to evidentiary rulings by the trial justice are without merit. We find that a certain written agreement entered into by the parties on January 31, 1948 was material and was properly admitted in evidence. Also defendant's offers of proof following the sustaining of plaintiff's objection to the introduction of certain testimony were correctly rejected. The testimony in question and the offers of proof related to the matters raised by the defendant's equitable pleas regarding the plaintiff's conduct allegedly amounting to restraint of trade and monopolistic practices. The demurrer to these pleas had been sustained by the superior court, but the defendant nevertheless attempted to introduce the

matter included therein under its plea of the general issue. In our opinion it was not admissible under the last-named plea and was rightly excluded. It apparently related to a subject which was entirely collateral to the trespass and ejectment proceeding then on trial. See *New England Transportation Co. v. Doorley,* 60 R. I. 50, and 60 R. I. 260. Also an equitable defense in an action at law is not admissible under a plea of the general issue. *Coates v. Coleman,* 72 R. I. 304; *Siravo v. Whitman,* 51 R. I. 102. Further, in our judgment defendant's contention that the excluded evidence was admissible under the plea of the general issue because of a provision in the lease under which it originally went into possession of the property is not sound. The present proceeding in trespass and ejectment was brought after the lease in question had terminated and did not in any way depend upon a breach of the provision above referred to. The defendant's first five exceptions are overruled.

The remaining exception is the decision of the trial justice. In support of its case the plaintiff put in evidence as exhibits a lease for one year dated April 15, 1946 under which the defendant went into possession of the property in dispute, a notice by letter from the plaintiff to the defendant dated January 13, 1948 to quit and surrender up the premises on April 15, 1948, and a written agreement executed by the parties January 31, 1948. The letter which contained the above express notice to vacate also contained an incidental reference to a previous unsuccessful attempt to have the defendant give up possession of the property on December 31, 1947, but that reference did not invalidate the rest of the notice which was complete and sufficient. The agreement was on good consideration and contained several provisions concerning matters between the parties. Two of these provisions were as follows: "(d) That Gamco is a tenant from year to year for the year beginning April 15, 1947, of four certain bays or units numbered 34, 34½, 36 and 36½ in said Produce Building; that its current yearly term expires April 14, 1948, and that all the terms, conditions and provisions of that certain Indenture of Lease of said premises in said Produce Building, dated April 15, 1946, between the Company as Lessor and Gamco as Lessee, are in full force and effect during said tenancy from year to year. (e) That the notice to quit, dated January 13, 1948, from the Company to Gamco, was served on Gamco on January 14, 1948, and is a good and sufficient notice to quit and to terminate said tenancy on April 15, 1948, unless Gamco has a right to retain possession of said premises for some other reason."

The defendant did not surrender possession of the property on April 15, 1948 and the present action was begun April 16, 1948. We have considered the defendant's argument in support of its contention that the decision of the trial justice was erroneous. We are unable to agree with that argument and we cannot say that in the circumstances his decision for the plaintiff was clearly wrong. The defendant's sixth exception is overruled.

[*Judgment for the Plaintiff*]

All of the defendant's exceptions are overruled, and the case is remitted to the superior court for the entry of judgment for the plaintiff on the decision.

[¶ 62,472] The People of the State of California v. Centr-O-Mart, et al.

In the California District Court of Appeal. Civil No. 7566. Third District. 93 A. C. A. 99. July 21, 1949.

Appeal from an order of the Superior Court of San Joaquin County sustaining demurrer to complaint without leave to amend and dismissing action. GEORGE F. BUCK, Judge. Affirmed.

Action by state to enjoin violations of Unfair Practices Act. Order of dismissal affirmed.

California Unfair Practices Act

State Action for Injunction—Definition of a Person—Unfair Competition.—An order dismissing a state action to enjoin violations of the Unfair Practices Act was affirmed, on appeal. The Court ruled that the state was not one of the persons entitled to sue for

injunctive relief under Section 17021. Without deciding whether violations of the Unfair Practices Act constituted unfair competition within the meaning of Section 3369 of the Civil Code, the Court held that since this action was not brought under that section, it could not be invoked as authorizing the state to sue for an injunction.

See the California Unfair Practices Act annotations, Vol. 2, ¶ 8068.80.

For the appellant: Forrest E. Macomber.

For the respondents: Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General.

[*Syllabus*]

Appeal—Judgments and Orders Appealable—Dismissal.—An order dismissing an action duly entered in the minutes of the court constitutes a judgment effective for all purposes, and hence is appealable. (Code Civ. Proc., § 581, subd. (d).)

Trademarks and Unfair Competition—Remedies—Who May Sue.—The state cannot maintain a civil action to enjoin alleged violations of the Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101), in view of the requirement of § 17020 that the "definitions in this article shall be used in construing this chapter," and of the fact that the state is not, although a municipality is, included among those persons defined by § 17021 who may bring an action under § 17070 to enjoin violations of the act.

Id.—Remedies—Injunction. — Civ. Code, § 3369, providing that the state may bring an action to enjoin acts of unfair competition, does not authorize the state to sue for an injunction under the provisions of the Unfair Practices Act or any other statute except § 3369.

Appeal — Review — Moot Questions. — Where it is concluded on appeal that a code section invoked by a party is inapplicable to the case, any question as to the constitutionality of such section is moot and irrelevent to the decision of the case.

[*Nature of Action*]

PEEK, J.: The District Attorney of San Joaquin County commenced this civil action in the name of "The People of the State of California" against the Centr-O-Mart, a corporation, and certain individual defendants, seeking to enjoin alleged violations of the Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101). The defendants interposed a demurrer and motion to dismiss the complaint upon the ground that the state was not a proper party plaintiff. The trial court made and entered its order sustaining the demurrer without leave to amend and dismissed the action. Inasmuch as the appealability of such an order was questioned the state caused a *nunc pro tunc* judgment of dismissal to be entered, and a second timely notice of appeal was filed therefrom. The sole question presented to this court is whether or not the state is authorized to maintain a civil action to restrain alleged violations of the Unfair Practices Act.

[*Jurisdiction Established*]

It is elementary that a reviewing court has jurisdiction to determine an appeal only if it is predicated upon an appealable order and the notice thereof is timely. (*Estate of Hanley*, 23 Cal. 2d 120 [142 P. 2d 423]; *Gwinn v. Ryan*, [1] 33 Cal. 2d 436 [202 P. 2d 51].) The facts shown by the record herein disclose that the order of dismissal was entered by the clerk in the minutes of the trial court on May 4, 1948, and that the first notice of appeal was filed May 21, 1948. Said notice specified that it was from "the order granting defendants' motion to dismiss." It is thus apparent that the notice was filed within the time prescribed by rule 2 (a) of the Rules on Appeal and thus confers the requisite jurisdiction upon this court to hear the appeal, if the order appealed from was an appealable order. Subdivision (d) of section 581 of the Code of Civil Procedure provides in part as follows:

> ". . . All dismissals ordered by the court shall be entered upon the minutes thereof or in the justice's docket, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes . . ."

Since by the plain provision of said statute the order of dismissal constituted a judgment effective for all purposes it is

[1] Advance Report Citation: 33 A. C. 391.

appealable. (*Gwinn v. Ryan, supra.*) The first notice of appeal conferred jurisdiction upon this court to hear the appeal, therefore it is immaterial to discuss the question as to whether or not the second notice of appeal from the *nunc pro tunc* judgment conferred such jurisdiction.

[*Scope of Definition of Person*]

The Unfair Practices Act is contained in division VII, part 2, chapter 4, sections 17000-17101 of the Business and Professions Code. Section 17070 provides that "Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages." Violations of the provisions of the act are made a misdemeanor by section 17100. The word "person" is defined by section 17021 as "any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation." Section 17020 provides that "The definitions in this article shall be used in construing this chapter."

Appellants contend that the word "person" appearing in said section 17070 includes the state and that the state was therefore authorized to maintain this civil action for an injunction. In support thereof, reference is made to *People v. Black's Food Store*, 16 Cal. 2d 59 [105 P. 2d 361] and *People v. Pay Less Drug Store*, 25 Cal. 2d 108 [153 P. 2d 9] wherein the state successfully maintained actions to enjoin violations of the Unfair Practices Act. However, in none of the cases cited by appellants was the question raised as to the right of the state to maintain the action and hence such cases cannot be construed as upholding such right. We have been referred to no case passing upon the precise question of whether the state is a person as that term is used in section 17021, and our own research has revealed none. The decisions of other state courts upon the question are in conflict (See Words & Phrases, Person, p. 243) and are of slight assistance particularly in view of the requirement imposed by section 17020 that "The definitions in this article shall be used in construing this chapter."

Thus the question becomes one of determining whether the state is a "person" within the meaning of the terms as used in said section 17021. In this regard appellants contend that since a municipality is included within the definition of "person" as that term is defined in said section the state therefore must be included therein. Appellant further asserts that to conclude otherwise leads to the result that the state cannot enforce its own law while a political subdivision of the state is empowered to do so. Such contention is without merit. The question is not whether the state can enforce its own law, since, as previously noted, it is given the power to prosecute violations of the act as misdemeanors; rather it is, whether the particular course pursued herein is available, that is, whether the state can enforce the act by the injunctive process in a civil proceeding. Analyzing the question in the light of the specific statutory provisions it would seem to follow that the absence of the state among the persons designated by section 17021 necessarily leads to the conclusion that such omission was intentional and that the state is not one of the persons entitled to sue for injunctive relief under section 17021.

[*Civil Code Provision*]

Appellants further contend that if authority for the state to maintain this action cannot be found in section 17021 of the Business and Professions Code such authority is contained in section 3369 of the Civil Code. Subdivision 2 thereof provides that

> "Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction."

Subdivision 5 provides that

> "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."

Appellants' contention is that violations of the Unfair Practices Act set forth in the complaint come within the category of unfair competition as that phrase is defined in subdivision 2 of section 3369 of the Civil Code, and therefore subdivision 5 thereof authorizes the state to maintain the present action. This contention cannot be sustained. Whether or not violations of the Unfair Practices Act also constitute unfair com-

petition as that phrase is used in section 3369 of the Civil Code is not the question. Section 3369 of the Civil Code merely authorizes actions for injunctions by the state "under this section" and the present case is not an action under section 3369 but is an action to restrain alleged violations of the Unfair Practices Act. Thus, by its very terms, section 3369 does not authorize the state to sue for an injunction under the provisions of the Unfair Practices Act or any other statute except "under this section."

[*Constitutionality of Section Irrelevant*]

Since we have concluded that the provisions of section 3369 of the Civil Code do not authorize the maintenance of this action by the state, the respondents' contention that said section is unconstitutional is moot and irrelevant to the decision of this case.

The order appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

[¶ 62,473] United States v. Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation.

In the United States District Court for the Southern District of New York. Equity No. 87-273. July 25, 1949.

Upon remand by the Supreme Court reversing in part and affirming in part decree and findings of December 31, 1946.

Sherman Antitrust Act

Motion Picture Industry—Geographic Distribution of Theatre Ownership.—Upon the United States Supreme Court remanding an antitrust action against major and minor film producers and exhibitors, the District Court held, that in the absence of competitive bidding, the theatre holdings of the major defendants played a vital part in effecting violations of the Sherman Act. It was found that the film companies owned or operated theatres either in largely separate markets or in pools with only trifling competition among themselves. Although the Court did not find an agreement to divide territory, it held that the effect of the distribution of ownership of the theatre circuits was to substantially limit competition. Geographic distribution was found to be a part of a system in which competition was largely absent and the status of which was maintained by fixed runs, prices, and clearances, pooling agreements and other illegal practices.

See the Sherman Act annotations, Vol. 1, ¶ 1220.175.

Motion Picture Industry—Effect of Vertical Integration upon Competition.—When an antitrust action against film producers and exhibitors was remanded by the Supreme Court for further consideration, the District Court held that the Government failed to show a calculated scheme on the part of the film companies to control the market rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. Vertical integration was declared illegal when it was found to be an active aid to the conspiracy to fix prices, runs and clearances. The test used by the Court to determine the illegality of vertical integration was its close relationship with illegal practices. In this case the vertical integrations were definite means of carrying out restraints and conspiracies in violation of the Sherman Act.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273.

Motion Picture Industry—Existence of Monopoly Power.—On remand of an antitrust suit against the film companies, the District Court held that the parties named must be viewed collectively rather than independently as to the power which they exercised over the market by their theatre holdings. It was found that the major companies owned

at least 70 per cent of the first-run theatres in the 92 largest cities. As distributors they received approximately 90 per cent of the domestic film rental from the films. These figures when coupled with the strategic advantages of vertical integration were found to indicate a power to exclude competition from these markets when desired.

See the Sherman Act annotations, Vol. 1, ¶ 1022.27, 1220.156.

Motion Picture Industry—Separation of Exhibition from Production.—Upon remand, the District Court ordered a separation of the business of the defendants as exhibitors of film from their business as producers and distributors. A provision to enjoin three exhibitor defendants and any theatre-holding corporation resulting from the proposed divorcement from acquiring a beneficial interest in any additional theatre was outlined by the Court for insertion in the decree. The Court declined to disestablish specific theatres on the theory of local monopolies or of illegal fruits since there was insufficient evidence to justify such a remedy.

See previous decree reported at 1946-1947 TRADE CASES ¶ 57,526.

For the plaintiff: Herbert A. Bergson, Assistant Attorney General; Robert L. Wright and J. Francis Hayden, Special Assistants to the Attorney General; George H. Davis, Jr., and Harold Lasser, Special Attorneys.

For the defendants: Davis, Polk, Wardwell, Sunderland & Kiendl; J. Robert Rubin, Attorneys for defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, S. Hazard Gillespie, Jr., and Benjamin Melniker, Counsel; Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh, Howard Levinson, and Harold Berkowitz, Counsel; James F. Byrnes; Dwight Harris Kloegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, defendants; James F. Byrnes, Otto E. Kloegel, John F. Caskey, and Frederick W. R. Pride, Counsel; Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich and Everett A. Frohlich, Counsel; Charles D. Prutzman, Attorney for the Universal defendants; Cyril S. Landau, Counsel; O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery and George A. Raftery, Counsel.

Before AUGUSTUS N. HAND, Circuit Judge. HENRY W. GODDARD and ALFRED C. COX, District Judges.

Opinion of AUGUSTUS N. HAND, Circuit Judge.

[*Digest*] This case comes before us after a decision by the Supreme Court affirming in part and reversing in part our decree and findings of December 31, 1946. *United States v. Paramount Pictures, Inc.*, 334 U. S. 131.

[*Geographical Distribution*]

A review of the illegalities which we, and the Supreme Court as well, have found to exist, in addition to a consideration of geographical distribution and a very general absence of competition between the major defendants, convinces us that in the absence of a system of competitive bidding, the theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-Trust Act.

We have been instructed by the Supreme Court to consider the question of geographical distribution of theatres among the five major defendants. In dealing with this subject, we do no take into account the presence or absence of independent theatres in the areas dealt with. We have examined the defendants' theatre holdings and find that in cities of less than 100,000 in population, there is no doubt that Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, there was in general little competition among the defendants, although considerably more than in towns of under 100,000. A summary of the data which substantially represents the true situation, but owing to certain differences in the proofs offered must be regarded as approximate rather than as entirely accurate, is as follows:

Cities of less than 100,000

In cities of less than 100,000, Paramount had complete or partial interests in or pool-

ing agreements* with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—or only 3%—there was competition with another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9% were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

Fox had similar theatre interests in 428 theatres located in 177 towns. In 13 of these towns containing 29 Fox theatres, or about 7% thereof, there was competition with another defendant. In about 93% of the towns containing the same percentage of Fox's theatre interests, Fox was the only defendant operating theatres.

Warner had similar theatre interests in 306 theatres located in 155 towns or less than 100,000. In 17 towns, or 11%, containing 30 Warner theatres, or 10% of its holdings, there was competition with another major defendant. In 3% of the towns, competition between Warner and the only other defendant in the town was substantially lessened or eliminated by means of pooling agreements; and in this 3% were located 4% of Warner's theatre interests. In 86% of the towns containing the same percentage of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between Warner and any other defendant in 89% of the towns and in respect to 90% of the theatres in which Warner had an interest.

Loew had interests in only 17 theatres located in 14 towns. In 4 towns, or 29%, containing 4 Loew theatres, or 23%, there was competition with another defendant. In 14% of the towns, competition was substantially lessened or eliminated by means of pooling agreements; and in this 14% were located 18% of Loew's theatre interests. In 57% of the towns, containing 59% of Lowe's theatre interests, Loew was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between Loew and any other defendant in 71% of the towns and in respect to 77% of the theatres in which Loew had an interest. It is to be noted, however, that Loew's theatre interests in towns of less than 100,000 constitute a far smaller proportion of its total theatre holdings than do those of the other defendants.

RKO had interests in 150 theatres located in 66 towns. In 6 towns, or 10%, containing 6 RKO theatres, or 4%, there was competition with another major defendant. In 60% of the towns, competition was substantially lessened or eliminated by means of pooling agreements, and in this 60% were located 73% of RKO's theatre interests. In 30% of the towns, containing 23% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between RKO and any other defendant in 90% of the towns and in respect to 96% of the theatres in which RKO had an interest.

As a further illustration of the absence of substantial competition among the five major defendants in towns of less than 100,000 population, the proofs as to their total theatre holdings make the following showing which seems to us impressive. They had interests altogether in 2,020 theatres located in 834 towns. In 26 towns, or 3%, containing 100 of their theatres, or 5%, there was competition among some of them. In some what over 5% of the towns, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 5% were located 7% of their theatre interests. And in somewhat less than 92% of the towns, containing 88% of their theatre interests, only one of the major defendants owned theatres in the area. Thus, there appears to have been little, if any, competition among the five defendants or any of them in 97% of the towns and in respect to 95% of the theatres in which they had an interest.

It appears from the foregoing that the effect of the geographical distribution in towns having a population of less than 100,000 was largely to eliminate competition among all of the defendants in the areas

* Pooling agreements and joint interests among defendants are treated as indistinguishable for the purpose of summarizing geographical distribution.

where any of them had theatres. The details upon which our results have been based appear in the statistical data set forth at the end of the opinion in Appendix 1 [not reproduced herein].

Cities of 100,000 and over

In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or 26%, there was competition with other defendants. In an additional 10% of the cities, containing 17% of Paramount's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 12% were located 18% of Paramount's theatre interests. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest.

Fox had similar theatre interests in 211 theatres located in 17 cities. In 5 of these cities, or 29%, containing 54 Fox theatres, or 26%, there was competition with other defendants. In an additional 18% of the cities, containing 41% of Fox's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Fox, both on first and later runs, that competition with Fox was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 53% of the cities, containing 33% of Fox's theatre interests, Fox was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Fox and any other defendant in 71% of the cities and in respect to 74% of the theatres in which Fox had an interest.

Warner had similar theatre interests in 243 theatres located in 26 cities. In 14 of those cities, or 54%, containing 89 theatres, or 37%, there was competition with other defendants. In an additional 8% of the cities, containing 5% of Warner's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Warner, both on first and later runs, that competition with Warner was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 19% of these cities competition between Warner and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 19% were located 51% of Warner's theatre interests. And in 19% of the cities, containing 7% of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Warner and any other defendant in 46% of the cities and in respect to 63% of the theatres in which Warner had an interest.

Loew had similar theatre interests in 144 theatres located in 37 cities. In 32 of those cities, or 86%, containing 122 Loew theatres, or 85%, there was competition with other defendants. In 3% of these cities, competition between Loew and the only other defendant in the city was eliminated by means of a pooling agreement affecting all of their theatres, and in this 3% were located 7% of Loew's theatre interests. And in 11% of the cities, containing 8% of Loew's theatre interests, Loew was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Loew and any other defendant in 14% of the cities and in respect to 15% of the theatres in which Loew had an interest. In the matter of mere geographical distribution of its theatres, Loew has the most favorable record of any of the major defendants. But it is to be noted that, while it is true that as to its neighborhood prior run theatres in New York, there was competition with RKO in the sense that both operated in New York on the same runs, nevertheless these two companies divided the product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. Indeed, on one occasion where Paramount was having a long dispute with

Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, we think that the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000.

RKO had similar theatre interests in 256 theatres in 31 cities. In 22 of these cities, or 72%, containing 190 theatres, or 74%, there was competition with other defendants. In an additional 6% of the cities, containing 4% of RKO's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with RKO, both on first and later runs, that competition with RKO was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 16% of these cities, competition between RKO and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 16% were located 15% of RKO's theatre interests. And in 6% of the cities, containing 7% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between RKO and other defendants in 28% of the cities and in respect to 26% of the theatres in which RKO had an interest. With respect to mere geographical distribution, RKO's record was relatively good but it is to be noted that approximately 58% of its theatre interests were located in New York on neighborhood runs, and the same comments as to distribution of film made in regard to Loew's are applicable to RKO. If its New York neighborhood theatre interests were excluded from the category of theatres in competition with other defendants, the RKO percentage would then be only about 16% in competition with other defendants.

The major defendants had interests altogether in 1,112 theatres located in 87 cities of more than 100,000. In 46% of these cities, containing 23% of their theatre interests, only one of the major defendants owned theatres in the area. In 11.5% of the cities, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 11.5% were located 16% of their theatre holdings. In an additional 11.5% of the cities, containing 17% of their theatre interests, there was more than one defendant having theatre interests in the city, but the position of one defendant was so dominant relative to the others that competition between them was unsubstantial. In 31% of the cities, containing 44% of their theatre interests, there was competition among the defendants. But the New York neighborhood theatres of Loew and RKO, which are included in reaching the 44% figure, should properly be excluded because there is no competition between Loew and RKO in obtaining pictures for the reasons we have already given. This would reduce the percentage of defendants' theatres which compete with one another to 27.

It appears from the foregoing that the effect of the geographical distribution in cities having a population of more than 100,000 was substantially to limit competition among the major defendants. The details upon which our results have been based appear in the statistical data set forth at the end of the opinion in Appendix 2 [not reproduced herein].

The plaintiff contends that the figures as to geographical distribution require a finding that there was an agreement to divide territory, but the evidence indicates that much of the acquisition of theatres was due to the buying up of circuits and that the purchases at least in some of these cases involved competition among certain of the defendants. We, therefore, do not find an agreement to divide territory geographically in the organization of the defendants' theatre circuits, but we do hold that the geographical distribution became a part of a system in which competition was largely absent and the status of which was maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-

licensing which made it necessary that they should work together. The argument of some of the defendants that they had no opportunity to change this geographical status not only seems inherently improbable but affirmatively contradicted by the making of pooling agreements and entering into joint ownership with one another. Moreover, even in the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films. In substantiation of the general picture, the plaintiff has shown, on the basis of a study of four seasons between the years 1936 and 1944, that during this period the privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a "split". The lack of competition which we have described has undoubtedly been induced in large measure by the reliance of the defendants on each other in obtaining pictures for use in their various theatres throughout the country. The defendants were also dependent on one another to obtain theatre outlets for their own pictures, for the best customers of any defendant were ordinarily one or more of the other defendants.

We think that there can hardly be adequate competition among the defendants where such interdependence exists. Moreover, when the defendants were interdependent as to a great part of their activities, it necessarily would affect not only competition among themselves, but with independents. We have already found such effects in the various concerted practices of the defendants which have restricted competition with independents. In our former opinion, we provided for a system of competitive bidding for film in the belief that such a system would sufficiently control the reliance of the major defendants on one another's product and theatres. That system having been rejected by the Supreme Court, we must find some other means of preventing the major companies from being in a state of interdependence which too greatly restricts competition.

[*Vertical Integration*]

One of the chief matters referred to us by the Supreme Court is the effect of vertical integration upon competition in the industry. While vertical integration would not *per se* violate the Sherman Act, the Supreme Court has made it clear that if such intergration is conceived with a specific intent to control the market or creates a power to control the market which is accompanied by an intent to exercise the power, the integration becomes illegal.

We are not satisfied that the plaintiff has shown a calculated scheme to control the market in the conception of the defendants' vertical integration, rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. We do not suggest that every vertically integrated company which engages in restraints of trade or conspiracies will thereby render its vertical integration illegal. The test is whether there is a close relationship between the vertical integration and the illegal practices. Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, a conclusion which requires the elimination of our Findings 152 and 153, as explained above.

[*Existence of Monopoly Power*]

In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point. In these circumstances, the defendants must be viewed collectively rather than independently as to the power which they exercise over the market by their theatre holdings. See *American Tobacco Co. v. United States,* 328 U. S. 781.

If viewed collectively, the major defendants owned in 1945 at least 70% of the first-run theatres in the 92 largest cities, and the Supreme Court has noted that they owned 60% of the first-run theatres in cities with populations between 25,000 and 100,000. As distributors, they received approximately 73% of the domestic film rental from the films, except Westerns, distributed in the 1943-44 season. These figures certainly indicate, when coupled with the strategic advantages of vertical integration, a power to exclude competition from these markets when desired. This power might be exercised either against non-affiliated exhibitors or distributors, for the ownership of what was generally the best first-run theatres, coupled with the possession by the defendants of the best pictures, enabled them substantially to control the market. If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize.

Furthermore, the power to fix clearances and runs which we have found existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion.

The Remedy

The Supreme Court has denied the remedy of requiring the defendants to offer films to the highest bidder and has required us to find some other means of obviating the illegal practices and attempted monopoly on the part of the defendants.

[*Separation of Exhibition from Production*]

As an injunction is regarded as an insufficient remedy there must, in our opinion, be a divorcement or separation of the business of the defendants as exhibitors of films from their business as producers and distributors. Just as in the *Crescent* case affiliation was held to furnish the incentive for carrying out the conspiracy that there existed, we find that vertical integration has served a similar purpose in the case at bar.

Therefore, the divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants. Beyond all the above considerations there would seem to be an inherent injustice in allowing defendants to avoid divorcement when they would have been originally subjected to it merely because two of their confederates eliminated themselves from a compulsory decree which would have been based upon the participation of all in the conspiracy.

Joint Interests

The Supreme Court has asked us to reconsider the dissolution of joint interests between defendants and independents because some partial interests of independents were said to have been held by investors rather than actual or potential exhibitors. Paramount and RKO need not be considered, since they are now subject to the provisions of consent decrees. Fox has obtained an order, agreed to by the plaintiff, dealing with the disposition of all its joint interests, except its partial ownership through its affiliate National Theatres Corporation in Evergreen State Amusement Corporation. Fox contends that evidence offered at the trial after remand shows that one Newman, who had an indirect interest of about 15% in Evergreen, was not an actual or potential theatre operator. He became the president and manager of Evergreen, but that in itself did not make him a co-owner with Fox in that company, and his interest of about 15% seems to us no more than the interest of an investor. Nor do we find any indication that he would have been an independent operator of a theatre but for his investment in Evergreen. Prior to the investment he had been an employee of National and for some seven years had had no ownership in a theatre. In the circumstances, we hold that the interest of Fox in Evergreen need not be dissolved, although it will be subject to a general divorcement like the other theatre holdings of Fox from its distribution business.

In respect to Warner, the plaintiff has consented to an order disposing of all its joint interests. In the case of Loew, the plaintiff has agreed to an order disposing of its joint interest in Buffalo Theatres, Inc., and seems to have approved a stipulation made in open court providing for the disposition of all its other joint interests.

In our opinion the orders and stipulations relating to joint ownerships of Fox, Warner and Loew with independents are sufficient to dispose of all questions arising under the requirement of the Supreme Court that joint

interests with actual or potential operators be dissolved. In view of the situation presented by the making of these orders and stipulations, our Findings 115, 116 and 117 should be vacated, and the proposed substituted findings of the plaintiff should be denied.

Franchises

We are directed by the Supreme Court to reconsider our prior decision prohibiting franchises in all cases, and as an initial step conforming to the Supreme Court's opinion our Finding 89 should be vacated. On reconsideration, we adhere to the view that the three remaining major defendants as well as the three minor defendants should not be allowed to grant franchises except to independents. Such a practice ties up the distribution of films and restricts competition by independents to obtain pictures for what we regard as unnecessarily long periods and has been a method of unlawful diccrimination in the past. We hold, however, that any of the defendants may grant franchises to an independent operator, provided that the result thereof will be to enable such independent to compete effectively with theatres affiliated with a defendant or with theatres in the new theatre circuits to be formed pursuant to our order of divorcement. We see no objection to the substituted Finding 89 proposed by the plaintiff and adopt it accordingly.

Clearance

Our disposition of clearances was in no way altered by the Supreme Court. We think, however, that our Finding 77 was inadvertent and should be modified so as to read as follows, thus conforming to paragraph 4 in Section II of our decree based upon the finding:

> "A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public."

The substitute for Finding 78 proposed by the plaintiff is denied.

Discrimination

The plaintiff requests cancellation of paragraphs 8 and 9 in Section II of our former decree, which include provisions as to discrimination, and wishes to substitute a flat prohibition against including in licenses made with affiliated exhibitors or circuits of theatres certain contract provisions by which discriminations against small independents and in favor of the large affiliated and unaffiliated circuits were accomplished, as this court stated in Finding 110, affirmed by the Supreme Court. These provisions would only be illegal if inherently discriminatory or used in a discriminatory manner. We think it sufficient to provide, as was done in the Paramount consent decree, that the distributor defendants be enjoined "from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others." It may be objected that this is competitive bidding which has been rejected by the Supreme Court, but it neither involves calling for bids nor licensing picture by picture. A group of pictures may be licensed to one who wishes to take them without conditions being imposed that he can obtain one only if he purchases the group. We hold that the request of the plaintiff for the cancellation of paragraph 8 of Section II of the decree should be granted, but paragraph 9 should stand as it is. A new paragraph corresponding with the one we have quoted above from the Paramount consent decree should be substituted for the cancelled paragraph 8.

The Three Minor Defendants

We can see nothing in the arguments on behalf of these defendants for special treatment except an attempt to revise some of our former findings of fact and conclusions of law which have been affirmed by the Supreme Court. We have already dealt with the questions of franchises and discrimination earlier in this opinion. In respect to road shows, we see no reason for exempting them from the various injunctive provisions of our decree. It is entirely possible for the licensor to license for road shows, so long as it is not done in a discriminatory manner, either at a flat rental or on the basis of some percentage of what the show is thought likely to yield. But it would be unlawful in this, as in the case of other licenses, for the licensor to require a fixed admission price as a condition of the license.

The three minor defendants argue that they should be allowed to retain their old

customers irrespective of discrimination and contend that the Supreme Court has indicated that they possess this right. We cannot so interpret the opinion of the Supreme Court. It only presented the argument that, if competitive bidding had been sanctioned, the three minor defendants would lose the relationships they had with old customers and would be at a disadvantage in competing with the more powerful major defendants whose own theatres were not subject to competitive bidding. The system of preferring old customers undoubtedly aided discrimination in the past and served as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful. When separation of the business of distribution from that of the operation of theatres is effected, there will be a favorable market for the three minor defendants in which to license their pictures. This will be not only a compensation for inability to prefer their old customers but apparently a substantial added advantage to them in obtaining a greater opportunity to license their pictures than they had heretofore.

The Decree

The Supreme Court has asked us to divest any theatres which may be fruits of past illegal restraints or conspiracies. It may appear also to be necessary, irrespective of our general plan of divorcement, to terminate theatre monopolies in certain local situations possessed by any individual defendant or by any new theatre circuit which may be set up under the divorcement decree we propose. The plaintiff has presented insufficient evidence to justify us in disestablishing particular theatres either on the theory of local monopolies or of illegal fruits, and indeed it has formally stated that evidence of illegal fruits is not now available. So far as local monopolies are concerned, the statistics presented by the plaintiff were furnished to support the need for a general divorcement which this opinion has sanctioned and did not precisely reach any situations of local monopoly which may require divestiture of specific theatres. Moreover, certain of the statistics presented by the plaintiff go no farther than the year 1945, and there have been various changes in theatre holdings since that date. Accordingly, consideration of fruits and local monopolies will be suspended in the decree which we shall presently make.

In accordance with the instructions of the Supreme Court it is necessary that the provisions of paragraph 6 in Section III of our former decree in respect to expansion of theatre holdings be vacated. A provision should be substituted in the decree to be entered which enjoins the three exhibitor-defendants and any theatre-holding corporation resulting from the divorcement we propose from acquiring a beneficial interest in any additional theatre unless the acquiring exhibitor-defendant or corporation shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

It is argued by the plaintiff that a limited prohibition of cross-licensing of pictures among the three major defendants should be adopted temporarily. We think such a limitation would be unwarrantedly injurious both to those defendants and to the public. The plaintiff proposes that each major defendant be enjoined from licensing more than half of its films to any of the other defendants pending the completion of divorcement plans in those towns where the plaintiff claims there are no independent theatres or at least on independent first-run theatres. The plaintiff evidently hopes that such a limitation would induce independents to acquire theatres in so-called closed towns. Unless and until that should happen, one or two of the major defendants might be unable to show more than half of their pictures in such towns, and if but one of the major defendants had theatres there, those theatres could show only half of the films of the other two. It is manifest that this limitation upon cross-licensing would injure both the major defendants and the public, who would be deprived of seeing some of the pictures. In addition to this, the selection of the particular pictures in the half which could be licensed would involve some difficulties and might prove in the end to have been unwise, both for the distributor involved and the public interest. Our remedy of divorcement will meet all of the purposes for which the plaintiff is striving. We do not think that its completion will be so delayed as to justify this doubtful and difficult *ad interim* remedy proposed by the plaintiff.

[*Arbitration*]

The arbitration system and the Appeal Board which has been a part of it have been

useful in the past and as we understand it have met with the general approval of the plaintiff and of those defendants who have agreed to it. In our opinion it has saved much litigation in the courts and it should be continued. Accordingly, the three major distributor-defendants and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitrators, should be authorized to set up an arbitration system with an accompanying Appeal Board, which will become effective as soon as it may be organized after the decree to be entered in this action shall be made, upon terms to be settled by the court upon notice to the parties to this action.

The decree herein should be settled on notice and should be in accord with what we have said in the foregoing opinion. The terms as to divorcement set forth in the plaintiff's proposed decree seem to us satisfactory, except that the reference to paragraph 10 in Section III relating to joint interests, which we have rejected, should be deleted. We also approve of the further proposal of the plaintiff that the plaintiff and the defendants shall submit plans calling for such divestiture of theatres as may comply with the requirements of the Supreme Court regarding local monopolies and illegal fruits. Any ultimate disposition, however, must await a later order which shall be dependent upon the proof the plaintiff may furnish as to local monopolies and illegal fruits. We may perhaps indulge in the hope that the parties may be able to agree as to the disposition of any such interests, as they have done in the case of joint ownerships.

We do not approve of the provisions limiting cross-licensing pending the completion of divorcement or the provisions relating to dissolution of joint interests with independents, which have been sufficiently provided for in stipulations of the three major defendants and the orders entered thereon to which we have made reference. Our opinion indicates other changes in the decree proposed by the plaintiff, which should be embodied in the amended decree.

We have specified former findings which should be vacated and in some instances have set forth proper substitutes. Further disposition of any findings to be made should await submission by the parties.

Submit proposed amended decree and findings on or before September 20, 1949.

[¶ 62,474] United States v. United States Alkali Export Association, Inc., California Alkali Export Association, Imperial Chemical Industries, Imperial Chemical Industries (N. Y.) Ltd., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Company, Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company, Inc., The Mathieson Alkali Works (Inc.), Niagra Alkali Company, Pennsylvania Salt Manufacturing Company, Southern Alkali Corporation, Westvaco Chlorine Products Corporation, Inc., Wyandotte Chemicals Corporation, West End Chemical Company (Inc.), Pacific Alkali Company (Ltd.).

In the United States District Court for the Southern District of New York. Civ. 24-464. August 12, 1949.

Sherman Antitrust Act, Webb-Pomerene Act

Export Associations—Allocation of Markets and Allied Practices—No Immunity Granted by Webb-Pomerene Act.—Injunctive relief was granted in a Government proceeding against two domestic export associations organized under the Webb-Pomerene Act, manufacturers, distributors, and exporters of alkalis charged with violating Section 4 of the Sherman Act. When the parties admitted execution of the cartel agreements but contested their illegality under the Sherman Act, it was held that the Webb-Pomerene Act afforded no right to export associations to engage on a world wide scale in international agreements allocating exclusive markets, assigning quotas in sundry markets, fixing prices on an international scale, and selling through joint agents. Congress did not exempt such agreements or such practices as restricting the import and export of a commodity, eliminating competition among producers, and price-fixing from the scope of the Sherman Act by Section 2 and at the same time outlaw the consequences of such economic conduct by Section 4 of the Webb Act.

See the Sherman Act annotations, Vol. 1, ¶ 1220.175, and the Webb Export Trade Associations Act annotations, Vol. 1, ¶ 687.

For the plaintiff: John F. X. McGohey, United States Attorney, New York, New York; J. Francis Hayden, Special Assistant to the Attorney General, Francis E. Dugan, Special Attorney, Antitrust Division and Manuel M. Gorman, Special Assistant to the Attorney General, of Counsel.

For the defendants: Cravath Swain & Moore, Attorneys for Defendant United States Alkali Export Association, Inc., New York, New York; William Dwight Whitney, and George S. Leonard, of Counsel; Dwight, Harris, Koegel & Caskey, Attorneys for Defendant Church & Dwight Company, Inc., New York, New York; H. Allen Lochner, of Counsel; Sage, Gray, Todd & Sims, Attorneys for Defendant Hooker Electrochemical Company (Inc.), New York, New York; William E. Sims, of Counsel; Chadbourne, Wallace, Parke & Whiteside, Attorneys for Defendant The Mathieson Alkali Works (Inc.), New York, New York; Ralph D. Ray, and Abel I. Smith, Jr., of Counsel; Kenneth B. Ray, Attorney for Defendant Westvaco Chlorine Products Corporation, New York, New York; Coudert Brothers, Attorneys for Defendants Imperial Chemical Industries, Ltd. (London) and Imperial Chemical Industries, Ltd. (New York), New York, New York; Alexis Coudert, of Counsel; Oliver & Donnally, Attorneys for California Alkali Export Association and West End Chemical Company, New York, New York; Michael F. McCarthy, and Martin A. Meyer, Jr., of Counsel.

[*Nature of Action*]

Opinion of KAUFMAN, D. J.

[Digest] This is an equitable proceeding brought by the United States under Section 4 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A. Sec. 4, to restrain certain practices alleged to be in violation of Section 1 of the same Act. The complaint was filed in March, 1944, and named as defendants two domestic export associations organized under the Export Trade Act of 1918 (Webb-Pomerene Law, 40 Stat. 516, 517, Public Law 126, 65th Cong., 2nd Sess., 15 U. S. C. A. Secs. 61-65), thirteen corporate members of one or the other of said associations, and a corporation of the United Kingdom together with its New York subsidiary.

Defendants, all of which either manufacture, distribute, or export alkalis, are charged with entering into a series of agreements and engaging in concerted practices whereby the export of alkalis from the United States to many markets of the world has been restricted; the import of alkalis into the United States from abroad has been prohibited; the production of alkalis within the United States has been curtailed and limited; competition between defendants and others has been eliminated; the trade of domestic competitors of the defendants engaged in exporting alkalis has been restrained; and prices of caustic soda in the United States have been fixed.

[*The Defendants*]

The principal defendant, the United States Alkali Export Association (hereinafter referred to as "Alkasso"), was organized as a Delaware corporation in 1919, and, pursuant to the Webb Act, filed in that year with the Federal Trade Commission a verified written statement containing the location of its offices, names and addresses of its officers and stockholders, and a copy of its certificate of incorporation and by-laws.

The California Alkali Export Association, otherwise known as "Calkex", is the second domestic export association named in the complaint. Calkex, a California corporation organized in 1936, was originally composed of three corporate members, West End Chemical Co., Inc., Pacific Alkali Co., Ltd., and American Potash & Chemical Corporation. Of these corporations, however, West End is the sole remaining member of Calkex and the only defendant in this case.

Also joined as parties defendant are Imperial Chemical Industries, Ltd. (hereinafter termed "I. C. I."), a British corporation which manufactures and exports alkalis, and its wholly owned New York subsidiary, Imperial Chemical Industries (New York) Ltd. (later referred to as "I. C. I., New York").

The complaint charges as "co-conspirators," though not defendants, the American Potash & Chemical Corporation, mentioned above, Solvay Process Company, an im-

portant domestic producer of alkalis and a member of Alkasso from 1919 until 1941, Solvay et Cie—hereinafter termed "Belgian Solvay"—a corporation of the Kingdom of Belgium and a principal manufacturer of alkalis in Europe, and I. G. Farbenindustrie Aktiengesellschaft, more widely known as "I. G. Farben", one of the largest chemical companies in the world at the time the acts and agreements alleged by the Government occurred.

The International Cartel

No issue of fact is presented with regard to the agreements, . . . which the Government maintains are violations of its anti-trust laws. The answers of Alkasso and of I. C. I. admit the execution of agreements relating to the division of world markets, the assignment of international quotas, and the fixing of prices in territories other than the United States, and the individual corporate members of Alkasso admitted knowledge of these cartel arrangements. Solely for determination, therefore, is their legality under the provisions of the Sherman Act and whether or not, if illegal under the Sherman Act, they are exempted from condemnation by virtue of the provisions of the Webb Act.

Insofar as the application of the Webb Act is concerned, the case is *res nova,* since the Webb Act has not heretofore been construed by the courts.

[*Alleged Justification of Webb Act*]

Defendants make no attempt to conceal the substance of their arrangements to allocate the world markets in alkalis. Indeed, the broad outlines of the successive agreements were openly communicated to the Federal Trade Commission (Def. ex. B, C, S). Defendants rest their claim of justification entirely upon the provisions of the Webb Act, claiming that, by virtue of that statute, the anti-trust laws have no applicability to world wide apportionment of territory, establishment of exclusive markets, and the fixing and maintenance of prices between foreign competitors and export associations organized in the United States under the terms of the Act.

Section 2 of the Webb Act (40 Stat. 517, 15 U. S. C. A. § 62) [4] provides that the Sherman Anti-Trust Act shall not, except in certain enumerated instances, apply to the formation of an export association engaged solely in the export trade or to "an agreement made or act done in the course of export trade by such association * * *." The question for determination, therefore, is whether or not this language authorizes export associations organized under the Webb Act to enter into such arrangements as those above set forth.

The decisions under the Sherman Act leave no doubt that all contracts, combinations, and conspiracies aimed at obstructing the foreign commerce of the United States come within the broad prohibitions of the anti-trust laws. *United States v. American Tobacco Co.,* 221 U. S. 106; *United States v. Pacific & Arctic Co.,* 228 U. S. 87; *Thomsen v. Cayser,* 243 U. S. 66; *United States v. Sisal Sales Corp.,* 274 U. S. 268; *United States v. Aluminum Co. of America,* 148 F. 2d 416; *United States v. National Lead Co.,* 63 F. Supp. 513; aff'd 332 U. S. 319. The rule of competition, basic in American economic philosophy and approved by express legislative fiat in the Sherman Anti-Trust Act, is equally applicable to our export trade as it is to trade among the several states. *United States v. Aluminum Co. of America, supra,* p. 444. The contention by the defendants during the trial was that the purpose of the Webb Act was to repeal entirely the provisions of the Sherman Act as they applied to international trade and to leave our foreign commerce completely unfettered by any statutory restraints.

Unquestionably the cartelization of the world, if accomplished by the individual corporate defendants separately and not through

[4] "Sec. 2. That nothing contained in the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further,* that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

an association organized under the Webb Act, would be a flagrant transgression of the anti-trust laws. As to this, there could be no doubt since the decision of Judge Rifkind in the *National Lead* case, 63 F. Supp. 513.

Therefore, apart from the question presented here as to the immunity afforded to export associations organized under the Webb Act, the *National Lead* case, together with the case of *United States v. General Dyestuff Corp.*, 57 F. Supp. 642, also decided by Judge Rifkind, indicates clearly that the type of economic conduct pursued by defendants is prohibited by the Sherman Act. See also *United States v. General Electric Co.*, 80 F. Supp. 989, 1009; *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 307-309; *United States v. General Electric Co.*, 82 F. Supp. 753, 847. Consequently, to hold in this case that defendants, by employing the medium of an export association, may restrain our foreign trade with impunity, uninhibited by the sanctions and proscriptions of the Sherman Act, would be to ignore the plain intent of the statute. To remove cartel agreements, if made by export associations organized under the Act, from the comprehensive ban of the Sherman Act, while at the same time condemning similar agreements by others, would be to overlook the fact that it was the evil of restraint on commerce which Congress sought to extirpate, and not the creation of a preferred class which was to be free to continue the evil. *Cf. United States v. Sisal Sales Corp., supra; United States v. American Tobacco Co., supra; United States v. General Dyestuff Corp., supra.*

[*Webb Act Interpreted*]

Whatever exemptions the Webb Act did bestow upon associations organized thereunder, it affirmatively appears upon the face of the statute that Congress did not intend thereby to abandon the rule of competition as applied to our export trade. All privileges accorded under the Act are removed should any association, agreement or act be "in restraint of the export trade of any domestic competitor of such association." This strong solicitude for those in this country who would be forced to compete with such associations abroad would be entirely frustrated if such cartel patterns as were established here were permitted under the Act. For as long as one rival of an export association sought to vend his wares in foreign territory, international agreements of the kind here involved could do naught but restrain his trade. As the Supreme Court has succinctly indicated (*International Salt Co. v. United States*, 332 U. S. 392, 396), "it is unreasonable, *per se*, to foreclose competition from any substantial market." See, also: *United States v. Griffith*, 334 U. S. 100, 107. Nor can the stifling effect of such arrangements upon potential competition be overlooked. *Cf. United States v. Griffith, supra*, p. 107; *United States v. Timken Roller Bearing Co., supra*, p. 318.

Far from restricting the application of the anti-trust laws abroad, the Webb Act made what, at the time of its passage, were wide extensions in the extraterritorial effect of those laws designed to preserve competition.[5] Section 5 of the Act enlarged the investigatory powers of the Federal Trade Commission to situations where " * * * an association either in the United States or *elsewhere* has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein * * * ." (Italics supplied.)

Section 4 of the Act was of even broader scope. It granted world-wide operation to Section 5 of the Federal Trade Commission Act (Pub. Law 203, 63rd Cong., 2nd Sess., 38 Stat. 719, 15 U. S. C. A. § 45). The effect of Section 4 of the Webb Act was to condemn such "unfair methods of competition", wherever committed. Nor does this section draw any distinction between associations organized under previous sections of the Webb Act and other corporations engaging in export trade, and consequently must be held to apply equally to export associations as to others.[6]

The Federal Trade Commission Act was specifically designed to remedy the economic abuses which had been revealed by actions

[5] The oft distinguished *Banana Case* had at that time left in doubt the extent to which the Sherman Act applied to extraterritorial restraints of trade. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

[6] See Notz, The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause (1919), 29 Yale L. J. 29, 31; Federal Trade Commission, Foreign Trade Series No. 2 (1935), p. 2; Hearings before House Committee on the Judiciary, 64th Cong., 1st Sess. (1916), Serial No. 46, p. 70.

instituted under the Sherman Act, *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 310. And included within the generic term "unfair methods of competition" are exactly those practices which the Sherman Act declares illegal [7], including price maintenance [8], establishment of quotas [9], and the suppression of competition [10]. Therefore, the Webb Act, by declaring such conduct, if engaged in by American enterprise abroad, would be illegal, became a remedial statute. It was designed to make the rule of competition equally as applicable to our commerce between nations as it was to trade among the several States. *Branch v. Federal Trade Commission*, 141 F. 2d 31, 36.

A reading of the Webb Act in its entirety must therefore lead to the rejection of the claim that the cartel agreements involved herein are sanctioned under the Act. It cannot be concluded that Congress exempted such agreements and practices from the scope of the Sherman Act by Section 2 of the Webb Act, and at the same time outlawed the consequences of such economic conduct by Section 4 of the Webb Act. The only alternative would be to argue that the purpose of the Act was to vest exclusive control and jurisdiction of extra-territorial restraints of trade with the Federal Trade Commission. That hypothesis, however, is no longer open. *United States Alkali Association v. United States*, 325 U. S. 196.

The legislative history of the Webb Act, when considered as a whole, refutes any claim that the Act was intended to leave the foreign commerce of the United States free of, and unfettered by, the anti-trust laws. The isolated statements, removed by defendants from context and cited for that contention, do not reflect the true purport of the Act and are unreliable guides for judicial interpretation in the face of the entire Congressional history of the statute indicating an abiding contrary intent. See *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 692.

The Webb-Pomerene Act was not haphazard legislation passed without the considered judgment of Congress [11] and the executive branch. [11a] Behind its passage was a thorough investigation by the Federal Trade Commission, which, in 1916, published a two volume report entitled "Cooperation in American Export Trade", calling for the enactment of remedial legislation to enable American enterprise to garner its share of foreign trade.

The report of the Federal Trade Commission is especially significant because it was presented to Congress and represented the background of the drafting, debating, and passage of the Act. It called to the attention of Congress the large economic units of other countries against which American exporters and manufacturers had to compete, and recommended that those in this country engaged in foreign trade be permitted to cooperate in order to meet the competition of large foreign combines. But the entire emphasis of the Federal Trade Commission's recommendations was upon furthering competition between domestic and foreign concerns and not the elimination thereof.[12] Nor did the Commission leave any impression that it intended to free the

[7] *Federal Trade Commission v. Cement Institute*, 333 U. S. 683; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 463; *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 326-327, cert. den. 323 U. S. 730; Beer, Federal Trade Law and Practice (1942), p. 94.

[8] *Federal Trade Commission v. Cement Institute*, 333 U. S. 683; *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52; *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, cert. den. 323 U. S. 730.

[9] *California Lumbermen's Council v. Federal Trade Commission*, 115 F. 2d 178, cert. den. 312 U. S. 709.

[10] *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U. S. 441; *United States Maltsters Ass'n v. Federal Trade Commission*, 152 F. 2d 161.

[11] See H. R. 16707, 64th Cong., 1st Sess., 1916; H. R. 17350, 64th Cong., 2nd Sess., 1916; H. R. 2316, 65th Cong., 1st Sess., 1917; Senate 634, 65th Cong., 1st Sess., 1917; Hearings before House Committee on the Judiciary on H. R. 16707, 1916; Hearings before Senate Committee on Interstate Commerce on H. R. 17350, 1917; H. Rpt. No. 1118, 64th Cong., 1st Sess., 1916; S. Rpt. No. 1056, 64th Cong., 2nd Sess.; 1917; H. Rpt. No. 50, 65th Cong., 1st Sess., 1917; Sen. Rpt. No. 109, 65th Cong., 1st Sess., 1917; S. Rpt. No. 9, 65th Cong., 1st Sess., 1917; H. Rpt. No. 468, 65th Cong., 2d Sess., 1918.

[11a] See H. Rpt. No. 50, to accompany H. R. 2316, 65th Cong., 1st Sess., 1917, p. 2; Temporary National Economic Committee, Monograph No. 6, Export Prices and Export Cartels, 76th Cong., 3d Sess., 1940, p. 118.

[12] Federal Trade Commission, Report on Cooperation in American Export Trade (2 vols., 1916), Vol. I, p. 8. The Commission's summary of its recommendations (Vol. I, pp. 379-381) indicated its belief "that American exporters should be enabled to compete in foreign markets on more nearly equal terms with foreign competitors * * *. It does not believe that Congress intended by the antitrust laws to prevent Americans from cooperating in export trade for the purpose of competing effectively with foreigners

international commerce of Americans from all requirements of the trust laws. It fully recognized that "The dangers in cooperative action must be faced frankly and provided against fully"[13], but strongly believed that its goal could be achieved "without altering the policy of the antitrust laws or interfering with their enforcement".[14]

The committee reports submitted to the Congress prior to the passage of the Webb Act indicate that doubt as to the applicability of the Sherman Act to combinations of American manufacturers selling abroad necessitated declaratory legislation permitting the association of domestic concerns for the purpose of competing with foreign nations in extraterritorial markets.[15] The reports specifically pointed out that "The bill does not authorize any violation of the present antitrust laws."[16]

The constant reassurance by sponsors of the legislation to the Congress that the bill did not remove the sanctions of the antitrust laws as applied to our foreign trade is cogent and compelling reason for concluding that the framers of the Webb Act had no intention of permitting international combinations to trade unbridled in the markets of the world. The advocates of the Act constantly maintained that its passage was necessary to enable smaller producers and manufacturers in this country to form cooperative selling agencies in order to compete effectively with large foreign units abroad.[17] Suggestion that by so doing, all restraints upon our foreign commerce were thereby repealed was sharply rejected.[18]

Viewing the Webb Act in the light of contemporaneous interpretation of the antitrust laws, considering the import of the

* * *." The above is reprinted in Temporary National Economic Committee, Monograph No. 6, Export Prices and Export Cartels, 76th Cong., 3rd Sess., 1940, p. 117. The Commission directly informed Congress that legislation permitting combinations of Americans at home would enable our industry to "compete more successfully with foreign syndicates and cartels." 55 Cong. Rec. 3577.

[13] Summary of "Cooperation in American Export Trade" made to Congress by the Federal Trade Commission, 55 Cong. Rec. 3576-7577. The Commission indicated that whatever legislation was passed should be crystal clear in preventing export associations from gaining a competitive advantage over domestic rivals "through the use of methods which would be considered unfair practices in the United States * * *". Federal Trade Commission, Report on Cooperation in American Export Trade (1916), Vol. I, p. 378.

[14] Id.

[15] H. Rpt. No. 1118 to accompany H. R. 17350, 64th Cong., 1st Sess., 1916, reprinted in H. Rpt. No. 50 to accompany H. R. 2316, 65th Cong., 1st Sess., 1917, pp. 2-4, declared, "Our exporters are forced to meet sharp competition in the foreign trade * * *. One prime result of the common selling agency would be to reduce the cost of marketing the product and to that extent help the exporter's profits and enable him the more easily to meet foreign competition. * * *

"In order that this country may hold the foreign trade which has been acquired during the European war and successfully meet the competition that will be offered when the war is over our exporters must be in a position to compete in the cheapest and most effectual manner." (p. 2)

S. Rpt. No. 1056, to accompany H. R. 17350, 64th Cong., 2nd Sess., 1917, reprinted in S. Rpt. No. 9 to accompany Senate 634, 65th Cong., 1st Sess., 1917, pp. 2-4, again emphasized the aspect of competition. "The committee believes that as amended this bill will give to those interested in our foreign trade the full power to organize with respect to that trade so as to enable them to meet our foreign competitors * * *." (p. 4) The committee indicated, however, that "While the purpose of the bill is to increase our foreign trade, it should not result in destroying the business of other companies, associations, or individuals who may be engaged in the foreign trade. The purpose is to increase and improve this trade, not to injure it." (p. 3)

[16] House Report 1118 to accompany H. R. 17350, 64th Cong., 1st Sess., 1916, reprinted in H. Rpt. No. 50, to accompany H. R. 2316, 65th Cong., 1st Sess., 1917, p. 3.

[17] See Statements of Mr. Webb, 53 Cong. Rec. 13538, 13539, 55 Cong. Rec. 3564; Mr. Gard, 55 Cong. Rec. 3568; Senator Pomerene, 56 Cong. Rec. 71, 181, 182; Senator Kellogg, 56 Cong. Rec. 110-111.

[18] See statements of Mr. Webb, 53 Cong. Rec. 13536, 13540, 13705, 55 Cong. Rec. 3577; Mr. Caraway, 55 Cong. Rec. 3574; Senator Pomerene, 55 Cong. Rec. 2786; 7326; 56 Cong. Rec. 119. Senator Pomerene openly stated to the Senate considering the Act: "* * * * although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its trust laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice." (56 Cong. Rec. 170)

In refuting the contention that the Webb Act would permit associations formed under the Act to participate in world-wide cartels, Senator Pomerene declared:

"* * * if I may refer to another phase of this debate, a very plausible argument was made yesterday when the position was taken in substance that this bill was a repeal of the Sherman antitrust law, and if it became the law of the land and these associations were authorized they would at once seek to control the foreign market, and probably enter into a combination with foreign companies and cartels engaged in the same line of business * * *."

"If the Senator when making this argument

Act when read as a whole, and giving careful attention to the entire legislative history of its passage, the conclusion is irresistible that the Webb-Pomerene Act affords no right to export associations to engage on a world-wide scale in practices so antithetical to the American philosophy of free competition. The international agreements between defendants allocating exclusive markets, assigning quotas in sundry markets, fixing prices on an international scale, and selling through joint agents are not those "agreements in the course of export trade" which the Webb Act places beyond the reach of the Sherman Law. *Cf. United States v. Borden,* 308 U. S. 188; *American Cooperative Serum Ass'n v. Anchor Serum Co.,* 153 F. 2d 907, 912, cert. den. 329 U. S. 721.

In reaching this conclusion, the ruling of the Federal Trade Commission in the Silver Letter [19], suggesting the possible legality of international agreements touching only foreign markets and the continued adherence by the Commission to a modified version of that position has not been overlooked.[19a] But, as has already been indicated (*United States Alkali Ass'n v. United States,* 325 U. S. 196, 208), the Commission is not entrusted with enforcing the Sherman Act. Nor is it the Commission which ultimately determines what economic behavior constitutes "unfair methods of competition" within the purview of the Federal Trade Commission Act. *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427; *Federal Trade Commission v. Beech Nut Packing Co.,* 257 U. S. 441, 453; *Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 568; *Ford Motor Co. v. Federal Trade Commission,* 120 F. 2d 175, 181, cert. den. 314 U. S. 668; *Federal Trade Commission v. Balme,* 23 F. 2d 615, 619. In any case, administrative interpretation must fall where clearly unsanctioned by law or in conflict with judicial decision. *Jewell Ridge Coal Corp. v. Local No. 6167,* 325 U. S. 161, 169; *Neuberger v. Commissioner,* 311 U. S. 83, 88-89; *Estate of Sanford v. Commissioner,* 308 U. S. 39; *United States v. Phelps Dodge Mercantile Co.,* 157 F. 2d 453, 456, cert. den. 330 U. S. 818.

The United States as Territory Embraced by the Cartel

Notwithstanding the foregoing interpretation of the Webb Act relating to the division of foreign markets, price fixing, and elimination of competition abroad, it is deemed advisable to dispose of the questions of fact presented at the trial. The first of these is whether or not the United States was territory reserved to Alkasso under international compact.

The contracts introduced in evidence between Belgian Solvay and I. C. I. in 1928 and 1935 (Gov. ex. 1 and Def. ex. F) and the contract of Belgian Solvay, I. C. I., and I. G. Farben of 1938 (Def. ex. G) are ambiguous and do not, standing by themselves, lead to an inference that the United States was specifically a market prohibited to any of the contracting parties.[20] Nevertheless the preponderance of the evidence does indicate that at least as early as 1933, the United

had recited facts instead of fancies, there might have been some force in his utterances, but he was giving free rein to his imagination. The Senator overlooked the fact that this bill does not repeal the Sherman law." (56 Cong. Rec. 172)

Further statements by Senator Pomerene were to the same effect. He declared, in speaking of the Webb Act, "It does not repeal, it does not affect the Sherman law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned beyond territorial lines." (56 Cong. Rec. 173); he specifically pointed out that "There is nothing in this bill authorizing the division of territory abroad." (56 Cong. Rec. 181)

[19] The letter was written in response to an inquiry regarding certain hypothetical issues raised by the silver producers and was published in a news release of August 6, 1924. See Temporary National Economic Committee, Monograph No. 6, Export Prices and Export Cartels, 76th Cong., 3d Sess., 1940, p. 125.

[19a] *In the Matter of Florida Hard Rock Phosphate Export Ass'n.,* Docket 202-2, 40 F. T. C. D. 843; *In the Matter of Phosphate Export Ass'n.,* Docket 202-3, 42 F. T. C. D. 555. The Commission, in these proceedings, has inquired into the reasonableness of cartel agreements as they affect our foreign trade rather than condemn them as illegal per se. *Cf.,* however, the following economic reports published by the Federal Trade Commission: Report on the Copper Industry, Part I, The Copper Industry of the United States and International Copper Cartels (1947), pp. 225-226; Report on the Sulphur Industry and International Cartels (1947), pp. 13-16, 82-84, 104-105; Report on International Steel Cartels (1948), pp. 5, 12-13, 40-41, 65, 115; Report on International Electrical Equipment Cartels (1948), pp. 8-9.

[20] The intent of the agreement of 1928 to bar shipments to the United States is not clear. In any case, the 1935 agreement superseded all prior arrangements and indicated that the United States was "Territory common to both Parties" and that I. C. I. and Belgian Solvay would each have the right "to manufacture and to sell in the United States * * *." The division of 1938 shows joint participation in the American market.

States became territory subject to international partition among the defendants.

In the spring of 1933, a draft of the 1933 agreement later entered into by I. C. I. and Alkasso was submitted to Finch, Alkasso's president, by Wallace on behalf of I. C. I. (Gov. ex. 214). Included in the draft were the following terms:

> "To Great Britain, the Continent of Europe, Australia and New Zealand, Alkasso will not ship in excess of their 1932 shipments to each or any of these markets.
>
> "I. C. I. will correspondingly not increase their shipments to U. S. A. and its dependencies Cuba, Hawaii, etc." (Gov. ex. 216.)

Finch returned the draft to Wallace, then in London, with the two clauses quoted above deleted. Attached to his accompanying letter was a slip saying: "Discussed this matter with George White who will be writing you." (Gov. ex. 216.) White, who headed I. C. I.'s subsidiary in New York, sent a letter to Wallace on July 13, stating that the omissions requested by Finch were made "in order to avoid embarrassing questions which might be raised by the Federal Trade Commission should they call for a copy of the agreement * * * ." The letter indicated further, however, that the deletions "will not alter the agreement or change the undertaking mutually reached in New York * * * ." (Gov. ex. 215.)

Finch admitted that he had deleted the two provisions from the draft of the 1933 agreement and that he had discussed the draft with White. He further testified that he subsequently agreed that Alkasso would thereafter refrain from exporting to the continent of Europe, Great Britain, and the British Empire, including New Zealand and Australia. He denied categorically, however, that any undertaking had been made to restrain British imports into the United States or that he had told White the deleted provisions of the agreement had been stricken to avoid complications with the Federal Trade Commission. Other members of the Association's board of directors testified that they were unaware of any agreement on the part of I. C. I. to remain without the market place of this country. But Finch's recollection of the events of 1933 was not at all clear,[21] while defendants' own evidence shows that Alkasso's directors would not necessarily be formally informed of such a provision in a cartel agreement (Def. Ex. A).

Further evidence that the market of the United States fell within the world division of territory is contained in the Minutes of the General Purposes Committee of I. C. I. in 1936 where Nicholson, a senior director of I. C. I., in summarizing the cartel agreement of 1936 between I. C. I., Alkasso, and Belgian Solvay, indicated that the United States was included within the exclusive territory allotted to Alkasso (Gov. ex. 221). It is conceded by I. C. I. that the minutes correctly record Nicholson's summary of the agreement (Gov. ex. 226) and it further appears that, based upon this summary, I. C. I.'s directors approved the arrangement which placed this country among the private markets of Alkasso (Gov. ex. 222). Thereafter, I. C. I., in its reports to Alkasso relating to international shipments grouped the United States among those countries included within Alkasso's exclusive sphere (Gov. ex. 194, 195, 196).

Finch testified that the provision granting the United States to Alkasso as an exclusive market was reinserted by I. C. I. in its draft of the 1936 agreement merely as a sop to prevent shipments by Alkasso to the continent and that he had again insisted upon its deletion.

Further testimony adduced on the part of defendants was that the paucity of imports into this country during the period under consideration was due to the economic unfeasibility of shipping alkalis to this country from abroad because of tariff barriers, extra freight charges, and a domestic preference for liquid caustic which could not be shipped across the ocean in that state.

In weighing the conflicting evidence, the contemporaneous documents showing that the United States was, at the time the agreements were executed, intended to be part of the exclusive territory of Alkasso must be given greater weight than the defendants' present denials. *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395-396; *United States v. Corn Products Refining Co.*, 234 Fed. 964, 978; *United States v. General Electric Co.*, 82 F. Supp. 753, 844-845; see *United States v. Hartford-Empire Co.*, 46

[21] At first Finch disclaimed all knowledge as to any agreement on the part of Alkasso to cease shipping to Europe in 1933. He later admitted such arrangement after his memory had been refreshed by the Government's documentary evidence.

F. Supp. 541, 553. The silent fact that the final written agreement made no reference to the allocation of the United States, while almost every other country in the world was divided and apportioned by these parties to the cartel, coupled with the fact that the markets of the United States were shown to be a subject of substantial international interest (Gov. ex. 20, 21, 194, 195, 196), leads to the conclusion that the omission was born of the fear that an express allocation of the United States would make the agreement illegal on its face. This is made stronger by the fact that the domestic market of each of the other cartel members was considered vested in the home producer (See Exhibit D to the complaint), and that, under the agreements, which made each member of the cartel responsible under quota arrangements for all material exported from its exclusive territory, Alkasso assumed liability for all shipments of alkalis from the United States. (See Exhibits A, B, C, D, to the complaint.) Statistics introduced in evidence by both sides are one in showing how negligible were imports of all alkali products into this country during the entire period of the conspiracy. (Gov. ex. 198, 199, Def. ex. P, Q) All of the above facts must be considered in the light of evidence indicating that as early as 1929 Alkasso and I.C.I. had entered into such close alliance that it was "understood there will be complete cooperation between us in order to avoid competition in any part of the world * * *." (Exhibit B to the complaint)

Nor is it entirely evident that defendants were without economic motive for including the United States within the provisions of the international compact. Many of the factors relied upon to prove the unfeasibility of imports here would apply equally as well to the markets of Canada and Mexico, countries prominently mentioned in the division of international trade. These two markets were always within the export orbit of Alkasso despite recognition in the agreements of the principle of Imperial preference (Gov. ex. 174, 175), which would logically have made Canada a market of I.C.I.

Defendants' own economic expert admitted that the same economic deterrents against exporting alkalis from Europe to the United States existed with respect to exporting from this country to Great Britain, and that there was no more likelihood of an agreement by Alkasso not to invade the market of the United Kingdom than there was for a covenant by I. C. I. to refrain from exporting to the United States. Yet Finch admitted the existence of an express obligation by Alkasso to respect the sanctity of the British home market and such was the tenor of the agreement of 1936 (Exhibit D to the complaint).

The factors suggested to keep imports of alkali out of the United States in no way made it economically unfeasible for Alkasso to ship to Europe had it so wished (Gov. ex. 10, 11, 12, 14, 19). While the American tariff would no doubt prove discouraging, the period of greatest imports of caustic and soda ash into this country occurred at a time when the tariff rate was at its highest (Def. ex. P, Q), and Alkasso itself had at one time expressed a willingness to enter into foreign markets where there existed high preferential tariff rates (Gov. ex. 20). Even assuming it unprofitable for foreign producers to export to the United States, it is not difficult to see the advantage to Alkasso of a covenant protecting the domestic market when it is considered what a sustained policy of foreign dumping would have done to the stable price of alkalis which existed in this country during the period in question, or how such a policy would have interfered with the methods Alkasso employed to prevent caustic from reaching the hands of competing American exporters.

What has already been said about the Webb Act renders unnecessary lengthy discussion of the legality of an agreement between an export association organized under the Act and a foreign seller prohibiting imports into the United States. It should be pointed out, however, that the provisos of Section 2 of the Webb Act withdraw all immunities afforded by the Act from associations that enter into any agreement, understanding, or conspiracy "which substantially lessens competition within the United States or otherwise restrains trade therein", or which is "in restraint of trade within the United States". There can be no question that imposing upon the domestic market restraints which ban all imports of a given commodity into this country is conduct expressly made subject to the anti-trust laws by these provisos of the Webb Act. The original contention by defendants, later abandoned, that such a provision was not an unreasonable restraint of trade within the meaning of the Sherman Act is without merit. *United States v. General Dyestuff*

Corp., 57 F. Supp. 642, 649; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 444; *United States v. National Lead Co.*, 63 F. Supp. 513, 527.

Participation of Calkex in the International Cartel

Calkex asserts as a defense that it was never party to the international cartel. The contention, however, is without substance, for, as will appear below, the very formation of Calkex sprang from the overall international agreements. Once in existence, Calkex agreed to market its material through agents of Alkasso and to limit its exports to specifically designated territories (Exhibit E to the complaint). Although Kalkex never signed the international agreements, its entire conduct was directed toward conforming to and abetting the pattern set by the international cartel. Thus Calkex withdrew from Europe, where prior to its formation its members had sold considerable quantities of soda ash (Gov. ex. 148, 149, 156, 157, 159). Calkex, along with its members, respected the cartel arrangements in business negotiations (Gov. ex. 150, 152, 153, 160, 161, 162), entered into direct discussions with I. C. I. regarding certain markets, and sold ash through I. C. I. agents in China and India. In its own eyes, Calkex considered itself a full and intimate member of the international alliance (Gov. ex. 150, 151, 154). Under these circumstances, there is no basis for its exoneration.

Elimination of Export Competitors

Having by international agreement abolished competition in foreign trade and obtained its share of international markets, Alkasso proceeded upon what overwhelming evidence shows to be a deliberate attempt to eliminate all domestic competition in the exporting of alkalis. The practices engaged in to this end were pursued as a direct consequence of the international cartels [22] and forcefully indicate why such international restraints of trade are interdicted by the Sherman Act and in no way sanctioned by the Webb Act.

It was incumbent upon Alkasso, starting from the earliest international agreement, to assume total responsibility under its export quotas for all alkalis exported from the United States.[23] Exports from this country to exclusive territories of other nations would consequently be deductible from Alkasso's tonnage in joint markets. More important, however, such exports might endanger the entire fabric of the international cartel structure.[24] On the other hand, exports from the United States by non-members of the cartel to Alkasso's exclusive or joint markets would sharply curtail the price advantage achieved through monopoly control.[25] In order, therefore, to keep its own markets free from price competition, to keep international agreements intact, and to secure maximum export tonnage thereunder for itself, Alkasso set upon a course to stifle all exports of alkalis from the United States other than shipments effected through or under its direction.

To prevent exports through independent sources, all agreements with members from 1924 until 1940 contained provisions appointing Alkasso exclusive agent for the sale of members' material abroad and permitting independent shipments only upon Alkasso's express permission in writing. This exclusivity clause was stricken from membership agreements in 1940 after the Federal Trade Commission had suggested its illegality in the case of the Pacific Forest Industries.[26] As a matter of practice, however, members thereafter consistently ad-

[22] See Gov. Exhibits 17, 34, 70, 71, 81, 84, 87. In its earliest cartel agreement with I. C. I., Alkasso expressly obligated itself to "take the necessary steps to control Inyo and any other makers of alkali products in the U. S. A." Such covenant is implicit in the subsequent agreements.

[23] Exhibit A to the complaint; Exhibit B to the complaint; see Exhibit C to the complaint, par. 11, and Exhibit D to the complaint, pars. 3, 6.

[24] See Gov. ex. 71. California ash reaching Norway and Sweden caused the Germans to threaten to sell "willy-nilly" on the continent (Gov. ex. 28).

[25] See Gov. ex. 82, 83, 84, 85, 93, 95, 102, 103, 104. Secure from foreign competition in exclusive markets and agreeing upon fixed prices with I. C. I. in joint markets, Alkasso employed the monopolistic price as a weapon to abolish American competition in these areas. (Gov. ex. 82, 83, 85, 102, 104) But this was only an alternative remedy to the control of material and the elimination of all competing exports from the United States itself (Gov. ex. 83, 84, 104).

[26] Recommendations for the readjustment of the business of Pacific Forest Industries, an Export Trade Association, Ap. 1-13889 (Jan. 27, 1940). The Federal Trade Commission recommended that Pacific Forest Industries, an association organized under the Webb Act, no longer maintain contracts which in any way prohibited members from selling material directly to other American exporters. See Temporary National Economic Committee, Investigation of Concen-

hered to the policy of refusing requests for export tonnage and considered Alkasso their sole agent for foreign sales (Gov. ex. 63, 64, 65, 66, 67, 68, 69); while Alkasso continued to "contact members, the material of which was moving abroad through channels other than the Association".

Further implementing its policy of controlling all possible material which might fall into the hands of other exporters, Alkasso, until 1939, maintained with nonmember manufacturers of alkalis within the United States contracts containing provisions appointing it the exclusive export agency of the producer (Gov. ex. 120).

Additional precautions against unauthorized exports were taken by each of Alkasso's members by inserting in all domestic sales contracts clauses stipulating that the material sold was for domestic consumption only and not for export. Such a provision was adopted "as a result of the decision of the directors of the Association" and was another link in the chain to prevent the shipment of alkali tonnage from the United States through exporters who were not members of Alkasso (Gov. ex. 60, 61, 62). Whenever domestic purchasers of material permitted alkalis to filter into unauthorized export channels, defendants thereafter cut off the buyer's supply by refusing to make additional sales (Gov. ex. 16, 17, 68, 79, 80, 87, 92, 98, 112, 114), for it was the open and avowed policy of the Association and its members to prevent what was euphemistically termed "bootlegging" (Gov. ex. 70, 71, 99, 100).[27]

An elaborate statistical system was utilized to obtain knowledge of all shipments exported outside the Association and reaching foreign territory. If alkalis reached Alkasso's own markets, it was informed of the shipments and the source, through reports from its foreign agents. Material infiltrating into the exclusive preserve of other parties to the cartel was identified and such information transmitted to Alkasso directly from I. C. I. or indirectly through Belgian Solvay. Alkasso also maintained inspectors at docks within the United States to scrutinize material leaving the country. From this information, blacklists of all "bootleggers" were compiled by Alkasso and circulated throughout its membership to prevent future sales. Lest all these intricate measures against errant exports should prove in some instances inadequate, the Association maintained "standing orders with certain parties in the trade to purchase at any time any loose or available tonnage which could reach the hands of export dealers or regular exporters". (Gov. ex. 9.)

The formation of Calkex was an integral part of the plan to control the exports of domestic competitors. Calkex was a direct incident and corollary of the cartel arrangement in that the primary purpose of its organization was to withdraw California ash from the already apportioned territory of Norway, New Zealand and Australia, and to market it in conjunction with and under the direction of Alkasso. Once established, Calkex employed the same devices to stifle export competitors as did Alkasso and cooperated fully with Alkasso toward this end.[28]

The effect of the means adopted by Alkasso in eliminating its export competitors was due in no small measure to the concentrated power manifested by Alkasso in the export field. For the larger part of the duration of the conspiracy, Alkasso was the export agent for almost all the producers of alkalis in the United States. Until 1941 it exported or controlled the export of well over ninety percent of all alkali material leaving this country. Finch, the Association's president, could recall the name of only one domestic manufacturer of alkalis which exported independently for a short period of two years, and well he could speak with a sense of accomplishment when, in 1937, he wrote of the "great measure of control we have ex-

tration of Economic Power, Monograph No. 6, Export Prices and Export Cartels, 76th Cong., 3d Sess., 1940, p. 130.

[27] The attitude of defendants regarding independent exporters is well portrayed by the bold statement of Calkex in its correspondence that "it will be unsatisfactory to allow the Los Angeles Chemical Company to remain in the export soda ash business. This same argument applies also to other jobbers who likewise wish to continue exporting small quantities of Soda Ash." (Gov. ex. 110)

[28] Calkex by a resolution of its Board of Directors required members to export exclusively through Calkex (Gov. ex. 146). It also abolished the formal requirement of the resolution in 1940 (Gov. ex. 147), but all members continued to export exclusively through Calkex thereafter. In domestic sales, Calkex members likewise maintained contract provisions restricting the use of ash sold to the consumption of the purchaser (Gov. ex. 164, 165). Its members supplied statistics regarding export shipments made independently of Calkex (Gov. ex. 107), and cooperated fully with Alkasso in eliminating export competition (Gov. ex. 74, 93, 95, 97, 108).

ercised over all foreign markets for many years, in the face of enormous supplies available here for subterranean traffic, not to mention the great benefit our control has meant to the British generally in the way of prices." (Gov. ex. 98.)

There is no merit in defendants' original argument that the word "competitor", in the proviso of the Webb Act making the Sherman Act applicable to any agreement or act "in restraint of the export trade of any domestic competitor of such association", was not intended to embrace the independent exporter. The explicit language of the proviso rebuts this contention. Nor does answer lie in the fact that the Webb Act seemingly contains no prohibition against monopoly combinations, for whatever degree of combination the Webb Act may exempt from the anti-trust laws, it does not sanction the use of monopoly power to extinguish the competition of independent domestic competitors engaged in the export trade.

Not only must the practices of defendants outlined above therefore fall as part of the overall international cartel heretofore declared illegal, but they must also be condemned as integral elements in an overt conspiracy, specifically interdicted by the Webb Act, to eliminate domestic competitors engaged in the export trade.

No lengthy discussion is necessary of the long line of decisions under the Sherman Act condemning such practices when their result is to restrain trade or fetter competition. The policy dictated by the Act prohibits the use of concerted boycotts and coercion,[29] circulation of blacklists,[30] the employment of espionage systems,[31] where that conduct tends in any way to "hinder or obstruct the free and natural flow of commerce * * * ." *Federal Trade Commission v. Beech Nut Packing Co.,* 257 U. S. 441, 453. The general provisions in the domestic contracts of Alkasso's members prohibiting the resale or export of alkali runs afoul of the Sherman Act in that defendants have unlawfully attempted to control the path of alkalis in interstate and foreign commerce after sale of such material has occurred. *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U. S. 373; *United States v. Schrader's Son, Inc.,* 252 U. S. 85; *Federal Trade Commission v. Beech Nut Packing Co., supra.* The exclusive agency relationship between Alkasso and its members, whether lawful or not when standing alone, cannot be sanctioned when it has been utilized as an important element in a conspiracy to eliminate export competition. See *United States v. General Dyestuff Corp.,* 57 F. Supp. 642, 648.

Stabilization of the Domestic Price of Caustic

The final aspect of the conspiracy charged is that Alkasso and its members employed the Association as a device for fixing and stabilizing the price of caustic soda in the United States within the meaning of the proviso of the Webb Act declaring the anti-trust laws applicable to any agreement, understanding, conspiracy or act "which artificially or intentionally enhances or depresses prices within the United States." There is no substantial dispute as to the facts presented by the evidence; contention is based mainly upon the inferences to be derived therefrom.

Both defendants' and the Government's evidence indicate a remarkable stability in the price of caustic soda from a period beginning in 1931. The government's statistics from the Oil Paint & Drug Reporter reflect a practically constant domestic quotation of $2.30 per ton for solid caustic from August 9, 1937, until the end of 1944 (Gov. ex. 212). From November, 1933, until August, 1937, the quotation for domestic caustic soda in car lots was a constant rate of $2.60 per ton (Gov. ex. 212, 213), while contract quotations between 1931 and 1933 varied only between $2.50 and $2.55. Defendants' exhibits show more fluctuation in price over the long run period—1922-1942. But the defendants' expert admitted that their price studies reflected an unusually stable price structure from 1931 on, while the report of Diamond Alkali, which appeared to assume an important part in the construction of defendants' statistics, showed only one shift in the price of solid caustic during the twelve year period, 1931-1943 (Gov. ex. 224). The domestic price stability of caustic is in marked contrast to what defendants showed were frequent and sharp fluctuations in the average export return (Def. ex. K), a contrast more

[29] *Fashion Originators' Guild v. Federal Trade Commission,* 312 U. S. 457; *Eastern States Lumber Association v. United States,* 234 U. S. 600; *United States v. Frankfort Distilleries,* 324 U. S. 293.

[30] *Eastern States Lumber Ass'n. v. United States,* 234 U. S. 600; *Lawlor v. Loewe,* 235 U. S. 522; *Straus v. American Publishers' Assn,* 231 U. S. 222.

[31] *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441.

significant when it is considered that the unwavering price on the domestic market failed to reflect the recession of 1937, while export prices showed sharp response to the vagaries of the economic cycle.

Taking the remaining evidence introduced with this stable price structure of caustic in the domestic market as background, there is ample ground for the conclusion that defendants utilized Alkasso as a means of removing surplus caustic soda from the domestic market in order to maintain the current price. Defendants argue that the price of soda ash also remained stable throughout the same period, and from that they seek exoneration on the ground that no charge of price fixing of the latter commodity has been made. However, the fact that the Government has not levelled any charge against defendants because of the stability of the price of soda ash does not alter the conclusions to be drawn from the stability of the price of caustic soda, especially where it has been shown that the problem of disposing of a surplus in caustic soda, unlike soda ash, was a continuing and plaguing one for the Association and its members.

Behind the need for the employment of Alkasso as a thermostat to keep constant the domestic price of caustic soda was the rapid rise from 1923 to 1945 in the production of electrolytic caustic (Gov. ex. 201). From 1931 to 1941, electrolytic caustic production increased some 270%. While the production of ammonia caustic remained relatively stable until the advent of the war, electrolytic caustic production, compared with total production of caustic, increased from 28% in 1923 to over 50% in 1941 and to 63% in 1943 (Gov. ex. 200, 202). As previously noted, this tremendous rise in the amount and percentage of electrolytic caustic produced was due to the great increase in the demand for chlorine. But it placed upon the Association and its members the urgent and pressing problem of disposing of excess production in such a way that it would not affect the going price in the domestic mart.

Alkasso was always keenly aware of the problems caused by the increase in electrolytic caustic. Finch wrote in 1942 of the "problem" confronting "the industry with this surplus material which continues to increase" (Gov. ex. 140). In 1933, Finch, in a memorandum to Dow Chemical Company with regard to membership in Alkasso, declared that "Hereunder the electrolytic problem is always recognized * * *" (Gov. ex. 126A), and at Alkasso's meeting of directors, it was indicated that the problem of the Association was primarily one "of distributing excess caustic soda" (Gov. ex. 129).

The concern demonstrated was not merely solicitude over the disposal of material which the domestic market could not consume, but was intimately identified with the preservation of the domestic price structure of defendants' product. In a letter to Alkasso, Dow, an electrolytic producer, mentioned "the intelligent export disposition of * * * (Dow's) * * * output, or the possible alternative of a heavy cost to those who participate to a much greater percentage in the country's total alkali business * * *" (Gov. ex. 124). And Hooker, another electrolytic manufacturer, wrote in opposition to a proposed plan of Solvay: "If we take the position in advance, which I think we have heretofore done, that we expect to place all of our material in the Domestic market and if possibly the other electrolytics do likewise, Solvay * * * might be forced * * * [to] give up their avaricious suggestion." (Gov. ex. 125)

So, too, in its negotiations with the British subsequent to 1933, it is clear that Alkasso was motivated by its need to obtain additional markets in order to dispose of material which might tend to depress the price of caustic within the United States. White of I. C. I., New York, indicated that if Carbide & Carbon, a manufacturer which purchased chlorine and caustic, utilized products other than caustic in its production, the backup in caustic in this country might force Finch to press too hard for export concessions from I. C. I., resulting in a breakdown of the international cartel and a crash in the domestic price. (Gov. ex. 217, 218) The British tried to persuade Finch to solve this problem by agreement with Carbide, but expressed concern over the fact that "the export market is being regarded by all these people as the ultimate element for stabilization." (Gov. ex. 220) On June 4, 1935, White wired London of the average prices in the United States market, indicated that the excess caustic problem was not one of a temporary nature, and said that he had informed Finch that it was doubtful "whether I. C. I. could accept or would discuss change in quota to relieve internal stress brought about by domestic competitive

affairs" (Gov. ex. 220). In the same cable White informed London that "* * * duPonts had learned of excessive caustic stocks and of possibility of break in price here arising from disagreement with us * * *". During this period the British remained adamant in refusing to change quotas "enabling states industry continue to maintain stability home market * * *" (Gov. ex. 20). Not only does the evidence demonstrate an intent on the part of Alkasso and its members to maintain domestic price stability by means of Alkasso, but it indicates clearly certain methods and devices employed by Alkasso to that end.

It was the policy of the Association to export caustic in preference to all other alkalis. By far the greatest proportion of its exports were electrolytic caustic (Gov. ex. 133). Premiums were placed on higher grade caustic to encourage purchases of lower surplus grades. (Gov. ex. 135) Markets not supplying a ready demand for caustic were abandoned, and Alkasso declined the sale of tonnage in other alkali products because "* * * the Association problem primarily being one of caustic soda and an increase in caustic shipments being more desirable for that reason". (Gov. ex. 129).

While at the beginning of each year, Alkasso established export quotas or allocations of material for each of its members based on the percentage of the member's sales to total sales in the domestic market, it readily abandoned its prearranged allocations and granted preferences or "overages" to producers of electrolytic caustic whenever surpluses of that material accrued. These overages granted to electrolytic producers were correspondingly deducted from the tonnage previously scheduled to be accepted from ammonia producers, and were, in the words of Finch, "due to the pressure upon us for electrolytic material * * *". Alkasso also purchased surplus electrolytic caustic from non-member producers upon the latter's request and stored it at already overcrowded warehouses.

Defendants' showing of overages in bicarbonate and ash does not rebut the inferences to be derived from their conduct in marketing caustic in the light of the testimony of Finch that the overages in ash and bircarbonate were due to brand preferences or to decisions by members not to ship and the absence of a showing that there was any surplus or overproduction of these latter products. Nor does the minuteness, percentagewise, of overages in caustic to total production remove the taint which must be accorded this practice, where it is shown to be an important element in a scheme designed to remove all surplus caustic from this market in order to stabilize the domestic price.

The final aspect of defendants' conduct aimed at implementing the stabilization program in caustic was to employ Alkasso as a huge warehouse for the storage of excess electrolytic caustic until such material could be moved abroad and out of the domestic market. This was done, according to Finch, directly as a result of the pressure exerted upon Alkasso by electrolytic members and non-members. While the normal carrying requirements of Alkasso demanded a stockpile of from 2,500 to 4,000 tons of caustic, at times it had on hand average monthly stocks in excess of 10,000 tons of material. In 1935 the cost of storage to Alkasso for caustic held in this country approximated $3,000 per month (Gov. ex. 142) and the average yearly cost computed in 1939 amounted to $25,000 (Gov. ex. 144). When storage at seaboard by Alkasso became too expensive, excess caustic was stored at members' plants for the account of Alkasso and Alkasso paid five cents per month per ton for storage expenses thus incurred.

In summary then, it must be concluded that the domestic price of caustic showed remarkable stability over a large period of the conspiracy; that defendants utilized Alkasso to dispose of surplus caustic when it would tend to depress the price in the domestic market; that the purpose in preferential exports of caustic, allocation of overages to producers of surplus electrolytic caustic, and the storing of excess material was to neutralize the tendency of surplus caustic to become a price depressant.

A suggestion is made that stabilization of price was not "artificially enhancing or depressing" prices within the meaning of the proviso of the Webb Act. The claim is baseless. Interpretation of the anti-trust laws does not turn upon such semantic niceties. The practice of domestic price stabilization by an export association and its members finds no sanction in the Webb Act and must be condemned under the Sherman Act, when, for half a century, the Supreme Court "has consistently and without deviation adhered to the principle that price-fix-

ing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." [32]

Defendants assert that the export market, representing only from between seven to ten per cent. of the total production of caustic in the United States, would not prove to be an effective device for maintaining constant price levels within this country. The evidence would not necessarily warrant this conclusion. In any case, however, the facts come within the rule laid down in the *Socony Vacuum Case,* 310 U. S. 150, declaring illegal any agreement for the purchase of "distress" or surplus material amounting to a small percentage of the total product where it is shown that such practice would materially interfere with the free interchange of those competitive forces which ultimately determine the commodity's going price. See *United States v. Aluminum Co. of America,* 148 F. 2d 416, 445.

The Issue of Mootness

Defendants originally argued that the issues involved in the case had become moot in that the recent war caused a practical termination of all international agreements and that there appeared little likelihood that the practices complained of would be resumed. The evidence fails to bear out this claim.

In 1941, two years after Britain had entered the war, Alkasso and I. C. I. intended to renew the 1936 agreement but such action was made unfeasible by British economic regulations. Despite the state of belligerency and uncertainty of governmental policy, however, both parties did arrive at a mutual understanding. While recognizing that wartime conditions made it mandatory to limit the extent of cartel coverage to some degree, they nevertheless reaffirmed the division of exclusive territories which had been allotted under the agreement of 1936 and also provided in detail for certain joint territories (Exhibit F to the Complaint). Finch testified that this division of markets was respected by both parties until the time the instant action was begun. Alkasso also negotiated sales abroad through agents of I. C. I. in South America until 1944 under arrangements stemming from the cartel.

The evidence also shows that I. C. I. and Alkasso employed the cartel as a means of allocating material during the period of war shortages. In 1942 Alkasso wrote to the Department of Commerce to protest contemplated governmental action in dividing the South American markets between Britain and the United States. Alkasso set forth the international cartel agreements between it and I. C. I. and requested "that both of us be left alone under this arrangement to work out the problem of feeding Latin American industries, for which previous arrangements were made and along which lines both of us have been working and will continue to work." (Gov. ex. 57.)

It is clear, therefore, that the war did not bring about a general abandonment of all cartel practices. No doubt the war necessitated curtailment of many cartel activities; perhaps it even caused the demise of certain co-conspirators such as Belgian Solvay and I. G. Farben. But there is no evidence indicating that defendants considered the state of war other than an inopportune interlude necessitating only retrenchment until the cessation of hostilities, when again the world markets in alkalis could be apportioned.

On reargument held on May 19th and 20th, 1949, counsel for defendants stated:

> "* * * this association is going very strong today in foreign markets, and there is not any cartel of any kind whatsoever, and if we can receive some expression or instruction as to whether we can or cannot have one and under what circumstances, and all the rest of it, that is an important thing. I see no reason why we can't tomorrow have a new one if we need to under the law * * *."

Injunctive relief is therefore eminently proper, for even where activities have totally ceased before the institution of suit, the equitable power to provide against their resumption still subsists unless it be shown that there is no reasonable expectation that such practices will recur. *United States v. Aluminum Co. of America,* 148 F. 2d 416, 448; see also *Walling v. Haile Gold Mines,* 136 F. 2d 102, 105; *United States v. National Lead Co.,* 63 F. Supp. 513, 526-527.

[32] *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 218; also *United States v. Trenton Potteries,* 273 U. S. 392; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211; *Standard Sanitary Mfg. Co. v. United States,* 226 U. S. 20.

Defendant Calkex urges that injunctive relief against it is improper because for all intents and purposes it has been inactive in the export field since 1941 and two of its three original members have withdrawn, leaving it a mere ghost or corporate shell. However, the evidence shows that the demise of Calkex in the export field was due solely to wartime difficulties in obtaining supplies of ash to export and in obtaining adequate shipping facilities. Despite these obstacles, the directors in 1941 recommended "that the Association should be preserved regardless of present difficulties" (Gov. ex. 166). Nor has the agreement between Calkex and Alkasso, which continues to link Calkex to the international conspiracy, ever been formally terminated. The fact that there is now but one member of Calkex still nursing its faint flame of life does not preclude the revival of its export activity when post-war supplies of ash become more readily available. This is all too likely to occur when it is considered that the withdrawal of its principal member, American Potash, was at the insistence of the Alien Property Custodian who is now no longer in control of corporate policy. Furthermore, Calkex has not seen fit to rest throughout these proceedings solely upon the contention that it has become defunct. On the contrary, it has argued in behalf of the propriety of the conduct engaged in by all defendants.

Since there appears reasonable likelihood of the resumption of its activities, and since it has constantly asserted the legality of its past behavior, Calkex, too, must submit to the equitable powers of this court. *United States v. Aluminum Co. of America, supra; Otis & Co. v. Securities & Exchange Commission*, 106 F. 2d 579, 584; *Walling v. Haile Gold Mines, supra*. See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 308.

Findings of fact will be made and a decree will be entered in accordance with this opinion.

[¶ 62,475] The California Oil Company v. Irving Reingold, individually and trading as Rein Motors; Irving Reingold and Philip Stark, trading as Rein Motors.

In the Superior Court of New Jersey, Chancery Division, Bergen County. Docket No. C-1721-48. Civil Action Opinion. July 21, 1949.

New Jersey Fair Trade Act, Sherman Antitrust Act

Trade-Marked Gasoline—Minimum Resale Price—Conspiracy Defense Dismissed.—An interlocutory injunction was granted to a producer of trade-marked gasoline enjoining service station operators, who had notice of the minimum retail selling price as set out in a contract between the producer and one of its retailers, from selling gas below the prices fixed therein. It was held that the gasoline was in fair and open competition, that the gasoline company had complied with all the statutory requirements and was therefor entitled to the protection of the New Jersey Fair Trade Act. The defense that the producer was engaged in a conspiracy to restrain trade and fix prices in defiance of the federal antitrust laws was dismissed since the company's minimum prices were at least one cent lower than those charged by other companies.

See the Sherman Act annotations, Vol. 1, ¶ 1660.151, and the New Jersey Fair Trade Act annotations, Vol. 2, ¶ 8564.30, 8564.80 and the Resale Price Maintenance Commentary, ¶ 7354.

For the plaintiff: Francis V. D. Lloyd, (Morrison, Lloyd & Griggs, Hackensack, N. J.).

For the defendants: Albert S. Gross, Hackensack, N. J., (George J. Kauper, Union City, N. J.).

[*Nature of Action*]

GRIMSHAW, J. S. C.: This matter is presently before me on a motion by the plaintiff for an interlocutory injunction restraining the defendants from using the trade-mark, name and brands of the plaintiff in connection with the retail sale of gasoline at prices below those fixed by the plaintiff.

[*Parties*]

The plaintiff, California Oil Company, a Delaware Corporation, authorized to do business in New Jersey, is engaged in the production and sale of gasoline. It markets its products under the trademark and name of "Calso" and "Calso Supreme". As a result of advertising, these names and brands

have acquired a special significance in connection with the products of the plaintiff and are, as a consequence, a valuable part of the good will which plaintiff enjoys.

Defendants, Irving Reingold and Philip Stark, trading as Rein Motors, operate a gasoline service station in the City of Hackensack. At this station defendants sell at retail the gasoline produced by the plaintiff. In doing so these defendants use the trademark, name and brands of the plaintiff.

[*Minimum Retail Selling Price*]

On March 4, 1949, plaintiff, in order to secure for itself the protection afforded by the provisions of the so-called Fair Trade Act, R. S. 56:4-3, 6, executed a contract with Refinery Calso Station, one of the retailers of its products. In the contract, plaintiff fixed the minimum retail selling price for its product sold under the name of "Calso" at 17.1 cents per gallon and the minimum retail price of its product sold under the name of "Calso Supreme" at 19.1 cents per gallon. These prices were in addition to all state and federal sales and excise taxes. Following the execution of the contract, plaintiff notified all retailers of its products, including these defendants, of the minimum retail prices so fixed. In April 1949 plaintiff notified all its retailers, including these defendants that thereafter the minimum resale price for "Calso" would be 17.7 cents per gallon and for "Calso Supreme" 19.7 cents per gallon, exclusive of state and federal sales and excise taxes. Defendants failed to charge the prices set by the plaintiff. They sold and still continue to sell plaintiff's products at a price approximately 2.4 cents below the minimum price plaintiff has set. Plaintiff protested and sought to have defendants follow its price list but defendants refused and this litigation ensued.

That the enactment of the Fair Trade Act, R. S. 56:4-3, 6 was within the authority of the legislature is no longer open to question. *Old Dearborn Distributing Co. v. Seagram Distillers Corporation*, 299 U. S. 183; *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585. Nor can it be disputed that the plaintiff took the necessary steps to qualify it for the protection afforded by the statute.

[*Consent Alleged as a Defense*]

Defendants concede that they received notice of plaintiff's minimum price list. But they base their refusal to conform upon three grounds. The first is that the plaintiff consented to the sale of its products at reduced prices. In his answering affidavit Irving Reingold says that in December of 1948, three months before plaintiff fixed its minimum prices, Reingold met with G. S. Cramner, plaintiff's sales manager and Martin Beck, the distributor from whom defendants obtained their supplies of gasoline. According to Reingold, he told his companions of defendants' intention to sell at reduced prices and they approved. This statement is categorically denied by both Cramner and Beck. Frankly I don't believe it. Six months prior to the meeting Beck had contracted to supply defendants with gasoline. The contract had several years to run. It is not reasonable that Beck who had nothing to gain by gratuitous concessions would deliberately invite a price war. Plaintiff was not a party to the contract nor was it consulted about the execution of the contract. At the time of the meeting, plaintiff was preparing to establish minimum prices for the resale of its gasoline. It strains belief to conclude that plaintiff would imperil all its plans for no conceivable benefit.

Reingold also charges that Refinery Calso Station, the retailer with which plaintiff made its price setting contract, is owned by the plaintiff and therefore the contract is a fraud on the statute. The allegation is made upon information and belief. It is supported by no proof other than an affidavit by a ubiquitous fire chief from Hackensack who swore that he accompanied Reingold to the Calso Refinery Station and heard the son of the proprietor say that plaintiff owned the station. Such evidence is not worthy of consideration. And it is interesting to note that the station owner was in court at the time of the argument but was not called upon to substantiate defendant's allegations either by affidavit or oral testimony.

[*Conspiracy Raised as a Defense*]

The last charge by Reingold, also upon information and belief, is that the plaintiff, in concert with the major oil producers of the country, is engaged in a conspiracy to restrain trade and fix prices in defiance of the federal anti-trust laws. Defendants charged that all the oil companies had set the same price for the retail sale of gaso-

line and that such action established a prima facie case of conspiracy. Unfortunately defendants' own proofs refute this allegation. Their own affidavits establish the fact that plaintiff's minimum prices are at least one cent lower than those charged by the other companies. So, whatever other producers may be doing, plaintiff, certainly, on the proofs before me, is not engaged in any conspiracy to restrain trade and fix prices by horizontal agreements with other producers.

[*Interlocutory Injunction Granted*]

Plaintiff's product is in fair and open competition. In setting a minimum price for its resale, plaintiff has complied with all the statutory requirements. It is entitled to protection. An interlocutory injunction will issue.

[¶ 62,476] Automatic Radio Manufacturing Company, Inc. v. Hazeltine Research, Inc.

In the United States Court of Appeals for the First Circuit. October Term, 1948. No. 4381. August 22, 1949.

On appeal from the United States District Court for the District of Massachusetts, FORD, J.

Sherman Antitrust Act

Suit to Recover Royalties—Alleged Patent Misuses—Unlawful Monopoly Not Established.—The validity of a patent license agreement was reaffirmed when the Court dismissed the appeal of a radio manufacturer from an interlocutory judgment which ordered the payment of royalties to a patent holding company engaged in radio research. None of the defenses alleging that the licensor had so misused the monopoly of its patent grants as to have disentitled itself to any relief were sustained. The fact that the licensed apparatus was required to be marked with a restrictive use notice did not invalidate the agreement. Payment of royalties measured by a percentage of the selling price of all radio apparatus of specified types was found to be unobjectionable, the parties being free to bargain as to the basis upon which royalties were to be computed. No proof was found for the allegation that the licensor was engaged in an illegal endeavor to eliminate competition and secure an unlawful monopoly; even assuming such claim had been established, the license contract was itself a valid agreement and not part of such scheme.

See the Sherman Act annotations, Vol. 1, ¶ 1270.101, 1660.240.

For the appellant: Floyd H. Crews, New York, New York, with whom George K. Woodworth, Boston, Mass., and Darby & Darby, New York, New York, were on brief.

For the appellee: Laurence B. Dodds, New York, New York, with whom Richard F. Walker and Roberts, Cushman & Grover, both of Boston, Mass., were on brief.

Before MAGRUDER, Chief Judge, WOODBURY, Circuit Judge, and SWEENEY, District Judge.

Opinion of the Court

MAGRUDER, Chief Judge: This is a suit for royalties alleged to be due under a patent license agreement between the defendant, Automatic Radio Manufacturing Company, Inc., a Massachusetts corporation (hereinafter called Automatic), and the plaintiff's assignor, Hazeltine Corporation, a Delaware corporation. Plaintiff Hazeltine Research, Inc., is an Illinois corporation organized as a wholly owned subsidiary of Hazeltine Corporation. Hazeltine Electronics Corporation, another wholly owned subsidiary of Hazeltine Corporation, conducts the research program about to be mentioned. We shall refer to these corporations collectively as Hazeltine.

For many years Hazeltine has engaged in a program of radio research, as a result of which it has developed many patented inventions. Other patents have been acquired by it through various business arrangements. At the time of this suit, Hazeltine owned, or had the right to grant licenses under, five hundred and more patents and approximately two hundred patent applications, chiefly pertaining to radio and television. As one of the largest licensors in the radio field, it has granted nonexclusive licenses to radio manufacturers, permitting them to use any or all of Hazeltine's patents, in return for a royalty payment of a fixed percentage of gross sales of various types of radio equipment.

Automatic first became a licensee of Hazeltine in 1935. It defaulted on its royalty obligations under the first two agreements with Hazeltine. However, in each instance a settlement was reached, and the relationship continued. The present contract between the parties became effective September 1, 1942, to run ten years, subject to an option of earlier termination by the licensor upon the happening of certain specified events. Automatic was given a non-transferable, non-exclusive license, under a schedule of enumerated patents and all other patents with respect to which Hazeltine should acquire the right to grant licenses during the period of the agreement. The license authorized Automatic to utilize such patents in the manufacture and sale of certain described radio, phonographic, and other equipment, "limited to use in homes, use for educational purposes and private non-commercial use". Automatic agreed to pay royalties expressed in terms of a specified percentage of the selling price of each piece of the enumerated types of equipment manufactured and sold by the licensee, whether or not any of such patents were actually used in the manufacture of the particular apparatus. In any case, the agreement called for a minimum royalty payment of $10,000 per year.

The contract, in Article VI, further provided—and appellant makes much of this—that the licensee

> "agrees to mark all licensed apparatus manufactured and sold by Licensee hereunder, in readily legible form, with the statement 'Licensed by Hazeltine Corporation only for use in homes, for educational purposes, and for private, non-commercial use, under one or more of the following patents and under pending applications:' followed by the word 'Patent' and the numbers of the patents which are, in the opinion of Licensor, involved in apparatus of the types licensed hereunder manufactured by one or more licensees of Licensor. The marking required by this section shall be affixed to said licensed apparatus by attaching plates bearing the required marking or by affixing said marking on said apparatus in some other form equally permanent and apparatus not bearing such marking is not licensed."

It was found by the district court that the contract was executed in New York, and that at least part of the performance thereunder was due in New York. The concluding article of the contract provided that it was to be "governed by and interpreted in accordance with the laws of the State of New York."

Because of wartime restrictions on the production of radio sets for private use, Hazeltine waived demand for payment of the minimum annual royalties from September, 1942, through August 30, 1945. Upon refusal of Automatic to pay royalties thereafter, Hazeltine filed its complaint in the present case on April 9, 1947. Plaintiff prayed for a judgment that Automatic pay to Hazeltine the minimum sum due under the contract for the year ending August 31, 1946, with interest; that an accounting be had and that the further sums due be determined and decreed to be paid to the plaintiff with interest; "that defendant render to the plaintiff the statements required by said agreement throughout the continuance in force of said agreement"; that defendant pay plaintiff's costs herein; and that plaintiff have such other and further relief as may be just.

After Automatic's answer was filed, both parties filed motions for summary judgment and submitted supporting affidavits. A hearing was held on the motions, and the district court concluded that the case was one appropriate for the application of summary judgment procedure since there was "no genuine issue as to any material fact". Hazeltine's motion was granted and Automatic's motion denied. 77 F. Supp. 493.

On June 21, 1948, an "Interlocutory Judgment" was entered, in which it was adjudged and decreed as follows:

> (1) "That the license agreement between the parties dated as of September 1, 1942, 'is good and valid at law and in full force and effect.'
>
> (2) "That plaintiff recover from defendant as minimum royalty under the license agreement for the year ending August 31, 1946 the sum of $10,000 with interest, 'and that execution may issue therefor.'
>
> (3) "That plaintiff recover such further sums as are due from the defendant at the date of this judgment under said license agreement, and that the case be referred to a Master to take and state an account thereof.
>
> (4) "That 'a permanent injunction issue out of and under the seal of this Court directed to defendant, its officers and agents, enjoining and restraining them and each of them throughout the continuance in force of said license agree-

ment from breaching such provisions of Articles IV and V thereof as relate to defendant's obligation to plaintiff to pay royalties and to keep records and render statements from which the proper amounts of such royalty payments may be determined'."

This court has jurisdiction to entertain the present appeal from such judgment, pursuant to provisions of the Judicial Code now found in 28 U. S. Code §§ 1291, 1292 (1), and 1294 (1) (1948). Counsel for both parties approved the judgment "as to form", and no question is presented here as to the scope of the injunction.

Automatic raised, and the district court considered, numerous defenses. In examining the judgment of the district court, we confine our attention only to those matters presented in this appeal. In its brief, Automatic has enveloped the case in an atmosphere of overreaching and chicanery hardly warranted on the record. A lengthy affidavit executed by one counsel for Automatic, and filed by Automatic in support of its motion for summary judgment, contains many sweeping claims and charges, but the affidavit was made for the most part "on information and belief", and not on personal knowledge, as required by Rule 56 (e).

I. *Patent Misuse*

Appellant has advanced a variety of defenses to sustain the proposition that Hazeltine has so misused the monopoly of its patent grants as to have disentitled itself to any relief under the present complaint.

Restrictive Use Notices

Automatic argues that the requirement in the license agreement that licensed apparatus be marked with a "restrictive use" notice, as above stated, constitutes such a misuse of the patent as to render the agreement unenforceable. This contention must be rejected on the authority of *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U. S. 175 (1938), and upon rehearing, 305 U. S. 124 (1938). In that case a non-exclusive license "was expressly confined to the right to manufacture and sell the patented amplifiers for radio amateur reception, radio experimental reception, and home broadcast reception." 304 U. S. at 180. The agreement required the licensee to affix to all amplifiers sold under the license a notice stating that the apparatus was licensed only for the aforesaid uses. Amplifiers with such notices attached were sold by the licensee to a purchaser who intended to and did put them to use in theaters as part of talking picture equipment. At the time of order, manufacture and sale, both the licensee and the purchaser knew of the purchaser's intended commercial use, and the purchaser knew that the license did not authorize the licensee to make and sell amplifiers for that use. Speaking through Mr. Justice Brandeis, the Supreme Court on rehearing reaffirmed its earlier view that the purchaser was accountable as an infringer.

> "That a restrictive license is legal seems clear. . . . The practice of granting licenses for a restricted use is an old one, see *Rubber Company v. Goodyear,* 9 Wall. 788, 799, 800; *Gamewell Fire-Alarm Telegraph Co. v. Brooklyn,* 14 Fed. 255. So far as appears, its legality has never been questioned . . . As the restriction was legal and the amplifiers were made and sold outside the scope of the license the effect is precisely the same as if no license whatsoever had been granted to [the licensee]. And as [the purchaser] knew the facts, it is in no better position than if it had manufactured the amplifiers itself without a license. It is liable because it has used the invention without license to do so." 305 U. S. at 127.

Consequently, the Court continued, there was

> "no occasion to consider what the rights of the parties would have been if the amplifier had been manufactured 'under the patent' and 'had passed into the hands of a purchaser in the ordinary channels of trade.' Nor have we occasion to consider the effect of a 'licensee's notice' which purports to restrict the use of articles lawfully sold."

We must conclude from the decision in the *General Talking Pictures* case that a license agreement is not necessarily invalid because the licensee is granted a restricted right to make and vend a patented apparatus for use limited to a particular, described field, and is required by the agreement to affix to the licensed apparatus a notice of such restricted use. There may be circumstances under which a notice of restricted use would be inoperative and unenforceable as against subsequent purchasers, but that problem is not presented in the case at bar. And it is to be noted that the judgment from which this appeal is taken does not even command Automatic, the licensee, to comply with the term of the agreement

requiring it to attach the restrictive use notices to the licensed apparatus sold by it.

General Talking Pictures Corp. v. Western Elec. Co. has not been overruled by the Supreme Court. Appellant contends that the case was wrongly decided, and that the authority of the case has been more or less undermined by subsequent decisions of the Supreme Court on related subject matters. From our examination of the latter cases we are not satisfied that this is so; at any rate, we decline to speculate on whether the case would now be followed by the Supreme Court. If the case is to be overruled, that must be done by the Supreme Court. Meanwhile, it is our duty to follow it.

In fact, it appears that none of the radio apparatus made and sold by Automatic has been marked with the restrictive use notice required by Article VI; in other words, Automatic has consistently ignored this provision of the agreement. Automatic makes the curious suggestion that its own breach of this term of the contract affords an independent ground for relieving it of the obligation to pay the stipulated percentage royalties. The argument is based upon the provision of Article VI that apparatus not bearing the restrictive use notice "is not licensed"; and therefore, Automatic argues, since "no licensed apparatus for which royalties are due under the contract has ever been made or sold", the district court erred in requiring an accounting of percentage royalties. Under the foregoing circumstances, no doubt Hazeltine would have had an election to proceed against Automatic on the theory of infringement. But the above contract provisions are for the benefit of the licensor, who may choose to waive them. Notwithstanding the failure of Automatic to attach the restrictive use notices, Hazeltine is entitled to insist upon the performance by Automatic of its contract obligation under Article IV to pay as royalties a percentage of the selling price of each complete apparatus of the types listed in Article III, Section 2, "sold by Licensee during continuance of this license".

Royalty Payments

It has been pointed out above that the license agreement gave Automatic the right to make use of any of Hazeltine's patents, and required Automatic to pay royalties measured by a percentage of the selling price of all radio apparatus of specified types manufactured and sold by Automatic, whether or not any particular apparatus in fact utilized any of the inventions of the Hazeltine patents, with a minimum royalty payment of $10,000 a year. There is no valid objection to this sort of agreement; the parties are free to bargain as to the basis upon which the royalties are to be computed. *H-P-M Development Corp. v. Watson-Stillman Co.*, 71 F. Supp. 906 (D. N. J. 1947). *Cf. Pyrene Mfg. Co. v. Urquhart*, 69 F. Supp. 555, 560 (E. D. Pa. 1946); *American Optical Co. v. New Jersey Optical Co.*, 58 F. Supp. 601, 606 (D. Mass. 1944); *Ohio Citizens Trust Co. v. Air-Way Elec. Appliance Corp.*, 56 F. Supp. 1010, 1012 (N. D. Ohio 1944). As stated in one of Hazeltine's affidavits, this type of royalty clause was originally adopted "for convenience of accounting". The court below stated:

> "This is a convenient mode of operation designed by the parties to avoid the necessity of determining whether each type of defendant's product embodies any of the hundreds of patents which plaintiff controls." 77 F. Supp. at 496.

Certainly a licensee, in consideration of the grant of the right to use a licensor's patent, may lawfully promise to pay the licensor a fixed sum per year during the life of the agreement; and this promise would not become unenforceable merely because the licensee in a particular year happened not to utilize the invention. If this is so, it would be no more against public policy to stipulate for a variable consideration by way of royalty for the right to use the patent, whether such consideration were expressed in terms of a percentage of the net profits of the licensee's business, or (as here) in terms of a percentage of the selling price of certain apparatus manufactured and sold by the licensee. Depending on the circumstances such a percentage royalty might well be a lesser charge upon the licensee's business than a stipulation for payment of a flat sum yearly.

A different problem would be presented if the license agreement had provided that, in part consideration for the right to make use of Hazeltine's patents, Automatic agreed not to compete in the commercial field in the manufacture and sale of any radio apparatus of the types enumerated, even though such apparatus did not embody any of the inventions covered by Hazeltine's patents. Such an agreement might be unenforceable as constituting an unlawful attempt to extend the monopoly of li-

censor's patents beyond the limits of the patent grants. But as we read the license agreement in the case at bar, Automatic would not break the agreement by manufacturing and selling for unrestricted use radio apparatus which in fact does not embody any of the inventions covered by Hazeltine's patents. This is true notwithstanding the fact that Automatic, in making such a sale, would be required by Article IV, Section 1, of the agreement to pay to Hazeltine the stipulated percentage of the selling price as royalty for the *right* to utilize the patents covered by the license agreement.

Duress

Automatic's brief states that its affidavits "assert the license was signed only in fear of disastrous litigation. If it was, in fact, coerced into taking a license under invalid patents having no application to any radio set made today, the patents were obviously misused." Not all economic pressure constitutes "duress" rendering a contract voidable. The defense of duress is discussed in 5 Williston, *Contracts* § 1606 (Rev. ed. 1937), where it is pointed out that the pressure exerted must be wrongful; that a threat to resort to civil litigation is not such duress as to justify rescission of a transaction induced thereby, even though there is no legal right to enforce the claim, provided the threat is made in good faith, that is, in the belief that a possible cause of action exists. Neither Automatic's answer nor its amended answer set up duress as a defense. Notwithstanding the statement in Automatic's brief, the record in fact contains no specific allegation that Automatic was improperly coerced into executing the license agreement now in suit. There is a statement in Automatic's counter motion for summary judgment, as one of the asserted grounds for dismissal of the complaint, that Hazeltine has misused its patents by suing and threatening to sue, and otherwise harassing customers of radio manufacturers refusing to take a license under its patents "and coercing radio manufacturers to take licenses under its patents by threats of repeated, expensive law suits"; and a similar statement is made in one of the supporting affidavits.[1] Even if—as would hardly be justified—we take this allegation to imply that Hazeltine improperly coerced other radio manufacturers to enter into license agreements by threats of patent infringement suits which Hazeltine knew to be unfounded, such wrongful conduct in respect to third persons would constitute no defense to Automatic in the present suit. A promisee's cause of action on one contract cannot be defeated merely by a showing that the promisee had improperly coerced third parties into entering into similar contracts with him. See 6 Williston, Contracts § 1752 (Rev. ed. 1938); 2 Restatement, Contracts § 597 (1932). This generally accepted rule of law should not, in our view, be discarded by an extension of the decision in *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942), which dealt with quite a different set of facts not involving the assertion of third-party defenses by a defendant sued for breach of contract.

Monopoly

Automatic has claimed that Hazeltine's alleged monopolistic practices should preclude its recovery here. Its answer alleged as a defense that Hazeltine "in an illegal endeavor to eliminate all competition and secure an unlawful monopoly in violation of the antitrust laws of the United States, acquired the approximately 425 United States letters patent and the approximately 120 applications for United States letters patent . . . from its employees" (and from other corporations and persons). From Automatic's somewhat nebulous generalizations, it is difficult to ascertain the precise nature of its argument on this score, though it does concede that the mere accumulation of patents, however great in number, is not illegal *per se. Cf. Transparent Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637 (1947). As one of the grounds in support of its counter motion for summary judgment, Automatic asserted that Hazeltine has misused its patents by "refusing to grant a license under any one or more of its patents to anyone who refuses to take a license under all." The only factual support we have been able to find for this allegation is a statement in one of Automatic's affidavits, made by the affiant on information and belief, not as a matter of personal knowledge. It is indeed nowhere alleged that Automatic had sought and been refused a license covering less than all of Hazeltine's patents. This particular con-

[1] It appears that among the other licensees of Hazeltine are General Electric Corporation, Westinghouse Electric Corporation, and Radio Corporation of America. R. C. A. paid approximately one million dollars in royalties to Hazeltine during the years 1937-1947.

tention has not been pressed on appeal as a separate ground of defense.

In most other respects, it appears that the defense of monopolistic practices is merely the assembling under a different heading of matters we have already considered. The district court correctly ruled that, even assuming *arguendo* that Hazeltine was engaged in an unlawful scheme to maintain a monopoly, the license contract in suit was not an integral part of it; that the license agreement, being itself a valid contract, will not be rendered unenforceable by collateral activities of the plaintiff in violation of the anti-trust laws. 2 Restatement, Contracts § 519 (1932); 5 Williston, *Contracts* § 1661 (Rev. ed. 1937); 2 Walker, *Patents* § 409 (Deller ed. 1937). See also *Bruce's Juices, Inc. v. American Can Co.,* 330 U. S. 743, 754, 755-56 (1947). *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U. S. 488 (1942), is no authority for the proposition that a contract action for patent royalties may be bogged down by the defendant into a complicated and protracted trial of asserted collateral infractions of the anti-trust laws. And see *Radio Corporation of America v. Majestic Distributors,* 53 F. 2d 641, 642-43 (D. C. Conn. 1931), and cases cited.

II. *Alleged Invalidity of Hazeltine's Patents*

Until recently, it had generally been thought to be settled law that, in a suit for patent royalties under a license agreement, the licensee was estopped from challenging the validity of the licensor's patent. *United States v. Harvey Steel Co.,* 196 U. S. 310 (1905); 2 Walker, *Patents* § 383 (Deller ed. 1937). *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.,* 329 U. S. 394 (1947), and *MacGregor v. Westinghouse Elec. & Mfg. Co.,* 329 U. S. 402 (1947), established that this proposition can no longer be received without qualification. In each of those cases the licensee had agreed to sell the licensed products at prices fixed by the licensor. "Such a restriction on the price of articles entering interstate commerce is a violation of the Sherman Act save only as it is within the protection of a lawfully granted patent monopoly." *Sola Elec. Co. v. Jefferson Elec. Co.,* 317 U. S. 173, 175 (1942). The Court, in the *Katzinger* and *MacGregor* cases, deemed the price-fixing undertaking to be an inseparable part of the "integrated consideration for the license grant"; and in these circumstances concluded that the public interest in "freedom from invalid patents and from restraints of trade" (329 U. S. at 401) would best be served by allowing the licensee to set up the invalidity of the patent in defense to a suit for royalties. It confined its decision to the set of facts before it, and pointedly declined to lay down the broader rule that a licensee may in all cases defend on the ground of invalidity of the patent even when no price-fixing stipulation was involved in the license contract. 329 U. S. at 399. As to that, the Court reserved judgment.

Until we receive further light and leading from the Supreme Court, we are disinclined to extend the holdings in the *Katzinger* and *MacGregor* cases so as to throw into the discard altogether the long line of earlier cases disallowing a licensee to challenge the validity of the licensor's patent. It is not uncommon for the parties to a patent infringement suit, in which there is a genuine issue as to the validity of the patent, to make a settlement of the litigation by an agreement under which the patent gives a license to the alleged infringer in consideration of the payment of a stipulated royalty. Indeed, the license agreement in suit seems to have been by way of settlement of earlier litigation between the parties. It is not apparent to us that the public interest would be served by rendering such common-sense business settlements nugatory, which would be the result of a ruling that the licensee could reopen the issue of validity when sued for the stipulated royalty.

In the case at bar, where a large number of patents were covered by a single license agreement containing no price-fixing stipulation, the result would be particularly awkward if it were held that the licensee may defend by putting in issue the validity of all these patents. Although Automatic's motion for summary judgment and its supporting affidavit make the general statement that none of Hazeltine's patents covered by the license are valid, no concrete attempt was made to buttress these assertions, and the district court concluded: "Furthermore, the defendant does not purport to contest the validity of all plaintiff's patents." 77 F. Supp. at 497. We ourselves have been unable to find from the record that Automatic seriously attempted to raise a "genuine issue" as to the validity of all the licensed patents. If the holding of the *Katzinger* and *MacGregor* cases were extended to the present situation, because of the restrictive use provision or otherwise, would the licensee,

in order to make out its defense, have to establish that each and every one of the licensed patents is invalid? Or could the licensee maintain, in view of the fact that the stipulated royalties are payable whether or not any particular apparatus manufactured and sold by the licensee embodies any of the inventions covered by the patents, that the royalty agreement as an inseparable entirety becomes unenforceable if it can be shown that any of the 500 licensed patents is invalid? Or, as a third alternative, would the licensee have to show that substantial number of patents, or the more important patents constituting the "substance" of the agreement, were invalid? If we are wrong in our conclusion that the licensee here cannot challenge the validity of the patents, then we confess we would be at a loss to know how to instruct the district court to proceed with the case upon remand. Whichever of the three alternatives above suggested were followed, it seems to us the resulting situation would be a mess, and the district court would likely be subjected to a well-nigh intolerable burden.

III. *Eviction*

Questions of direct attack upon validity aside, Automatic relies on the defense of eviction which, as we understand its attempted application here, is in substance a defense of failure of consideration. The argument is based upon these circumstances: At various times in the past, Hazeltine brought infringement suits against third parties based on one or more of eight of the patents licensed under the agreement in suit. Only one of these eight patents was ever passed on by the Supreme Court, and its judgment of invalidity did not extend to all of the claims of this patent. Of the other seven patents, lower courts held all of the claims of two invalid, and some of the claims of the remaining five were also held invalid. Two additional patents sued on by Hazeltine were held by a lower court not to have been infringed. Some of these patents were litigated before the effective date of the agreement in suit and some after. The record is clear that Hazeltine informed Automatic of the aforesaid Supreme Court judgment of invalidity before the present license agreement was executed, but Automatic alleges that it was then unaware of the judgments of invalidity or non-infringement of the other patents litigated before that date.

Although Automatic did not in this court rely on a defense of fraud or misrepresentation, Automatic does claim that the aforesaid ten patents litigated adversely to Hazeltine were the ones in which Automatic had been chiefly interested; that the judgments against Hazeltine demonstrate the worthlessness of these patents, and that consequently there has been a failure of consideration relieving Automatic of its obligations under the license agreement.

It may be that the defense of eviction or failure of consideration raises a question of local law. The court below correctly ruled that, in so far as local law is controlling, the local law properly applicable under the circumstances of this case is that of the State of New York. See *Klaxton Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U. S. 487 (1941); *Adamowski v. Curtiss-Wright Flying Service, Inc.*, 300 Mass. 281 (1938); Restatement, Conflict of Laws §§ 332, 358, Comment *b* (1934).

In our opinion the defense of eviction is insupportable on several grounds.

The mere fact that Automatic may have regarded ten particular patents, out of the more than 700 patents and patent applications covered by the license agreement, as the most important ones licensed, in no sense means that *both* parties regarded those patents as the "substance" of the agreement and contracted accordingly. The record offers no significant suggestion that such was the case, and the district court concluded that Automatic "has not made any serious effort to show eviction here and could not show it", and that Automatic got "by the contract, what it bargained for, namely, the right to use whatever patents are available for use in plaintiff's large collection." 77 F. Supp. at 497.

Even if Automatic had properly presented this defense, we do not think it could be sustained where a non-exclusive license is concerned. Without attempting a full discussion of the doctrine of eviction,[2] we may assume for present purposes that, where an *exclusive* license is granted and the patent is held invalid, even by a lower court, in a suit between the patentee-licensor and a third party, the licensee may successfully claim an eviction. An exclusive license agreement may be said to presuppose a

[2] See 2 Walker, Patents § 384 (Deller ed. 1937).

grant to the licensee of a complete monopoly; if the patent is not upheld in even one suit against an infringer, the desired monopoly is *pro tanto* destroyed, and there may be said to be a failure of consideration. See *Schutte & Koerting Co. v. Wheeler Condenser & Engineering Co.*, 295 Fed. 158 (E. D. Pa. 1924); 1 Williston, Contracts § 137 (Rev. ed. 1936). But where the license, as here, is *non-exclusive,* this argument is inapplicable.

To hold that a non-exclusive licensee may base a defense of eviction on lower court judgments of invalidity in suits between the patentee-licensor and third parties would seem inconsistent with the principles recognized in *Triplett v. Lowell,* 297 U. S. 638 (1936). There it was held that, even though in an earlier infringement suit against a third party some claims of a patent had been held invalid and the patentee had failed to disclaim them, the patentee might still maintain a suit against another alleged infringer for infringement of those same claims as well as other claims. The Supreme Court pointed out that many times it had upheld claims previously held invalid in litigation that had not reached the Supreme Court; that if in the second suit the previously invalidated claims were upheld, no question of failure to disclaim would be presented; but if these claims were again invalidated, the court would be faced with the question whether recovery on other claims should be barred by reason of the failure to disclaim the invalidated claims. We think in the present suit against Automatic on the non-exclusive license agreement, it would be anomalous to give greater effect to a lower court's judgment of invalidity in an infringement suit against a third party than would be given to such a judgment if Automatic had not been a licensee and had been sued as an infringer. In short, a holding by one lower court that a patent is invalid is hardly a conclusive determination of that patent's invalidity and hence the "worthlessness" of a non-exclusive license of that patent. See *Appleton Toy & Furniture Co. v. Lehman Co.*, 165 F. 2d 801 (C. A. 7th, 1948); *Pope Mfg. Co. v. Owsley,* 27 Fed. 100 (C. C. N. D. Ill. 1886). But *cf. Drackett Chemical Co. v. Chamberlain Co.*, 63 F. 2d 853 (C. A. 6th, 1933).

Nor do we find that any different rule prevails in the State of New York. It is true that in *Hazeltine Research, Inc. v. De Wald Radio Mfg. Corp.*, 84 N. Y. S. 2d 597 (Sup. Ct., Special Term, N. Y. County, Part III, 1948), in ruling on plaintiff's motion for summary judgment, Justice Hofstadter apparently held that the defense of eviction like that advanced in the case at bar was available in New York to a non-exclusive licensee being sued for royalties. We have examined the New York authorities cited by the court, and do not think that they support this conclusion. The leading case of *Marston v. Swett,* 66 N. Y. 206 (1876), after retrial, 82 N. Y. 526 (1880), dealt with an exclusive license; we have already pointed out the important difference in this connection between an exclusive and a non-exclusive license. *Herzog v. Heyman,* 151 N. Y. 587 (1897), involved the sale or assignment of a patent, not a non-exclusive license agreement. The distinction is important. See *Marston v. Swett,* 66 N. Y. 206, 212-13 (1876); 1 Williston, Contracts § 137 (Rev. ed. 1936). In *Buffalo Rubber Mfg. Co. v. Batavia Rubber Co.*, 90 Misc. 418, 153 N. Y. S. 779 (Sup. Ct. 1915), the license was taken by defendant upon a representation that the licensor had a patent application pending, when in fact such application had been rejected by the Patent Office on the ground of prior invention by an earlier patentee; and the court held that the false representation was sufficient ground in equity for the rescission of the license agreement induced thereby. In *Pomeroy v. New York Hippodrome Corp.*, 197 App. Div. 114, 188 N. Y. S. 734 (1921), the license agreement was also made during the pendency of a patent application; however, the patent sought, for the device covered by the license, was refused by the Patent Office, which allowed the licensor merely a patent for a minor improvement on an earlier patent. Appellant also cites *Bottlers Seal Co. v. Rainey,* 225 N. Y. 369, 373 (1919); but the passage referred to was *dictum* merely, and furthermore the discussion was with reference to the position of an assignee of an exclusive license. Clearly none of these cases is controlling on the eviction question raised in the *De Wald* case and in the case at bar. It does not appear whether the attention of Justice Hofstadter in the *De Wald* case was directed to the aspects of the eviction doctrine we have already discussed. At any rate we are constrained to believe that the apparent holding in the *De Wald* case is not in accordance with the law of New York as it would be declared by the highest court of that state.

IV. *Repudiation*

On September 18, 1947, several months after the filing of the complaint in the present case, Automatic wrote a letter to Hazeltine formally advising the latter, without more, that Automatic "has repudiated and terminated the License Agreement". Automatic asserts that this notice of "repudiation" extinguished its contract obligation to pay royalties. Perhaps a sufficient answer to this contention is that no such defense was set forth either in Automatic's answer or amended answer, or in its counter motion for summary judgment. Furthermore, giving every indulgence to Automatic's contention, such repudiation could operate only prospectively, and would not affect the judgment for minimum royalties for the contract year ending August 31, 1946, nor would it affect Automatic's liability for percentage royalties due for the period up to the date of such "repudiation". In addition to that, so far as it may be a question of federal law, in the absence of a cancellation option in the agreement, or of a substantital default by the licensor, the licensee cannot by any such unilateral notice of repudiation terminate its contract obligation under a license agreement having several years yet to run. *St. Paul Plow Works v. Starling,* 140 U. S. 184 (1891); *Ohio Citizens Trust Co. v. Air-Way Elec. Appliance Corp.,* 56 F. Supp. 1010 (N. D. Ohio 1944). But *cf. Martin v. New Trinidad Lake Asphalt Co.,* 255 Fed. 93, 94 (D. N. J. 1919). Assuming that local law governs the matter, we are satisfied that, even if repudiation by the licensee is, in some circumstances, a defense in New York to a suit for royalties, Automatic's letter of September 18, 1947, does not meet the stringent requirements set forth in *Skinner v. Wood Mowing and Reaping Machine Co.,* 140 N. Y. 217 (1893).

The cases which have suggested the existence of some such doctrine of unilateral repudiation have explained that the licensee may announce unequivocally "that he no longer recognizes the binding force of the agreement, and that he will thereafter manufacture or use the article covered by the patent under a claim of right, founded upon the alleged invalidity of the patent, and in hostility to and defiance of the authority of the patent and the license, so that the licensor can thereafter proceed against him for an infringement of the patent, if he choose so to do." *Martin v. New Trinidad Lake Asphalt Co., supra,* 255 Fed. at 94. See *Skidmore v. Fahys Watch-Case Co.,* 28 App. Div. 94, 101, 50 N. Y. S. 1016, 1021-22 (1898); *L. Heller & Son, Inc. v. Lassner Co.,* 214 App. Div. 315, 318, 212 N. Y. S. 175, 180 (1925). But as we have already pointed out, under the license agreement in suit Automatic's liability for royalties does not depend upon its actual use of any of the licensed patents in the particular apparatus made and sold by it. If Automatic were permitted to repudiate the license agreement and in fact did not utilize any of the inventions covered by Hazeltine's patents, Hazeltine could not prevail in an infringement suit even if all its patents were valid; and Automatic would thus achieve immunity from liability by non-use of Hazeltine's patents, despite its contract undertaking to pay royalties, regardless of such use, for the *right* to make use of them. Hence, even assuming that a doctrine of unilateral repudiation might in some cases be recognized, such a defense certainly would not be available under the circumstances of the case at bar.

The judgment of the District Court is affirmed.

[*Dissenting Opinion*]

WOODBURY, Circuit Judge, (dissenting). In my view the decisive question on this appeal is the enforceability of a licensing agreement requiring the licensee to pay royalties even though in fact he does not make any use whatsoever of any invention embodied in a patent owned by the licensor. Such agreements as I see it necessarily have the effect of expanding a patent beyond the legitimate confines of the monopoly granted therein, and for many years the Supreme Court, because of the public interest dominant in the patent system, has held licensing agreements having that effect unenforceable in spite of the business convenience or even necessities of the parties. *Morton Salt Co. v. Suppiger Co.,* 314 U. S. 488, 492; *B. B. Chemical Co. v. Ellis,* 314 U. S. 495, 498; *Mercoid Corp. v. Mid-Continent Co.,* 320 U. S. 661, 665 *et seq.,* and cases cited. Therefore, by parity of reasoning with the above cases I would hold the licensing agreement here in suit unenforceable.

[¶ 62,477] Sunset Oil Company v. Fred R. Vertner.

In the Washington Supreme Court. 134 Washington Reporter, No. 5, 245. No. 30859. Department One. July 28, 1949.

Appeal from a judgment of the superior court for Yakima county, BARNETT, J., entered September 11, 1948, in favor of the plaintiff, notwithstanding the verdict of the jury rendered in favor of the plaintiff in a smaller amount. Reversed.

Washington Fair Trade Act, Sherman Antitrust Act, Clayton Act

Price-Fixing of Gasoline—Exclusive Dealing Contract—Antitrust Violation as a Defense.—A judgment, entered in an action taken by an oil company against a service station operator for breach of contract, was ordered reversed with instructions to enter judgment for the amount which the jury found to be owing. The gasoline dealer was held to be entitled to present to the appeal tribunal his defense that the contract should be held illegal and void under Section 1 of the Sherman Act and Section 3 of the Clayton Act even though his opponent's demurrer to this defense had been sustained and an amended answer and a supplemental cross-complaint had been filed. It was held that the contract under which the buyer agreed to resell at prices established by the seller pursuant to the Fair Trade Act did not provide for illegal price-fixing in violation of the Sherman Act. The Court found no basis in the record for holding that the buyer's undertaking not to handle directly or indirectly any petroleum products other than those secured from the seller was illegal.

See the Sherman Act annotations, Vol. 1, ¶ 1660.151, 1660.350.

For the appellant: Cheney & Hutcheson.

For the respondent: Meier & Murray and Brown & Hawkins.

BEALS, J.: At all times herein mentioned, Sunset Oil Company, the plaintiff in this action, has been and is a corporation organized under the laws of the state of California, and authorized to do business in the state of Washington. Sunset Gas & Oil Company is a Washington corporation and a distributor for Sunset Oil Company.

June 9, 1945, Sunset Gas & Oil Company (herein referred to as Sunset Gas or seller) entered into a written "distributor's agreement" with Fred R. Vertner (the defendant herein) and Stanley A. Pemberton, copartners engaged in the business of selling petroleum products and other merchandise in the city of Yakima and vicinity, under the name of Marine Oil Company (referred to in the agreement as "distributor").

By the terms of this contract, the partnership agreed to purchase exclusively from Sunset Gas lubricating oils, gasoline, and other petroleum products for resale within a described area in Yakima county, during the period beginning June 9, 1945, and ending May 31, 1950.

In September, 1945, Mr. Pemberton sold his interest in the partnership to Mr. Vertner, and, in this opinion, we shall refer to Marine Oil Company as Vertner or distributor.

By the agreement above referred to, Vertner agreed to purchase each calendar month during the term of the agreement certain minimum quantities of petroleum products, namely, fifty thousand gallons of gasoline, one hundred gallons of lubricating oils, and fifty gallons of grease, the gasoline to be purchased at a price six and one-half cents per gallon less than the seller's posted retail price. The prices to Vertner of the other products were fixed by standards set forth in the agreement.

By paragraph No. 5 of the contract, in consideration of the seller's covenant to refrain from selling any of its branded products described in the agreement to third parties within the described territory, Vertner agreed not to "handle, directly or indirectly," any petroleum products for sale or distribution within this territory other than those secured from seller, pursuant to the contract.

By paragraph No. 7, Vertner agreed to pay cash for all purchases at the time of delivery, unless otherwise agreed in writing by seller's credit department.

Paragraph No. 8 of the agreement stated that Vertner understood that, pursuant to the provisions of the "Fair Trade Act," the seller had certain rights and privileges relating to resale prices, Vertner agreeing not to sell the products which he purchased from seller at less than the seller's posted service station tank wagon prices,

". . . unless said sales are made at retail, in which event Distribtutor agrees that he will not sell such products at less than the posted retail price established by Seller from time to time for the place of resale."

By paragraph No. 9, Vertner also agreed that he would not sell any products purchased from seller to any person, unless the purchaser first agreed not to resell the products at less than the seller's posted retail price at the place of resale.

The seller reserved the right to sell or assign its interest in the contract to a responsible oil company.

Paragraph No. 16 of the agreement reads as follows:

> "No waiver by either party hereto of any nonperformance or breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision. All remedies, rights and options accorded herein, or otherwise available to the Seller shall be cumulative, and no one such remedy, right or option shall be exclusive of any other, and the pursuit of any such remedy, right or option shall not be deemed to waive any other or different remedy or relief to which the Seller might otherwise be entitled, either at law or in equity. Distributor waives any claim against Seller as to price, quantity or quality of any delivery of petroleum products hereunder, as well as any claim for damages resulting from any breach of contract on the part of Seller, unless such claim is made by Distributor to Seller in writing within ten (10) days after receipt of said delivery or breach of contract."

Purchases by Vertner were shipped from the seller's plant at Seattle to Yakima by common carrier until December, 1945, after which Vertner transported such purchases by his own truck.

August 22, 1946, Sunset Gas assigned its interest in the contract referred to above to Sunset Oil Company, plaintiff in this action.

By lease or pursuant to "products agreements," Vertner controlled or owned interests in the following gasoline stations: (1) Moxee station in Moxee, Yakima county; (2) a station in Ellensburg, Kittitas county; (3) Curtis Cabin Camp station; (4) Yakima Truck Service station, and (5) a gasoline station, the latter three in the city of Yakima.

By its amended and supplemental complaint, upon which the action was tried, plaintiff pleaded six causes of action, alleging, in its first cause of action, the making of the contract above referred to, the assignment of the contract to plaintiff by Sunset Gas, and the performance thereof by plaintiff; that, during the month of October, 1946, defendant, orally and by a written notice, informed plaintiff of his intention to sell his business; that, at some date thereafter, defendant did sell his business to a person unknown to plaintiff; and that, October 16, 1946, defendant ceased to purchase gasoline and other petroleum products from plaintiff, as he was required to do pursuant to the contract, and thereafter purchased products from others, failing to purchase from plaintiff event the minimum quantity of gasoline he was obligated by the contract to purchase each month. Plaintiff then alleged the profits which it would have realized had defendant performed the contract, and demanded judgment for damages, on account of defendant's breach of the contract, in a sum exceeding sixty-eight thousand dollars.

In its second cause of action, plaintiff repeated certain allegations set forth in its first cause of action, and alleged that, during the month of September, 1945, defendant owned or controlled a service station at Moxee and requested plaintiff to paint that station; that plaintiff complied with the request, at a cost of $165.87, and that the parties hereto entered into a "service station advertising contract" for a term ending March 4, 1948. Plaintiff demanded judgment on its second cause of action for $165.87.

By its third, fourth, fifth, and sixth causes of action, plaintiff made similar claims on account of painting four other service stations owned or operated by defendant, demanding, by each cause of action respectively, judgment for sums ranging from $169.38 to $259.83.

To this complaint, defendant filed a second amended answer and supplemental cross-complaint, denying that he had breached the contract pleaded by plaintiff and denying that he was indebted to plaintiff upon any cause of action pleaded by plaintiff.

By way of a first affirmative defense, defendant alleged that plaintiff and its predecessor in interest had waived the provisions of the contract with regard to minimum monthly purchases thereunder by defendant, and alleged that, by its conduct, plaintiff was estopped from contending that defendant was required to purchase any minimum amount of products from the plaintiff.

By a second affirmative defense, defendant alleged that, by custom and practice, any liability from defendant to plaintiff on account of the five causes of action set forth in plaintiff's complaint, based upon painting service stations, and so forth, should be limited to the *pro rata* amount thereof for the remaining unexpired term of each of the agreements.

By his third affirmative defense, defendant alleged that, during the month of August, 1946, plaintiff, through its authorized officers, represented to defendant that plaintiff would not object to a sale of his business by defendant, provided that defendant gave plaintiff seasonable notice of such sale, and that defendant had given plaintiff such notice.

By a fourth affirmative defense, defendant alleged that plaintiff had materially and substantially breached the terms and conditions of the contract as alleged in detail by defendant, and had, without cause, repudiated the contract and refused to make further deliveries thereunder.

By way of a supplemental cross-complaint, defendant alleged that, by plaintiff's refusal to perform the contract, defendant had suffered damage, by reason of loss of profits which he would have made had the contract been performed by plaintiff, in an amount in excess of seventy-two thousand dollars, for which amount defendant demanded judgment against plaintiff.

Plaintiff replied to defendant's affirmative defenses and cross-complaint with denials and affirmative defenses.

The action was tried to the court, sitting with a jury, the jury having returned a verdict in favor of plaintiff in the sum of $669.45.

Defendant moved for judgment in his favor notwithstanding the verdict, which motion was denied by the court, and, in the alternative, moved for a new trial, this latter motion having later been waived by the defendant, as stated in the judgment.

Plaintiff did not move for a new trial, but moved for judgment in its favor notwithstanding the verdict, and, after argument, the court granted this motion, awarding plaintiff judgment against defendant, upon plaintiff's first cause of action, for the sum of $6,845.78. The court also granted plaintiff's motion as to its second to sixth causes of action, both inclusive, awarding judgment for the amounts, respectively, for which plaintiff had demanded judgment.

The court then entered findings of fact and conclusions of law in accordance with its order, granting plaintiff judgment upon its several causes of action as above stated, together with plaintiff's costs as fixed by the court, followed by a judgment in favor of plaintiff and against defendant in the amounts above stated.

From this judgment, defendant has appealed, assigning error (1) upon the overruling of appellant's demurrer to the complaint; (2) upon the trial court's ruling sustaining respondent's demurrer to appellant's first affirmative defense contained in his amended answer; (3) upon the denial of appellant's motion for judgment of dismissal notwithstanding the verdict; (4) upon the trial court's ruling granting respondent's motion for judgment for increased recoveries notwithstanding the verdict; (5) upon the making of eight specified findings of fact by the trial court; (6) upon the making of four specified conclusions of law; (7) upon the entry of judgment in favor of respondent; (8) upon the admission in evidence of an exhibit offered by respondent; (9) upon the court's refusal to enter judgment dismissing the action; and (10) upon the court's refusal to enter judgment in favor of respondent in an amount not exceeding the verdict of the jury, namely, $669.45.

The questions presented upon this appeal are somewhat confused, and extremely complicated.

At the outset, it may be noted that it is not disputed that appellant sold his business January 18, 1947.

We shall consider appellant's contentions in the order in which they are presented in his brief.

Appellant first argues that the contract between the parties, referred to above, is void for want of mutuality. The contract was prepared by respondent's assignor and should therefore, generally speaking, be construed in appellant's favor.

We quote the second portion of paragraph No. 5 of the contract:

> "In consideration of Seller's agreement not to sell any of the hereinafter described branded products in the above described territory, Distributor agrees to not handle, directly or indirectly, any petroleum products for sale or distribution in said territory other than those secured from Seller under and by the terms of this agreement. Seller, however, reserves the right at its

option to solicit orders for the sale and delivery of any of the hereinafter described branded products in the territory of Distributor to any municipal, county, federal or other governmental or public body or agency, or to any common carrier or public utility within the territory aforedescribed."

Appellant argues that the contract is entirely unilateral, obligating appellant to sell no products other than those purchased from respondent, while respondent is free to sell its products in appellant's territory. Respondent, of course, is holder of the contract by assignment from Sunset Gas, the original seller named therein.

Appellant admits the assignment of the contract to respondent by the original seller, but argues that it nowhere appears that respondent assumed and agreed to perform the terms and conditions of the contract. Appellant contends that, as it does not appear that respondent agreed in writing to carry out the contract, and as the contract, by its terms, was not to be performed within one year, respondent was not obligated by the provisions of the contract, pursuant to Rem. Rev. Stat., § 5825 [P. P. C., § 577-3] (statute of frauds).

Assuming, for purposes of argument, that the situation falls within the statute referred to, respondent proceeded to perform the contract during the months of August and September, 1946, by making deliveries to appellant in accordance with the terms of the agreement, and the contract was partially performed by respondent by the sale to appellant of over one hundred sixteen thousand gallons of gasoline pursuant to the contract. *Rowland v. Cook,* 179 Wash. 624, 38 P. (2d) 224, 101 A. L. R. 180; *Foelkner v. Perkins,* 197 Wash. 462, 85 P. (2d) 1095.

It may be noted that appellant did not plead the statute of frauds in bar; but, in any event, in view of the record before us, the contract was not void for want of mutuality. The parties confirmed the contract by acting thereunder, and the cases cited by appellant in this connection are not controlling.

Appellant next argues that the contract upon which respondent relies should be held illegal and void under § 1 of the Federal statute referred to as the Sherman Anti-Trust Act, and § 3 of the Clayton Act (15 U. S. C. A., §§ 1, 14).

Respondent contends that, upon the record before us, appellant may not at this time present this question.

Appellant pleaded this question by an affirmative defense in his original answer and by way of an affirmative defense in his amended answer, to both of which defenses respondent's demurrers were sustained. Appellant then pleaded over, filing his second amended answer and supplemental cross-complaint.

Respondent relies upon the well-known rule that the filing of an amended pleading, after a demurrer to the original pleading has been sustained, amounts to a waiver of any objection to the ruling of the trial court sustaining the demurrer. This is the general rule. However, the question now before us falls within the rule laid down in the case of *Miller v. Sisters of St. Francis,* 5 Wn. (2d) 204, 105 P. (2d) 32, in which we said:

> "There is an exception to that rule where a motion to strike has been granted and a demurrer sustained, if there remains a question of fact in the case, and the one to whom the ruling is adverse does not waive his right to have it reviewed on appeal by pleading over. [Citing cases.]"

In the recent case of *Rathke v. Yakima Valley Grape Growers Ass'n,* 30 Wn. (2d) 486, 192 P. (2d) 349, this court held that a sales contract, void under a Federal statute, was unenforcible.

Upon the record in the case at bar, appellant may present the question of the illegality of the contract under the Federal statutes referred to above.

In connection with the question now under discussion, Rem. Rev. Stat. (Sup.), § 5854-12 [P. P. C. § 989-103] (a portion of the fair trade act), and United States statutes, including those above referred to, may be considered.

It is not denied that all products purchased by appellant from respondent were branded or trademarked goods, sold under respondent's name or bearing its labels. In view of the applicable statutes, it appears that the provisions of the contract pursuant to which appellant was operating, which provisions fixed prices, were not void as in contravention of any state or Federal statute. We find in the record no evidence which would support a finding by the jury to the effect that there was, between the parties, any

agreement which would be unlawful as involving illegal fixing of prices.

Appellant cites several Federal cases, including *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, and *United States v. Frankfort Distilleries, Inc.,* 324 U. S. 293, 89 L. Ed. 951, 65 S. Ct. 661.

In view of the evidence in the record, the authorities cited by appellant do not support his contention that the contract was illegal for the reasons assigned.

Appellant also contends that the contract violates the Federal anti-trust act, because appellant was required to handle only respondent's products.

In the case of *Chicago Board of Trade v. United States,* 246 U. S. 231, 62 L. Ed. 683, 38 S. Ct. 242, Ann. Cas. 1918D, 1207, the supreme court considered many questions pertinent to this inquiry, and observed that each case must be decided upon the particular facts shown.

In 36 Am. Jur. 617, § 147, the rule is stated as follows:

> "Thus, the issue as to legality or illegality of the disputed contract or combination is ordinarily to be determined in view of the facts of the case. [Citing authorities.]"

The cases cited by appellant in this connection also approve this principle.

Appellant relies upon the opinion of the United States district court in the case of *United States v. Standard Oil Co. of California,* 78 F. Supp. 850, which concerned the validity of exclusive dealing contracts in the oil industry. In the course of the opinion, the court said:

> "As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, *as shown by the evidence,* restricts the stations not employee-operated to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal *per se.* We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it result in a substantial lessening of competition or the creation of monopoly in the line of commerce." (Italics ours.)

Again, the opinion refers to the "proved facts" of the case (p. 853).

The case cited was appealed to the supreme court of the United States, which affirmed the judgment of the district court. *Standard Oil Co. of California v. United States,* — U. S. —, 69 S. Ct. 1051, — L. Ed. —.

In the case at bar, no evidence was introduced as to any particular facts, save that appellant made purchases under the agreement. The contract between the parties is the only evidence before us which may be considered in connection with the question now under discussion.

We find in the record no basis for holding that the contract between the parties is illegal and void, under the Federal anti-trust acts.

Appellant argues, as stated in his brief:

> "It is undisputed that in the latter part of October, 1946, or at least at all times on and after November 1, 1946, on orders of its main office at Los Angeles, *respondent completely repudiated the contract and failed and expressly refused to make any further sales or deliveries to appellant thereunder.*"

The court instructed the jury (instruction No. 11) as follows:

> "You are instructed that if one party to a contract commits a material breach of the contract, the other party may refuse to proceed further under the contract and may treat the contract as terminated.
>
> "In this event, the injured party may bring immediate action for the damages he has sustained.
>
> "A material breach of a contract is a breach of a substantial part of a contract, as distinguished from a part of the contract which is immaterial or inconsequential. A breach may be material, even though it does not render performance of the remainder of the contract impossible or impractical."

No error is assigned upon this instruction, which is the law of the case, in so far as this appeal is concerned.

In the case of *Knight v. Pang,* 132 Wash. Dec. 230, 201 P. (2d) 198, appears the following:

> "It is a well-recognized principle of law that, when the sufficiency of the evidence to support a jury's verdict is questioned on appeal, the evidence will be interpreted in support of the verdict rendered."

There was evidence before the jury to the effect that, prior to the assignment of the contract by Sunset Gas to respondent, appellant at times had found it difficult to meet the terms of the contract by making the

required cash payments for products delivered to him. After the assignment of the contract to respondent, the latter fixed a credit limit, to which appellant objected, whereupon a plan was considered pursuant to which appellant's business would be increased. However, these negotiations had no tangible result.

During the month of August, 1946, appellant purchased from respondent and its predecessor in interest over fifty-four thousand gallons of gasoline and, in the following month, over sixty-two thousand gallons. During October, 1946, appellant purchased considerable quantities of gasoline and other products from a Yakima dealer, as appears from an exhibit in the case, and, apparently, made no further purchases from respondent. The summons and complaint in this action were served upon appellant during the month of October, 1946.

November 1, 1946, appellant's tank wagon called at respondent's base in Seattle, but respondent's agent refused to deliver gasoline, stating that future deliveries would be made only on a cash basis.

From the evidence, which was conflicting, the jury was warranted in finding that appellant committed the first breach of the contract.

The trial court did not err in denying appellant's motion for judgment in his favor as a matter of law.

After the jury had returned its verdict, each party moved for a judgment notwithstanding the verdict, appellant arguing that the verdict in respondent's favor was not supported by the evidence, and respondent moving for judgment in its favor for a much larger sum than that allowed by the jury, arguing that such judgment in its favor should be granted upon uncontradicted and undisputed evidence, in connection with which mathematical computations would clearly show that respondent was entitled to judgment for larger amounts.

The court denied appellant's motion and, as above stated, granted respondent's motion and entered findings of fact and conclusions of law in respondent's favor, pursuant to which the judgment appealed from was entered.

The trial court did not entirely disregard the jury's verdict, as, in finding of fact No. 6, appears the following:

> "The finding of the jury in favor of the plaintiff establishes the foregoing finding of fact; namely, the defendant materially and substantially breached the contract on or about October 16, 1946."

Both parties having moved for judgment notwithstanding the verdict of the jury, in response to a suggestion from this court the parties filed briefs discussing the question of whether, in view of the motions of the respective parties, the jury's verdict should be given any consideration by this court.

Rule of Practice 23, adopted July 1, 1942, 18 Wn. (2d) 47-a, reads as follows:

> "A motion for a directed verdict which is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts."

The foregoing rule does not apply to motions for judgments notwithstanding the verdict of a jury; and, considering the motions made by the respective parties in the case at bar, we are of the opinion that, by their respective motions, the parties did not submit to the court the questions at issue between them for decision as matters of law. We, accordingly, hold that the verdict of the jury should be considered in determining the questions presented upon this appeal.

The verdict returned by the jury was a general verdict, in the sum of $669.45. The case was submitted to the jury March 24, 1948. It appears from the statement of facts that, after the jury had retired to deliberate upon its verdict, each party took exceptions to certain of the court's instructions, and that the court adjourned at 5:30 p. m., March 24, 1948.

The jury returned its verdict, which bears the clerk's stamp, "Filed for Record 3-24-48." The verdict is general, reading, after the title of the cause:

> "We, the Jury in the above entitled cause, find for the Plaintiff and assess the amount of recovery in the sum of Six hundred sixty-nine and 45/100 Dollars ($669.45). [Signed] L. J. Farley, Foreman."

In their respective briefs, the parties refer to a handwritten memorandum, which, it is stated without dispute, by some undisclosed method, appeared with the jury's formal verdict.

In a supplemental transcript, filed by respondent, appears the jury's general verdict and a typewritten document bearing the words "(Notation attached to Verdict)."

Pursuant to our directions, the original verdict has been forwarded to the clerk of this court and is before us. Attached to the general verdict by wire staples is a small piece of paper, containing handwritten letters and figures as follows:

"Cost	Unexpired Time	Unexpired Value
165	16/24	110.00
169	43/54	135.00
171	19/24	135.00
260	7/24	76.00
240	6-24	60.00
		516.00
Atty fees		50.00
		566.00
Gardner Gas to 10/24		
10400 gal. gas at .0075		78.00
5800 stove oil at .00382		22.15
2000 Diesel .00165		3.30
		669.45"

The paper contains no other words or figures than as above set forth, nor is it anywise referred to in the verdict of the jury. The statement of facts discloses nothing which indicates when the jury returned its verdict, nor does it contain any reference to the handwritten paper.

Respondent contends that this paper writing should be considered in connection with the verdict. How the paper came into the possession of the court or the clerk of the court, we do not know. We have no information as to whether, when the verdict was returned by the jury and handed to the clerk of the court by its foreman, the paper was stapled to the verdict or whether it was so attached later. We do not know that the memorandum was seen or discussed by the jury, nor in what manner or for what purpose the jury used or considered the memorandum, if they did use or consider it. The memorandum itself bears no file mark whatever. The clerk's certificate with the supplemental transcript simply states that that transcript "is a true and correct transcript of such pleadings and files" in the case at bar as the clerk had been directed by respondent's attorneys to transmit to the supreme court. The certificate attached to the statement of facts, signed by the trial judge, contains no reference to the verdict.

Even assuming that the handwritten memorandum was delivered to the court by the foreman of the jury, it should, nevertheless, be disregarded as extraneous and superfluous. *Martin v. Nichols,* 110 Wash. 451, 188 Pac. 519; *Pearson v. Arlington Dock Co.,* 111 Wash. 14, 189 Pac. 559; *Lindsey v. Elkins,* 154 Wash. 588, 283 Pac. 447; *Rowe v. Safeway Stores,* 14 Wn. (2d) 363, 128 P. (2d) 293.

It does not appear that the court instructed the jury to make any specific findings upon any particular questions of fact, or to return separate verdicts upon each of the six causes of action pleaded by respondent.

Respondent argues that the handwritten notation should be considered and that the verdict "was in effect a verdict on each cause of action." We do not agree with respondent's contentions upon this point. The verdict, as returned, is a general verdict.

The trial court might have submitted the case to the jury for a separate verdict on each cause of action, but was not required to do so. *Yamamoto v. Puget Sound Lbr. Co.,* 84 Wash. 411, 146 Pac. 861; *Olympia Water Works v. Mottman,* 88 Wash. 694, 153 Pac. 1074; 53 Am. Jur. 721, § 1043.

The record contains evidence which, if believed by the jury, was, in law, sufficient to support a verdict in respondent's favor for some amount, upon each of the six causes of action pleaded by respondent, provided that the jury was of the opinion that, in consideration of all the evidence before it, the preponderance thereof was in respondent's favor. However, if, in the opinion of the jury, respondent was entitled to recover upon any or all of these causes of action, the amount or amounts to which respondent was entitled remained for the jury to determine, upon consideration of all of the evidence introduced.

As above stated, the trial court accepted the jury's finding that appellant was indebted to respondent, and denied appellant's motion for judgment in his favor notwithstanding the verdict. The question to be here determined is whether the trial court, having so far sustained the verdict of the jury, was authorized by the evidence to enter judgment in favor of respondent in an increased amount, notwithstanding the verdict rendered by the jury.

A motion by a party to an action for judgment in his favor in a larger amount than that which a jury has fixed, is a motion for a judgment notwithstanding the verdict. 3 Bancroft's Code Pleading, Practice and Remedies (Ten-year Supp.) 2267, § 1772; *De Boer v. Olmsted,* 82 Colo. 369, 260 Pac. 108.

In the case of *Fargo Loan Agency v. Larson,* 53 N. D. 621, 207 N. W. 1003, an action by the plaintiff for the conversion of wheat, the jury returned a verdict in favor of the plaintiff for $43.43, whereupon the plaintiff moved for judgment for a larger amount notwithstanding the jury's verdict. The trial court granted the motion and entered judgment in favor of plaintiff in the amount of $406.08, from which judgment the defendants appealed. In the course of the opinion, the court quoted from the opinion of the supreme court of North Dakota in the case of *Sheffield v. Stone, Ordean, Wells Co.,* 49 N. D. 142, 190 N. W. 315, the following:

> "'Judgment notwithstanding the verdict may be ordered only in a case where it clearly appears from the whole record that the party who moves for such judgment is entitled to a judgment on the merits as a matter of law.'"

In the case cited, the court held that certain facts were "either admitted by the defendants or are not contradicted by substantial evidence in the case," and that the plaintiff, as matter of law, was entitled to judgment in a sum in excess of the amount in the verdict of the jury. The court continued:

> "Nor can it be said from the record in the case that there is a reasonable probability that a different result would be reached should a new trial be granted."

The court held that the judgment entered by the trial court was too large, and directed the entry of judgment in an amount less than that entered by the trial court, but somewhat in excess of the jury's verdict.

The supreme court of Colorado, in the case of *De Boer v. Olmsted,* 82 Colo. 369, 260 Pac. 108, held that the trial judge had erred in substituting "his own judgment for that of the jury," and in determining that plaintiff before the trial court was entitled to recover an increased amount. The court observed that the evidence was conflicting and directed that the judgment be reduced to the amount of the verdict returned by the jury.

In the case of *Peterson v. Rawalt,* 95 Colo. 368, 36 P. (2d) 465, it appeared that, based upon conflicting testimony, the jury had entered a verdict for one hundred dollars in favor of the plaintiff, the amount of the verdict, apparently, not being based upon any evidence introduced by either party to the action. On plaintiff's motion, the trial court set the verdict aside and entered judgment for over six hundred dollars, the full amount claimed by the plaintiff. The judgment was reversed. In the course of the opinion, the court said:

> "We come now to the second contention, namely, that the trial court could not enter an independent and radically different judgment of its own in lieu of the jury verdict it set aside. The power of a *nisi prius* court to enter a judgment *non obstante veredicto* does not include the virtual abolition, apparent in this case, of the right to a jury trial. The judge here substituted a sum more than six times the sum awarded by the jury. This would have been proper only if the judge could legally have directed the jury to render a verdict corresponding exactly to the judgment so entered; that is, only in a case where the supporting evidence both as to liability and as to the amount of damages is uncontradicted and unimpeached. Here the evidence was in sharp conflict. The incongruous verdict herein naturally induces the belief that, as to damages if not also to the preliminary and vital question whether there was any liability at all, the verdict was a sheer compromise, and utterly worthless as an index of the jurors' *bona fide* conclusions, if any they had. When a flagrant and unexplainable understatement has been committed by a jury, the only fitting remedy is to have a new trial under normal conditions that will make similar confusion unlikely or impossible. So in the case at bar it was reversible error to enter judgment notwithstanding the verdict and then refuse to grant a new trial."

Respondent relies upon the opinion of this court in the case of *Rawleigh Co. v. Graham,* 4 Wn. (2d) 407, 103 P. (2d) 1076, 129 A. L. R. 596, in which this court, sitting *En Banc,* affirmed a judgment entered upon findings of fact entered by the trial court in favor of the plaintiff, notwithstanding a verdict rendered by the jury in favor of the defendant. After the rendition of the jury's verdict, the plaintiff moved for judgment in its favor notwithstanding the verdict or, in the alternative, for a new trial, which former motion was granted. The court then entered findings and conclusions in favor of the plaintiff, followed by the judgment from which the defendant appealed. A majority of this court found "no controversy in the evidence going to the merits of respondent's claim, upon which the jury was entitled to pass." In the course of the opinion, we said:

"It is, of course, the law that if in the opinion of the trial court there is no conflict in the evidence as to the issue of fact to be submitted to the jury, the court may grant a motion for a directed verdict, made at the close of the case, either simply in favor of the defendant, or for a particular amount, in favor of one party, if the undisputed evidence shows such sum to be due, or in favor of one party, the jury to fix the damages. It would seem that, if the supposed issue of fact has been submitted to the jury, the court, upon further consideration after the return of the verdict, and upon a motion for judgment in favor of the losing party notwithstanding the verdict, could not only grant the motion, if convinced that there was no disputed question of fact upon which the jury should pass, but could make findings in support of a money judgment, if, according to the undisputed evidence, the entry of such a judgment was proper. There would seem no good reason why the court may not do after the return of the verdict what it could unquestionably, in another way, do before."

If the court was of the opinion that there was no dispute whatever in the evidence, the question submitted for decision was one for the court to determine as matter of law.

In the case at bar, after the trial court had refused to submit certain questions for the jury's consideration, there remained several disputed questions of fact which the court properly submitted to the jury.

During the trial, appellant vigorously denied any liability whatever to the respondent and contended that, if he was liable in any amount, such liability was very much less than the amounts contended for by respondent.

It is clear that no motion by either party for a directed verdict would have been appropriate, and no such motion was presented.

There having been several disputed questions of fact in the case, which were properly submitted to the jury, and in view of our holding in the case of *Rawleigh Co. v. Graham, supra,* to the effect that a motion for judgment notwithstanding the verdict of a jury is, in essence, the same as a motion for a directed verdict, the trial court would have been warranted in granting respondent's motion for judgment in its favor notwithstanding the verdict only if, assuming appellant's basic liability as found by the jury, the amount of damages to which respondent was entitled was then undisputed.

Evidently, the trial court was of the opinion that, based upon respondent's exhibit No. 18 (an exhaustive compilation prepared on behalf of respondent showing the damages which respondent claimed followed a breach of the contract by appellant, as alleged in respondent's first cause of action), the evidence as to loss of net profits by respondent, resulting from appellant's breach of the contract, was uncontradicted.

Upon the evidence, the question of the amount of damages to which respondent would be entitled was a matter to be submitted to the jury.

It would seem, from the evidence, that the jury might have found that, even though appellant had violated his contract by the purchases he made from other oil companies during the month of October, such acts on his part did not amount to a definite breach of the entire contract which would support a judgment in respondent's favor for recovery of damages as to the entire balance of the contract. 3 Williston on Sales (Rev. ed.) 251 *et seq.*, §§ 585a, 585b; 17 C. J. S. 973, § 472 *et seq.*

The jury might have found that these breaches of the contract, while rendering appellant liable for damages concerning these particular purchases, did not afford a basis for respondent to treat the contract, considered in its entirety, as broken. 12 Am. Jur. 966, § 389.

Before this court, appellant assigns no error upon any instruction which the court gave to the jury. By its instructions, the trial court explained to the jury the difference between a material breach of the contract, namely, a breach of a substantial part thereof, as distinguished from an immaterial or inconsequential breach of the contract. The jury was not instructed to return separate verdicts as to each cause of action, but returned a general verdict in respondent's favor.

In connection with its first cause of action, the burden rested upon respondent to prove definitely and within a reasonable degree of certainty, probability, and accuracy, the damages which it sought to recover. *Quist v. Zerr,* 12 Wn. (2d) 21, 120 P. (2d) 539; *Hole v. Unity Petroleum Corp.,* 15 Wn. (2d) 416, 131 P. (2d) 150.

In the case of *Pappas v. Zerwoodis,* 21 Wn. (2d) 725, 153 P. (2d) 170, an action by a tenant against his landlord to recover loss of profits for breach of certain of the landlord's covenants, we said:

"In such case, however, the loss must be shown with a reasonable degree of certainty and accuracy, and the proof establishing the loss must be clear and convincing, free from speculation or conjecture."

The court instructed the jury as to the rights of the parties to this action in regard to their respective claims. Based upon evidence in the record, the jury, if it determined that respondent was entitled to recovery in the action, could have returned any verdict within the issues as defined by the court in its instructions.

Generally speaking, a motion for judgment notwithstanding the verdict is not the proper method by which an arbitrary or unreasonable verdict may be attacked. Such a situation should be met by a motion for new trial; but, in the case at bar, no such motion was made by respondent. The amount of the recovery in respondent's favor, as fixed by the jury, is within the issues presented by the pleadings and the court's instructions. Each party to the action claimed large damages against the other. As far as the record shows, the members of the jury all agreed with the verdict rendered.

It is true, as argued by respondent, that, in case of a breach by the purchaser of a contract for the future sale of merchandise, damages may be recovered for loss of profits. Respondent also admits that "such profits must be shown with reasonable certainty but need not be computed with mathematical accuracy."

This court has upheld judgments for damages for loss of profits occasioned by a breach of contract, in cases in which the causes of action concerned different branches of the petroleum industry.

The question before us for decision is whether, upon the record, the trial judge was justified in setting aside the general verdict of the jury, and was authorized to enter judgment in respondent's favor, as matter of law, for a different and larger amount.

A somewhat similar question was considered by this court in the case of *McClure v. Wilson,* 109 Wash. 166, 186 Pac. 302, 18 A. L. R. 1421, a tort action, in which it was held that the trial court had erred in granting the defendents' (respondents here) motion for a judgment in their favor notwithstanding the jury's verdict in favor of the plaintiff.

The record in the case at bar is voluminous, the statement of facts comprising approximately six hundred pages of testimony, and about forty-five exhibits having been introduced in evidence.

Examination of the extensive record convinces us that the questions presented were properly for the jury to determine, and that the trial court erred in granting respondent's motion for judgment in its favor notwithstanding the verdict.

The judgment appealed from is reversed, with instructions to enter judgment in respondent's favor for the amount which the jury, by its verdict, found that respondent was entitled to recover.

JEFFERS, C. J., STEINERT, MALLERY, and HILL, JJ., concur.

[¶ 62,478] Opinion of the Attorney General of Minnesota.

Addressed to J. W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. August 5, 1949.

Minnesota Trusts and Combination Act

Joint Advertising—Price-Fixing Not Involved—Restraint of Trade Not Involved.— Members of a corporation do not violate the antitrust provisions of the Minnesota Statutes by advertising jointly in a newspaper in regard to merchandise to be sold by them. Since regulation of price is not involved, such concerted action does not constitute a restraint of trade in the opinion of the Attorney General.

See the Minnesota Trusts and Combinations Act annotations, Vol. 2, ¶ 8435.

Your letters of July 15 and July 28 refer to a corporation organized under Minnesota law. A copy of the articles of incorporation and by-laws has been submitted. The purpose of your investigating this corporation is to determine whether it appears to be operating within the law.

The purposes of a corporation and the business in which it may engage are to be ascertained from the declared purposes in

the articles of incorporation. I have examined the articles submitted and I am of the opinion that the declared purposes of the corporation are within the law.

[*Facts*]

You state that the members of the corporation propose to engage in joint advertising. That is to say, a newspaper advertisement will appear, advertising an article of merchandise which various members sell at a certain price on a particular day or period, and on this advertisement appears a list of names and addresses of the member retailers where the item may be purchased. You have asked the

Question

Do such facts disclose a violation of M. S. A. 623.01?

Opinion

The section mentioned prohibits trusts and combinations in restraint of trade. I fail to see that such facts indicate an agreement, combination, or understanding between such members in restraint of trade. I fail to see that such arrangement limits, fixes, controls, maintains or regulates the price of an article of trade. These members merely offer to the public that they will sell such article at such price. There is nothing in the facts considered which shows that the members limit competition in such sales.

[¶ 62,479] United States v. Cotton Valley Operators Committee, et al.

In the United States District Court for the Western District of Louisiana, Shreveport Division. Civil Action No. 2209. Proceedings of July 7, 1949.

Sherman Antitrust Act

Procedure—Privileged Documents—Preliminary Determination by Court—Dismissal of Suit upon Failure To Produce.—Where hydrocarbon manufacturers had entered a motion for production of documents and statements of their customers, and government attorneys refused to deliver the documents to the court for preliminary determination of the question of privilege, the government's suit alleging conspiracy to restrain interstate trade was dismissed.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1610.341, 1610.353.

For earlier proceedings in the same case, see ¶ 62,216, 62,243.

For the plaintiff: Malcolm E. LaFargue, United States Attorney, and Daniel B. Britt, Special Assistant to the Attorney General.

For the defendants: Charles B. Wallace, Dallas, Texas, and Dixon Carrol, Shreveport, La., for the Magnolia Petroleum Co.; Arthur O'Quin and C. Ford Currier, both of Shreveport, La., for the Ohio Oil Co.; Charles T. Black and W. W. Heard, for Stanolind Oil & Gas Co.; Sidney M. Cook and C. D. Egan, both of Shreveport, La., for Cotton Valley Operators Committee; John Madison, Shreveport, La., for the Union Producing Co., et al.; David Smitherman, Shreveport, La., for North American, et al.; J. R. Goff, Arcadia, La., for H. L. Hunt Oil Co., et al.; Ralph Halliburton, Shreveport, La., for Woodley, et al.

Before BEN C. DAWKINS, District Judge.

Proceedings

[*Digest*] MR. BRITT: I have here, which I now hand to you, copy of an opinion written by Judge Kirkpatrick in Philadelphia last week which relates to the exact problem which we have here now, growing out of almost exactly the same kind of case. The subject matter of the case is not exactly the same, but it does relate to interrogatories, the nature of which is not stated or referred to in that opinion, but in effect it says that, as I have been arguing to your Honor the last few trips that I have made here, in an Anti-Trust suit where injunctive relief is sought, which involves the violation of a criminal statute, it takes on not only privileged treatment, under Rule 34 and 26 (d), but under certain provisions the question of dealing with public policy which the Attorney General has to take into con-

sideration in dealing with letters, or other communications, written by customers of the defendant, and states that they should not be produced by the Attorney General, if he decides that they should not be produced.

MR. O'QUIN: If your Honor pleases, I say that this is one opinion, by one District Judge, passing upon a matter that your Honor has already passed upon three times.

In the case which Mr. Britt has handed to your Honor the judge there had the choice of saying yes or no; that they would either produce them, or not produce them. In this case your Honor has the right under your previous ruling to view these documents and see whether they are privileged, or whether it would be against public interest to divulge them, before we are even given an opportunity to see them. You will protect the public interest yourself.

MR. BRITT: Here you will see, by reading the opinion, I think, that it is on all-fours with the situation we have, almost identical with the situation we have here. Your Honor will see, by reading that opinion, that we do not have to produce the reports or letters of the customers themselves even to the Court, and I think, if your Honor will study this opinion, it will persuade you to the effect that we do not have to produce these documents even to your Honor.

THE COURT: Well, the situation is that I am confronted with the problem of determining whether I shall order these records produced and given to the defendant, or whether the Attorney General shall decide the matter. That is what I am confronted with.

Afternoon Session

THE COURT: Gentlemen, I have considered this opinion of Judge Kirkpatrick, and that examination has not served to change my views as to what should be done to determine whether or not the documents called for in the motion to produce are privileged within the meaning of the Rules of Civil Procedure.

Here the Court has heard the parties on the motion to produce and concluded that the only way in which it can determine the question of privilege is by inspecting the document itself before production in court, and has, accordingly, directed that counsel for the Government list and indicate by proper means in the files those documents claimed to be privileged. Counsel for the Government states that each of the files does not fall within that category, and has agreed to furnish some of it. To say that this ends the matter is to state that counsel for plaintiff, or the Government, is the exclusive judge of whether the documents are privileged.

I am not convinced that the matter of privilege should be left exclusively to the Attorney General, but I believe it is my duty to determine this question by an examination of the documents.

MR. BRITT: May it please the Court, as I indicated this morning, I have been ordered to come before your Honor and say that I have the reports with me, but it is my instruction to respectfully decline to produce them to your Honor under these circumstances.

THE COURT: Mr. Britt, the only alternative then, as I appreciate it, is to direct you to do that within a fixed time, and if it is not done within that fixed time to dismiss the suit.

MR. BRITT: I am perfectly willing for the time to start now, if your Honor pleases. I have them here, and I still refuse to produce them.

THE COURT: All right, let the suit be dismissed at this time.

[¶ 62,480] United States v. Greater Kansas City Retail Coal Merchants' Association, et al.

In the United States District Court for the Western District of Missouri, Western Division. No. 17,328. July 26, 1949.

Sherman Antitrust Act

Coal Retailers—Sufficiency of Indictment—Motion to Dismiss Denied.—A motion made by coal companies, officers, and individuals to dismiss an indictment charging conspiracy to fix coal prices was denied. The time, place, manner, means and effect of the

offense were generally alleged so as to establish a violation of the Sherman Act. Factors such as when and where the conspiracy was formed, whether it consisted of an express or an implied agreement were more properly addressed to the indictment by way of a motion for a bill of particulars and not through a motion to dismiss. Motions to strike out pleadings were overruled on the ground that the government had the right to reveal the entire operations of the parties to a conspiracy, how they conducted business, and the means they used in making proof of the conspiracy. The court refused to grant the motion for a bill of particulars since to do so would limit the evidence of the prosecution.

See the Sherman Act annotations, Vol. 1, ¶ 1630.225, 1630.355.

Miller-Tydings Amendment

Coal Retailers—Sufficiency of Indictment—Competitors on Horizontal Trade Basis.— The indictment charging retail coal dealers with conspiracy to fix prices was found to be sufficient even though it did not negate the proviso contained in the Miller-Tydings amendment. That enactment makes no exception as to competitors on a horizontal trade basis. The retailers in this case are, but for the combination alleged, clearly established to be competitors with each other.

See the Resale Price Maintenance Commentary annotations, Vol. 2, ¶ 7076.

Memorandum on Motion to Dismiss and for Bill of Particulars

[*Digest*] The indictment herein, revealing the following facts, charges the defendants (seven corporations, six of the officers thereof, and nine individuals) with forming a combination and conspiracy to fix, stabilize, maintain and raise the price of coal sold and distributed at retail in the greater Kansas City area. The coal so purchased by dealers is carloaded at mines and transported therefrom in interstate commerce to sidings of the dealers, from whence a substantial quantity of it is delivered to users immediately after arrival of said cars. Some dealers stock pile said coal and make deliveries to users therefrom.

The indictment charges that since approximately September 15, 1933, the exact date being unknown, and continuously up to and including the day of the presentation of the indictment, the defendants have been engaged in a combination and conspiracy to fix, stabilize, maintain and raise the price of coal sold and distributed in said area, in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

[*Grounds of Motion to Dismiss*]

Defendants challenge the sufficiency of the indictment, by way of motion to dismiss, because the indictment fails to allege:

"the names of those who formed the alleged conspiracy or combination; when and where it was allegedly formed; the manner and means by which it was allegedly formed; whether the alleged combination or conspiracy consisted of an express or an implied agreement; whether the alleged conspiracy was formed by an oral or a written agreement; the names of those who joined the alleged conspiracy or combination after its formation; when and where each of such parties allegedly joined; the manner and means by which each allegedly joined; whether each such alleged joining consisted of express or implied agreements; whether each such alleged joining was done in writing or orally; what particular part it is claimed each defendant had in the alleged combination or conspiracy; when, where, in what manner, and which defendants performed overt acts in furtherance of the alleged conspiracy; what acts were performed in furtherance of the alleged combination or conspiracy within the jurisdiction of this court within the applicable period of the statute of limitation; when and where they were performed; and by which defendants."

[*Reasons for Denial of Motion*]

Such challenge cannot be sustained when considered either separately or collectively. All such factors are more properly addressed to the indictment by way of a motion for bill of particulars and not through motion to dismiss for failure of the indictment to allege facts sufficient to charge an offense. *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

The constituent elements of time, place, manner, means and effect through which the government here charges defendant with violation of the Sherman Act (15 U. S. C. A. Sec. 1 and 2) are generally alleged in the instant indictment so as to establish a violation of that act.

> "The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy, for which (defendants) contend, is not essential to an indictment"

returned under the Sherman Act. *Glasser v. U. S., supra.* Such an indictment is legally sufficient if it generally charges all the essential elements of the offense with sufficient clarity to advise the defendants of the accusation made against them, to enable them to prepare their defense, and to enable them to plead a judgment of conviction or acquittal thereon in bar to a subsequent prosecution for the same offense, (*Swift & Co. v. United States,* 196 U. S. 375) even though the generality of the charges made may be subject to be particularized. Cf. *United States v. The Central Supply Association, et al.,* 40 F. Supp. 964.

In regard to the "time" of the conspiracy here charged, it is alleged as beginning September 15, 1933, and continuing thereafter up to and including the day of the presentation of the indictment. The conspiracy thus alleged is in effect charged to have been renewed each day during its continuance. *U. S. v. Borden Co.,* 308 U. S. 188, 202. The "place" where such conspiracy was entered into and performed in part is alleged to be in the "greater Kansas City area", within the jurisdiction of this district court.

> "The allegation that the conspiracy was entered into and carried out in part within the district in which the indictment was returned was sufficient in respect to place, as against an attack by motion or demurrer on the ground of complete infirmity of the indictment." *Frankfort Distilleries v. United States* (10 Cir.), 144 F. (2d) 824, 832.

The manner and means by which defendants are alleged to have unlawfully conspired are detailed by the agreements and concert of action that the government charges defendants concluded to establish uniform retail prices of coal to users; in submitting bids on agreed prices; and in agreeing and establishing uniform charges for extending credit to purchasers of coal. These things the indictment charges constituted a conspiracy to restrain interstate trade and commerce, to diminish competition between coal dealers, or to control or limit the supply and movement of coal in such trade and commerce, as the case may be. Such particularity is all that is essential to allege the manner and means of effecting the conspiracy here charged. *Glasser v. United States, supra. Nash v. United States,* 229 U. S. 373; *United States v. Empire Hat and Cap Mfg. Co., et al.,* 47 F. Supp. 395; *United States v. Virginia-Carolina Chemical Co., et al.,* 163 Fed. 66.

The indictment names the defendants as those who formed the conspiracy. It charges such conspiracy to be a continuing one, so that defendants are informed thereby that each day of its continuance they are charged with the formation and continuance of the allegedly unlawful conduct in violation of the Sherman Act. (Cf. *U. S. v. Borden, supra.*) Whether the agreement constituting the conspiracy and combination was express or implied among defendants, oral or in writing, is immaterial. The essential element of the offense is that such an agreement is charged to have existed between the defendants and that is all that is necessary to allege in the indictment to sufficiently state the crime here considered. *U. S. v. H. Piowaty & Sons, et al.,* 251 Fed. 375. When and where the defendants individually joined the alleged conspiracy, the manner and means by which they joined, whether by express agreement, orally or in writing, and the particular part each defendant performed in the conspiracy are not essential allegations to charge the offense. The indictment sets forth specific overt acts performed in furtherance of the conspiracy and alleges that the conspiracy was entered into and carried out in part in this district. When and where within the district, in what manner, and which defendant performed such acts are not essential allegations in testing the sufficiency of the instant indictment. It is not necessary that a conspiracy indictment set forth in detail each separate transaction and the part each of the individuals engaged therein performed. *United States v. Patterson,* 201 Fed. 697. The venue of the crime here charged is laid by allegation of facts, revealing overt acts committed within the jurisdiction of this United States District Court. Identical venue allegations have been sustained as sufficient to establish where and when the offense of conspiracy under the Sherman Act was consummated and the jurisdiction of the courts thereover. *United States v. Trenton Potteries,* 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *United States v. N. Y. Great Atl. & Pac. Tea Co.* (C. C. A. 5), 137 F. (2d) 459.

[*Miller-Tydings Amendment*]

Defendants' challenge of the sufficiency of the indictment for failure to negative the proviso in Section 1 of the Sherman Act, *supra,* (the Miller-Tydings Amendment) cannot be sustained. It is not required that an indictment contain allegations negativing every possible theory of innocence of an accused, (*Evans v. United States,* 153 U. S. 584) or such possible defenses as may be set up by the defendant. (*Stokes v. United States,* 157 U. S. 187.) Where the language of a statute defining the offense is so entirely separable from the exception therefrom that the ingredients of the offense may be stated without reference to the exception, such matter need not be referred to in an indictment. *McKelvey v. United States,* 260 U. S. 353; *United States v. Cook,* 17 Wall (U. S.) 168. It is only where a statute defining an offense contains an exception or proviso in its enacting clause, which is so incorporated with the language describing and defining the offense that the ingredients of the offenses cannot be accurately and clearly stated if the exception is omitted, that it is necessary to negative such exception or proviso in an indictment. *United States v. Britton,* 107 U. S. 655. Under Section 1 of the Sherman Act the substantive offense of conspiracy, *aliunde* a contract for resale, may be accurately and clearly described without reference to the proviso in said section. Manifestly a conspiracy or combination among retail dealers engaged in a single line of business themselves, to lessen competition and to raise prices, could not be within the ambit of the Miller-Tydings Amendment. Such retail dealers are, but for the conspiracy and combination alleged, clearly established to be competitors with each other under such circumstances. The Miller-Tydings Amendment makes no exception as to competitors on a horizontal trade basis. *United States v. Univis Lens Co.,* 316 U. S. 241; *United States v. Bausch & Lamb Opt. Co., et al.,* 45 F. Supp. 387. Consequently the indictment here under the above related facts cannot be held defective for failure to negative the provision contained in Section 1 of the Sherman Act.

[*Interstate Commerce Involved*]

Defendants' further attack against the indictment on the ground that the facts alleged only reveal intra-state price fixing in the retail sale of coal is without merit. Restraints on interstate commerce to be effective "do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *U. S. v. Women's Sportswear Manufacturers Association, et al.,* 336 U. S. 460, 464. It is too late in the day to say that a conspiracy or combination to fix and maintain prices, either at the beginning or end, of goods customarily and normally moved and shipped in interstate commerce, does not operate directly to restrain and monopolize interstate commerce. *Local 167 v. U. S.,* 291 U. S. 293; *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *U. S. v. Gypsum Co.,* 333 U. S 364: *Eastern States Lumber Assn v. U. S.,* 234 U. S. 600; *U. S. v. Trenton Potteries Corp.,* 273 U. S. 392; *Mandeville Island Farms, Inc., et al., v. American Crystal Sugar Co.,* 334 U. S. 219.

The indictment herein charges a single continuing conspiracy. As laid, it alleges several related acts and means, occurring over a stated period of time, for making the conspiracy effective.

> "The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose." *Frankfort Distilleries v. U. S.,* 144 F. (2d) 824, 832.

It is rudimental law that a conspiracy, once shown to exist, is presumed to continue whenever one conspirator does some act in furtherance of its purpose. *U. S. v. Perlstein,* 126 F. (2d) 789. In a continuing conspiracy proof of an overt act is necessary only to establish the continued existence of the agreement and to bring the existence thereof within the applicable period of limitation, and not as an essential part of the conspiracy itself. *Safarik v. U. S.,* 62 F. (2d) 892.

Even though the offense under the Sherman Act is complete when a conspiracy is formed, yet when the indictment charges that the unlawful conspiracy continued throughout a given period and an overt act is shown to have been committed within the applicable statute of limitation, prosecution thereof is a single offense and evidences may be offered commensurate with the entire time the conspiracy is alleged to have been formed and continued. *U. S. v. Kissell and Harned,* 218 U. S. 601. In charging a continuing conspiracy committed by several means for the single purpose of fixing, stabilizing, maintaining and raising prices of coal in restraint of interstate trade and commerce, the indictment herein is not defective because of duplicity.

From what has heretofore been said it clearly appears that jurisdiction and venue of the crime here considered is properly lodged in this district court. Therefore the separate motion of Apex Coal Company and the joint and several motions of defendants, Greater Kansas City Retail Coal Merchants Association, et al., are by the court overruled.

Motions to Strike

In prosecutions for conspiracy the government has the right to show the whole history of the conspiracy from the commencement thereof to its conclusion. It is no objection that the evidence covers a period of time prior to the statutory limitation within which the prosecution may be maintained, if the facts shown have a bearing on the existence of the conspiracy continuing within the statutory period. *Baker v. U. S.*, 276 Fed. 283; *St. John v. U. S.*, 268 Fed. 808; *Haywood v. U. S.*, 268 U. S. 795, cert. den. 256 U. S. 689; *Nyquist v. U. S.*, 2 Fed. (2d) 504, cert. den. 267 U. S. 606.

There is no allegation in the indictment relating to the sale of branded coal in the state of Kansas. If such fact exists and the evidence at time of trial further shows that it was sold within the ambit of the Miller-Tydings Amendment, then such sales of course would be no evidence of the conspiracy charged. A proper objection thereto at time of trial may result in deleting or limiting testimony thereon. There is no allegation to strike from the indictment because of the existence of that fact, even if true, at this time.

The same is true with reference to the period covered by the Emergency Price Control Act of 1942. If defendants merely sold coal at maximum prices during the enforcement period of that Act, without the existence of any agreement between them to fix, stabilize and maintain the price of coal at such maximum, the fact that each of them so retailed coal to users could be no evidence of a conspiracy. However, though defendants were by the regulations promulgated under the Emergency Price Control Act of 1942 lawfully authorized to charge a maximum price for coal, yet if they did so by agreement to fix, stabilize and maintain such price at the allowable maximum, then we do not perceive how defendants can exclude testimony concerning that fact, if introduced solely because of the enactment of the Emergency Price Control Act of 1942. What defendants may have legally done separately under that act would, if done in concert, resulting in restraint of interstate trade and commerce, be a violation of the Sherman Act.

Sub-paragraphs (f) and (g) of Paragraph 17 allege facts from which it may be inferred that the government charges that defendant Association herein policed its membership and placed obligations on its members to prevent competition among such members, promote uniform prices, and lend inducement to such members to remain in participation of the conspiracy charged. Although from the allegation of sub-paragraph (f) we fail to perceive how the facts there stated, if true, tended to fix and stabilize the price of coal as charged, in restraint of trade and commerce, we hesitate, without some reason other than that stated in the motion to strike, to cause such allegation to be deleted from the indictment. The government has the right to reveal the entire operations of the parties to a conspiracy, how they conducted their business, the means they used, etc., in making proof of the conspiracy. Though such a showing may be more than embarrassing to the conspirators and inflame the jury against them, yet such matters, tending to reveal the *modus operandi* of the conspirators, would be relevant and proper subjects of inquiry. The court cannot now determine what importance the government attaches to such circumstance. It does not clearly appear that the allegations made in sub-paragraph (f) are wholly irrelevant, and the court cannot say that they are of such a character as to be prejudicial *per se* to defendants.

The several motions of the defendants to strike are overruled.

Bill of Particulars

We have heretofore considered many of the matters defendants seek to have the government set forth by way of Bill of Particulars, from the standpoint whether such matters are essential allegations to the charging of an offense for violation of the Sherman Act, and have held that a detailed statement thereof is not necessary in the instant indictment. It is a fundamental principle concerning bills of particulars that where the offense charged in an indictment is stated with sufficient clearness and definiteness that defendants are informed of the nature of the charge made against them, so they might plead former acquittal if subsequently charged with the same offense, and defendants might reasonably be expected to prepare a defense, without surprise, such motions will be refused. (*United States v. General Electric Co.*, 40 F. Supp. 627, and cases there cited by Judge Liebell.) Such motions are seldom granted where to do so will unduly limit the evidence of the prosecution. *Mulloney v. U. S.* 79 F. (2d) 566, cert. den. 296 U. S. 658. In a prosecution under the Sherman Act, the existence or non-existence of the conspiracy charged is the sole issue for determination. Proof thereof is usually made by circumstantial evidence. It is readily apparent that from the nature of such a prosecution a too detailed statement of the ultimate facts, either in an indictment or bill of particulars, would seriously interfere with the government's presentation of such actions. *U. S. v. General Petroleum Corp.*, 33 F. Supp. 95.

To grant defendants' first and second request for bill of particulars herein would be to require the government to set forth practically all the evidence it has in this case. The conspiracy here charged is alleged to have come into existence about the time the defendant, Greater Kansas City Coal Merchants Association, Inc., was incorporated. Whether the then incorporators and officers of such corporation or the then officers of the other corporate defendants or individuals named in the indictment were the parties who formed the alleged conspiracy, and the manner and means they used in its formation, are matters which the evidence at time of trial will probably reveal, but the government should not be required to state such matters at the present stage of the case. The precise date when either, or any, of the defendants joined, if so, the conspiracy is likewise a matter of evidence which the court should not now require the government to adduce, and thereby limit the proof of the government. Specific identification and detailed statement of particular constituent facts establishing proof of the formation, existence and joining of a conspiracy should not be required to be stated by the government. To do so would be to unduly limit the government in its proof and compel the prosecution to reveal its evidence before time of trial. It is not the function of a bill of particulars to force the government to reveal its evidence in advance of trial, or the kind of testimony it will offer.

The matter and events which defendants seek in the remaining items of their motions for bill of particulars relate to overt acts alleged to have been committed in furtherance of the conspiracy. Overt acts are no part of the crime of conspiracy denounced by the Sherman Act. *Nash v. U. S.*, 229 U. S. 373, 378. Consequently allegations revealing such acts are not required to be alleged in an indictment. The fact that overt acts are alleged in the instant indictment is of distinct benefit to defendants, as said allegations inform the defendants of the character and trend the government's evidence will take at the trial. This we think is all that defendants are entitled to, and that the government should not be required to state what particular part each defendant head in the alleged conspiracy, or where, when and how such overt acts were committed.

The indictment here returned against defendants contains but a single charge of violation of the Sherman Act. The conspiracy and combination alleged is delimited as to time, place, manner, means and effect. The defendants are fully informed as to such matters and the period the conspiracy is alleged to have been in existence. Whether defendants ever participated in the conspiracy to effect its object, as alleged in the indictment, must be known by them. If defendants did not so conspire they can readily defend against the charge so made. Successfully so defending, each of the defendants can plead former acquittal for any offense subsequently charged against them for violation of the Sherman Act by the manner and means here alleged on any date between September 15, 1933, and the date of the returning of the instant indictment. The defendants cannot be hereafter taken by surprise by any additions made

to the nature of the charge here alleged. They may be astonished by such charge and the course the evidence introduced at time of trial takes, but such factors are not grounds for sustaining their bill of exceptions addressed to the instant indictment.

Defendants' motions for bill of particulars are severally overruled.

Immunity

Certain of the individual defendants have filed supplemental motions to dismiss, claiming immunity from prosecution in this action because of becoming witnesses and producing documents and records before the Grand Jury on subpoena of the government. The government has filed with their brief excerpts from the transcript of testimony given before the Grand Jury by said defendants. Defendants have filed motion for hearing on their said motions as to be afforded an opportunity to refute such transcript and establish the extent of the immunity so claimed. Defendants are entitled to such a hearing in open court. Such hearing will be granted, limited, however, to the nature, character and extent of the testimony claimed to have been given by said defendants before the Grand Jury, and the nature and character of documents produced, if so, by said defendants. The court does not hereby intend to sustain that portion of said defendants' motions seeking to require the government to produce a complete transcript of all testimony given before the Grand Jury and the documents said defendants adduced before the Grand Jury. The government need not produce such documents at said hearing. The hearing aforesaid is now set for Friday, July 29, 1949, at 10:00 o'clock a. m.

[¶ 62,481] Allan B. DuMont Laboratories, Inc. v. H. R. Macy & Co., Inc.

In the New York Supreme Court, New York County, Special Term. Part 1. 122 N. Y. L. J. 349. August 30, 1949.

New York Fair Trade Act

Retail Sale of Television—Selling Below Price of Competitors—Total Failure to Comply with Statute.—A television manufacturer who failed to avail itself of the price-fixing features of the New York Fair Trade Act was denied a temporary injunction to prevent a department store from advertising television receiver sets below the price claimed to have been agreed upon by the manufacturer and its dealers and distributors.

See the New York Fair Trade annotations, Vol. 2, ¶ 8604.75, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7352.

[*Parties*]

GREENBERG, J.: The plaintiff manufactures television receiving sets which it sells through dealers and distributors under the trade name of "DuMont." It alleges that in order to maintain the cordial relationship existing between it and its dealers and distributors, it has, among other things, sought to prevent price cutting and that in furtherance of this policy all its dealers and distributors have been and are appointed by written agreement granting to dealers what is termed a "franchise." In spite of its asserted policy plaintiff has not *price fixed* its merchandise and it is, therefore, not entitled to the protection of the provisions of the Feld-Crawford Fair Trade Act. In fact there is no claim, as there could be none, that defendant has violated the Fair Trade Act.

The defendant, R. H. Macy & Co., Inc., is a nationally known concern. It has for many years operated department stores in this city and in various other cities of the United States. Among the myriad of articles it sells is home receiving television sets. It also maintains facilities for installing, servicing and repairing such sets. The defendant has an established merchandising policy of endeavoring to sell its free priced merchandise at 6 per cent below competitors and such a policy the defendant avers is known throughout the trade.

The plaintiff, claiming that the defendant has been guilty of certain practices calculated to injure its business, namely, the advertising and the selling of DuMont Television Receiving Sets below the price claimed to have been agreed upon between plaintiff and its dealers and distributors, obtained an order to show cause with a sweeping temporary stay, restraining the defendant from (1) advertising and selling DuMont Television Re-

ceiving Sets at cut prices; (2) taking orders from its customers for sale and delivery to its customers of DuMont Television Receiving Sets; (3) purchasing DuMont Television Receiving Sets from dealers and distributors of the plaintiff for the purpose of resale to defendant's customers; (4) publishing advertisements to the effect that defendant will continue to have a wide selection of DuMont Television Receiving Sets or that defendant will continue to deal in, handle or sell DuMont Television Receiving Sets or that defendant is a dealer or distributor of DuMont Television Receiving Sets. The motion came on to be heard at Special Term. Part I.

Following the argument of the motion, this court vacated all of the provisions of the temporary stay except the one which restrained the defendant from advertising that it is an authorized dealer or distributor of DuMont Television Receiving Sets.

[*Allegations*]

The principal application is now before the court for disposition. Plaintiff alleges that shortly prior to July 5, 1949, defendant's vice-president conferred with its general manager concerning the granting of a dealer franchise to the defendant; that the latter's vice-president assured plaintiff's general manager that if defendant were appointed a dealer it would adhere to plaintiff's price and merchandising policies and would not advertise plaintiff's receiving sets at cut rate prices; that plaintiff relied on these representations and appointed the defendant an authorized dealer, but subsequently the defendant, in violation of the assurances given by its vice-president, caused to be published in various newspapers an advertisement of the sale of plaintiff's product at cut rate prices. The plaintiff thereupon terminated defendant's franchise and demanded that defendant cease what plaintiff terms its "illegal activities" in that regard. Defendant refused to comply with plaintiff's request and thereupon plaintiff instituted this action for an injunction and is seeking temporary relief pending the trial.

The defendant (hereinafter referred to as Macy's) denies all of the material allegations of the moving papers and accuses the plaintiff of bad faith and breach of what the defendant asserts is the true arrangement between the parties. In support of its position the defendant sets forth that its six per cent trade policy was well known throughout the business world and that in conferences with the representative of plaintiff it insisted that it would enter into no arrangement that did not take this policy into account. Plaintiff's consent was obtained to this arrangement, since it was anxious to liquidate its 1949 line of television receiving sets in order to make way for the new 1950 television sets.

After considerable conversation and, on July 5, 1949, the representative of plaintiff concededly delivered to the representative of the defendant a written dealer franchise agreement for one year, signed by plaintiff. It was agreed that pending the signature of the contract by the defendant, Macy's might purchase merchandise and consider itself an authorized dealer. Accordingly, and this stands without contradiction in the record, on July 11, 1949, defendant drew up advertising copy for the sale of DuMont Television Sets. This advertisement was to be inserted in the New York newspapers on July 14, 1949. The copy was shown to and examined by DuMont's advertising manager whose approval appears on the proof as corrected. This advertisement appeared in the newspapers on July 14, 1949.

Shortly after this advertisement appeared, and unknown to it, a number of DuMont dealers in the City of New York protested to DuMont against Macy's competition. Their further complaint was to the effect that they were stocked with 1949 merchandise purchased before DuMont reduced its wholesale prices and that they could not as readily reduce their retail prices to the same extent as Macy's. DuMont, the defendant alleges, having been criticized for the situation, attempted to lay blame on Macy's by pretending that it had acted without DuMont's approval. On July 21, 1949, the defendant's representative contacted plaintiff's representative. There was some talk about the signing and return of the contract to DuMont. Defendant said it would mail the contract; plaintiff said it would send for it which it did on the 21st of July. The very next day, July 22, without further conversation of any kind with Macy's, DuMont mailed to Macy's a letter undertaking to cancel the franchise without cause, on ten days' notice. Owing to the fact that this notice was sent by registered mail, addressed simply to R. H. Macy & Company, it did not, according to the allegation of the opposing affidavit, reach a responsible officer of

Macy's until the morning of July 28. Macy contends that the cancellation of the contract on July 22, 1949, one day after it had been signed and returned by it and received by plaintiff, indicates the utmost bad faith, and demonstrates a calculated design on the part of plaintiff to embarrass the defendant by announcing to the trade that DuMont had disenfranchised Macy's because of certain claimed improper practices. Macy's thereupon, and on August 3, 1949, published the advertisement of which plaintiff complains. This advertisement states that Macy was cutting prices. Macy's argues that it was justified in inserting this advertisement in the New York newspapers because of what it claims was the plaintiff's bad faith in canceling the dealer contract almost immediately upon its receipt.

In the main, the facts here set forth present the picture which obtained at the time the plaintiff sought its order to show cause.

[*Equitable Interference Not Justified*]

Sharp issues of fact are involved which it is obvious should not and cannot be adequately disposed of on motion papers. The verity of the claims of the contending parties can only be properly evaluated and determined after a formal trial where the parties and the witnesses may be subjected to cross-examination and the conflicting claims more appropriately inquired into. Injunction is a drastic remedy and it is well established law that before it will be granted plaintiff must make out a clear case entitling it to the relief sought. Moreover, it is also well settled law that a party will not be granted on motion the same relief to which it would be entitled, if it would be entitled to it at all, only after a trial of the action upon the merits.

A very careful consideration of all of the papers, voluminous in character, which have been submitted to this court, compels the conclusion that not only is plaintiff not entitled to equitable interference but that the equities weigh heavily in favor of the defendant. The claim by plaintiff that the defendant has been guilty of inducing breach of contract is nowhere borne out by the papers; the complaint of the plaintiff that the advertisement of August 3 violates the agreement entered into between the plaintiff and the defendant fails to find support in the conceded facts—the advertisement of July 14, which was approved by the plaintiff, states that plaintiff's product could be purchased at Macy's at a lower price, and the advertisement of August 3, 1949, in substance carries the same advertised thought, namely, that DuMont televisions could be purchased at Macy's at a lower price. There is, therefore, no occasion for complaint in so far as the advertisements are concerned. It seems to this court that the plaintiff is complaining, not so much because of what it conceives to be the defendant's breach of contract, but because the price at which defendant is offering the television sets for sale is lower than plaintiff, at the present time, considers appropriate. Plaintiff could easily have protected its position, if it desired to do so, by the simple process of price fixing the merchandise under the Fair Trade Act. Having failed to avail itself of the protective features of the Fair Trade Act, it clearly has no right to challenge the defendant's sale of DuMont televisions below the price which the plaintiff, in the light of past happenings, considers to be fair and proper.

[*Injunction Denied*]

Accordingly, plaintiff's motion for an injunction *pendente lite* is denied and the remaining portion of the stay contained in the order to show cause is vacated. Settle order on one day's notice.

[¶ 62,482] The Container Company v. Carpenter Container Corporation v. Continental Can Company.

In the United States District Court for the District of Delaware. Civil Action No. 1053. July 19, 1949.

Sherman Antitrust Act

Separation of Patent and Antitrust Causes—Excusable Neglect—Jury Trial Granted.— An antitrust cause having been separated from a patent infringement claim, the former was ordered to be tried by a jury even though the request for such mode of trial was not made within the prescribed time. The failure to make a timely demand was found to be

excusable since at the time it was assumed that both claims would be tried simultaneously and one was not appropriate for consideration by the jury.

See the Sherman Act annotations, Vol. 1, ¶ 1640.634.

For the plaintiff and additional defendant: Richard F. Corroon (Sutherlans, Berl & Potter) of Wilmington, Del., and Mark F. Hughes and Raymond C. Murphy (Wilkie, Owen, Farr, Gallagher & Walton) of New York, N. Y.

For the defendant: Alexander L. Nichols (Morris, Steel, Nichols & Arsht) of Wilmington, Del., and Marvin C. Harrison and Allan Hull (Harrison, Thomas, Spanbenberg & Hull) of Cleveland, Ohio.

[*Issue Before the Court*]

Opinion of RODNEY, D. J.

[*Digest*] The question here is whether a jury trial should be ordered by the court upon a motion therefor by the defendant when no timely demand therefor has been made.

Neither party demanded a jury trial within the time specified in Rule 38 (b).

[*Grounds Supporting Motion for Jury Trial*]

Subsequent to the court's decision granting a separation for trial, defendant moved under Rule 39 (b) for a trial by jury of the issues involved in the first (anti-trust) claim or cause of action in the counterclaim. In support of the motion is filed an affidavit by one of counsel for defendant, the gist of which is that the question of a trial by jury of the first claim in the counterclaim was considered by defendant's counsel; that inasmuch as it was assumed then that the first and second claims would be tried simultaneously and the second claim, being one relating solely to patent matters, was not appropriate for consideration by a jury, it was decided not to demand a jury trial of the first claim; that defendant's desire for a jury trial of the anti-trust issues will no longer interfere with the trial of the patent issues, in view of the court's order for separation; that the decision of defendant to waive its right to a jury trial of the anti-trust issues was based upon the assumption that there would be a trial of all issues at one time; and that since the court has ordered separation, it is just and equitable that defendant be permitted to obtain a jury trial of the anti-trust issues.

No affidavits in opposition have been submitted by plaintiff or the additional defendant.

[*Exercise of Court's Discretion*]

It is clear that the defendant would have been entitled to a jury trial of the anti-trust issues as of right upon making a timely demand therefor. See *Ring v. Spina,* 2 Cir., 1948, 166 F. 2d 546. The only question here is whether the court's discretion should be exercised in favor of a jury trial as requested. The discretion to be exercised under the rule should be exercised in accordance with law and reason.

If there had been a separation of the issues and provision for separate trial of those issues at an earlier stage of the proceedings and before any right to a jury trial had expired, I am assured that the defendant would have requested a jury trial on the issues triable by jury. The mere fact that the motion of the plaintiff for separate trials was not made until after the expiration of the time for electing a jury trial should not militate against the grant of that fundamental privilege to the defendant.

The right to a jury trial, of course, is fundamental, and the courts should indulge every reasonable presumption against waiver of such right. *Aetna Ins. Co. v. Kennedy,* 1937, 301 U. S. 389, 393. Under the circumstances outlined in the uncontroverted affidavit in support of defendant's motion, this court cannot presume that defendant intended to waive its right to a trial by jury of the anti-trust issues if such issues were to be tried separately from the other issues in the case.

[*Reasonable Excuse*]

The excuse submitted on behalf of defendant in explanation of its failure to make a timely demand for a jury trial is reasonable and constitutes "excusable neglect" for not making a timely demand therefor.[1]

[1] *Compare Paper Stylists, Inc. v. Fitchburg Paper Co.,* N. D. N. Y., 1949, 9 F. R. D. 4, with *Cannister Co. v. Nat. Can. Corp.,* D. C. Del., 1948, 8 F. R. D. 408 and *Bullock v. Sterling Drug Co.,* E. D. Pa., 1948, 8 F. R. D. 575; Cf. *Kass v. Baskin,* App. D. C., 1947, 164 F. 2d 513, 518. See also *State of Delaware v. Mass. Bonding & Ins. Co.,* D. C. Del., 1942, 3 F. R. D. 65.

[*Trial by Jury Granted*]

An order may be submitted granting a trial by jury of the issues involved in the first (anti-trust) claim or cause of action in defendant's counterclaim.

[¶ 62,483] Bond Crown & Cork Company v. Federal Trade Commission; Crown Manufacturers Association of America, L. C. McAuliffe, E. J. Costa, Benno Cohn, Arco Crown & Cap Co., Inc., Crown Cork & Seal Company, Inc.; Penn Cork and Closures, Inc.; Consolidated Cork Corporation, et al. v. Federal Trade Commission; Armstrong Cork Company and Joseph C. Feagley, Individually and as Director of Crown Manufacturers Association of America v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. Nos. 5813, 5814, 5817. Argued June 14, 1949. Decided August 22, 1949.

On Petitions for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Bottle Cap Manufacturers—Unfair Competition—Sufficiency of Evidence and Findings. —Petitions to set aside a Federal Trade Commission order were refused when an appeal court modified the order by requiring that references to the individuals named and to cork discs be stricken out. In the opinion of the court the Commission's findings of fact as to the lack of price competition, standardization of the product, equalization of freight, and that the named bottle cap manufacturers and their trade association control 85 per cent of the industry were supported by the evidence and sufficient to base a finding of conspiracy and combination in restraint of trade in violation of Section 5 of the Federal Trade Act. The order which commanded the petitioners to desist from carrying out any planned common course of action with respect to the practices involved in the conspiracy was affirmed and enforced as modified.

See the Federal Trade Commission Act annotations, Vol. 2, ¶ 6380.63, 6380.80, 6551.45.

Modifying and affirming the Federal Trade Commission cease and desist order in Dkt. 4602.

For the petitioners: Roger A. Clapp (Albert E. Donaldson and Hershey, Donaldson, Williams & Stanley on brief) for Petitioners in No. 5814; H. Bartow Farr (Willkie, Owen, Farr, Gallagher & Walton; Helmer R. Johnson, and Semmes, Bowen & Semmes on brief) for Petitioner in No. 5813; Frank B. Ingersoll (Rex Rowland, and Smith, Buchanan & Ingersoll on brief) for Petitioners in No. 5817.

For the respondent: Donovan R. Divet, Special Attorney, Federal Trade Commission, (W. T. Kelly, General Counsel; Walter B. Wooden, Associate General Counsel, and James W. Cassedy, Associate General Counsel, Federal Trade Commission, on brief).

PARKER, Circuit Judge: These are petitions to review and set aside an order of the Federal Trade Commission finding that the petitioners have been parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition in violation of section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 USC sec. 45) and commanding them to cease and desist from carrying out any "planned common course of action" with respect to certain acts and practices found to be involved in the conspiracy. The petitioners are corporations engaged in manufacturing crown bottle caps, a trade association of these manufacturers and certain individuals holding office either in the corporations or the association. The commission in its brief filed in this court consents that its order be vacated as to the individual petitioners, and no further attention need be given to them. The manufacturing corporations and the association ask that the order be vacated because not based on sufficient findings and because the findings are not supported by substantial evidence.

The case was heard before a trial examiner, who filed a report recommending that the commission find that there had been no conspiracy in restraint of trade or unfair trade practice in violation of the Trade Commission Act and that it dismiss the peti-

tion. Exceptions were filed to this report, and the commission made a complete finding of facts covering every aspect of the case and reached the conclusion that a combination and conspiracy in restraint of trade did exist and that a cease and desist order should issue. The findings of the commission are that the manufacturing petitioners control 85% of the business in question, that there is no price competition of any sort among them, but that absolute uniformity of prices and discounts has prevailed since 1938; that, through their association they considered uniform pricing techniques and a uniform contract in the year 1928, and that, although this uniform contract was not adopted, its provisions have been followed by petitioners; that through the association petitioners have worked out a standardization of product so that even in the matter of decoration the product of all petitioners is precisely the same; that in connection with patent licensing agreements the petitioner Crown Cork & Seal Company, which was the largest manufacturer of crown bottle caps, furnished lists of its prices to all the other petitioners for a period of many years and ceased only a short while before the institution of this proceeding; that such license agreements provided that the licensees should not sell at prices lower than those of Crown Cork & Seal; and that all of the manufacturing petitioners follow the uniform practice of equalizing the freight on shipments, with the result that the cost of goods plus freight is the same at any given point anywhere in the United States, no matter from which of petitioners the purchase is made. Upon these facts the commission found the existence of the conspiracy charged in the following language (13th finding):

> "The commission is of the opinion that in the circumstances shown to exist an understanding or agreement under which the respondents acted and still act in concert may be inferred. The intention of the parties participating in the meeting of respondent association, held on July 24, 1928, for all members of the association to sell their products at one and the same price and under identical terms and conditions is clearly evident from the minutes of that meeting. The subsequent use by all such parties of the general pricing plan then formulated, including the schedules of deductions, additions, and differentials, and the adoption of such plan by all of the other respondent manufacturers, with the resulting uniformity in prices, terms and conditions of sale as among all such manufacturers, indicates just as clearly an intention of all of the parties to continue in effect the original understanding. In the opinion of the commission, there is a direct connection between this understanding and the admitted efforts of the respondents to standardize their products to such an extent that a prospective purchaser would have no choice in the realm of coloring, lettering, and decorations as between the products of any two manufacturers; and the concurrent use by all of the respondent manufacturers of the freight-equalization plan serving to maintain identical delivered prices for all purchasers at any given destination, adds materially to the combination of circumstances showing a deliberate and concerted effort on the part of the respondents to completely remove effective competition as among the sellers of crown bottle caps and discs used in connection therewith. Considering, in addition, the price-fixing provisions of the various license agreements, all of which exceeded the legitimate rights of the licensors to protect themselves in the enjoyment of the fruits of their inventions, the sum of all the other incidents referred to in the foregoing paragraphs, the commission has no difficulty in concluding, and therefore finds, that the respondents have in fact entered into and have engaged in and carried out an understanding, agreement, combination or conspiracy among themselves to restrain and suppress competition in the sale of their products. While the record does not show that each of said respondents has participated in all of the activities relied on to establish said understanding, or agreement, each has acted in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices herein set forth in furtherance of the understanding or agreement common to them all."

We think there can be no question but that this finding supports the order of the commission and we think it equally clear that it, in turn, is supported by the findings as to evidentiary facts which precede it and by the evidence in the case.

Crown bottle caps are the closures for bottles used by the brewing and bottling industry. They consist of metal shells enclosing cork discs and have long been substantially identical in construction and dimension. The Crown Cork & Seal Company, one of the petitioners, manufactures approximately 50% of those produced in this country and the other petitioners approxi-

mately 35%. In 1925 the trade association was organized and most of the petitioners were members of it. One of the first things that it did was to bring about more complete standardization of product in that, by agreement of the manufacturers, the decoration of the caps was made uniform, so that those sold by all manufacturers were identically the same. Another matter discussed at an early meeting of the association was the technique of arriving at prices with a view of having uniformity throughout the the industry in the schedules of deductions, additions and differentials from base prices. This was to be incorporated in a standard form of contract; and, while the standard form was never adopted, the evidence is that throughout the industry there is as much uniformity in the deductions, additions and differentials allowed from base prices as if it had been adopted. No form of contract of any sort is used, but sales are made informally by correspondence or oral negotiation; and it appears that no written contract is needed, in view of the uniformity that has been attained throughout the industry with respect to matters which a contract would ordinarily embrace within its terms.

There is no proof of any express agreement to charge uniform base prices; but the evidence shows that since 1938 the prices of all the manufacturing petitioners have been the same. Prior to 1938, there were but few changes, the same price, with minor variations, was charged by all, and, when changes in prices were made, they were made by all at about the same time. In 1933 Crown Cork & Seal granted licenses under patents which it held to most of the other manufacturing petitioners; and in connection with these licenses they agreed not to sell at a less price than that which Crown Cork & Seal established. It is significant that, in connection with these licenses, Crown Cork & Seal furnished a list of its prices to the licensees, who were under agreement not to sell for less. In the case of petitioner Gutman, where mutual licensing following the adjustment of patent litigation, there was an exchange of prices, although neither party used the patents of the other. Not until 1941, shortly before the institution of the proceeding before the commission, was this furnishing of prices discontinued. Its continuance over so long a period of time furnishes adequate explanation of the uniformity of prices attained. The commission has found that, when it was discontinued, it was no longer necessary to maintain uniformity. Certainly, there have been no changes in prices of bottle caps since that time, notwithstanding the fluctuations in the prices of all other commodities. The question which arises with respect to these patent agreements is not whether a patentee may exact an agreement as to prices from a licensee who uses the patent, but whether such agreements under the circumstances here appearing support the charge of conspiracy to destroy competition and fix prices throughout the industry. See *United States v. U. S. Gypsum Co.,* 333 U. S. 364.

The freight equalization practice to which reference has been made goes back at least as far as 1921. That practice is to sell the bottle caps f. o. b. the plant of the manufacturer with an agreement that the purchaser shall be credited with the difference between freight actually paid and that which would have been paid if purchase had been made from the nearest manufacturer. This practice has all the vice of the basing point system in that the purchaser pays the same delivered price, whatever manufacturer he purchases from, and the manufacturer must absorb the freight differential, so that the net selling price which he receives is different for different customers, depending upon their location. The effect of this practice in destroying competition and its importance in establishing the existence of the conspiracy charged is well stated by the commission in its ninth finding, from which we quote as follows:

> "This uniformity in base prices, together with the concurrent use by all the respondent manufacturers of the freight-equalization plan, inevitably means that a purchaser at any given locality will be required to pay exactly the same delivered price for crown bottle caps regardless of the manufacturer from which he purchases. It is undisputed that since 1938, at least, it has been impossible for any purchaser at any location to obtain crowns from any respondent manufacturer for a less price or on better terms than the prices charged or the terms imposed by any other respondent manufacturer. Even on privately decorated crowns the extra charges made by all of the respondent manufacturers have been the same. * * * Thus every respondent manufacturer is informed at all times of both the prices and the terms of sale quoted and offered by all of the others. In addition to knowl-

edge of the base prices of all of the other respondent manufacturers, each such respondent manufacturer knows that every other respondent manufacturer uses the plan of equalizing freight with the location of the manufacturer nearest the purchaser. It knows, too, that by the use of this plan each will be able to deliver its products to every purchaser at any given destination for exactly the same delivered price as others using the plan, and thus all users of the plan will be able to present to a prospective purchaser a condition of matched prices in which such purchaser is deprived of any choice on the basis of price. * * * In order to produce such matched prices sellers of crowns must, at numerous destinations, accept net receipts for their products varying in amount according to the freight absorbed as a result of the closer proximity to the purchaser of some other seller. Each participant in the use of the plan consciously intends that no attempt be made to exclude any seller of crowns from the natural freight-advantage territory of another, and by the use of the plan invites other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the crown bottle cap industry since 1938, and the failure of prices of crown bottle caps to respond in any way to changing conditions of supply and demand are not consistent with the existence of effective competition. The complete standardization of crowns as a result of the admitted efforts made by respondents, and other circumstances showing an overriding desire on the part of the respondents to present to a prospective customer a completely united front insofar as products, prices, and terms of sale are concerned, indicate the total absence of such competition. When, as in this industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure."

Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission. The standardization of product, for example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition. As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words". *Fort Howard Paper Co. v. Federal Trade Com'n*, 7 Cir., 156 F. 2d 899, 905. Where, as here, the evidence is sufficient to support the findings of the commission, it is for that body, and not the courts, to say what conclusions are to be drawn from it. *Federal Trade Com'n v. Standard Education Society*, 302 U. S. 112, 117; *Federal Trade Com'n v. Algoma Lumber Co.*, 291 U. S. 67, 73.

And the rule just stated is no different, as some of the petitioners seem to think, because the trial examiner reached a conclusion different from that of the commission. *N. L. R. B. v. Laister Kauffmann A. Corp.*, 8 Cir., 144 F. 2d 9, 16-17. It is the commission, not the trial examiner, that is charged with ultimate responsibility for finding the facts; and it is the commission's findings and order that we are authorized to review under the express limitation that "the findings of the commission as to the facts if supported by evidence shall be conclusive". 15 USC 45 (d). In point is *Beard-Laney Co. v. United States*, 73 F. Supp. 27, 33. In that case, it appeared that the order of a hearing division of the Interstate Commerce

Commission had been reversed on rehearing and it was argued that the usual rules for review of orders of the commission should not be applied for that reason. In answering this contention, the special statutory court of three judges said:

"The rules to be applied in reviewing the order of the commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the commission, was the final and definitive action of the commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. *Lang Transp. Co. v. United States, D. C.,* 75 F. Supp. 915, 925."

There has been a great deal of argument with regard to the practice of freight equalization. It should be noted in this connection, however, that the question in this case is, not whether such practice may be enjoined as constituting of itself an unfair trade practice, but whether it may be considered along with the other facts and circumstances to which we have adverted as tending to establish the conspiracy and combination in restraint of trade, which is the only charge of the complaint. We think that it was properly considered for that purpose. *Federal Trade Com'n v. Cement Institute,* 333 U. S. 683; *Triangle Conduit & Cable Co. v. Federal Trade Com'n,* 7 Cir., 168 F. 2d 175; *Milk & Ice Cream Can Institute v. Federal Trade Com'n,* 152 F. 2d 478. As was well said by Judge Major of a similar freight equalization plan in the case last cited:

"It is argued, perhaps correctly, that such a freight system had long been employed by industry so that members thereof might deliver their product at the same price. In fact, the commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and by such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity of believe, as argued, that petitioners employed this system without any agreement or plan among themselves. * * *"

Whether viewed as an unfair labor practice in itself, or as evidence of the existence of a conspiracy, we see no practical distinction between the freight equalization practice here involved and the multiple basing point system before the Supreme Court in *Federal Trade Commission v. Cement Institute, supra,* 333 U. S. 684. Both result in "identity of prices and diversity of net returns". In speaking of the single basing point system, which had been condemned in *Corn Products Co. v. Federal Trade Com'n,* 324 U. S. 726, and *Federal Trade Com'n v. Staley Co.,* 324 U. S. 746, the Supreme Court, in the *Cement Institute* case, pointed out the results that flow from that system, saying:

"One is that the 'delivered prices' of all producers in every locality where deliveries are made are always the same regardless of the producers' different freight costs. Another is that sales made by a non-base mill for delivery at different localities result in net receipts to the seller which vary in amounts equivalent to the 'phantom freight' included in, or the 'freight absorption' taken from the 'delivered price'."

The court then pointed out that

"the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns. Such differences as there are in manners here pertinent are therefore differences of degree only."

The same is true of the freight equalization practice here under consideration.

It is argued that the case here is distinguishable from the *Cement Institute* case because no "phantom freight" is involved; but there is involved freight absorption, resulting in equal delivered prices by all manufacturers selling in a given locality and unequal net returns to the manufacturers from sales to customers in different localities. So far as the questions before us are concerned, there can be no difference between phantom freight and freight absorption. See 333 U. S. at 725. Another argument is that the case here is distinguishable because there is no prohibition of the purchaser's taking delivery at the point of manufacture

and thus eliminating freight altogether; but, so far as appears, no one has ever availed himself of this right, and the distinction does not seem to be one of any practical value. We need not decide, however, whether the freight equalization practice here involved constitutes of itself an unfair trade practice or whether it may be condemned as systematic price discrimination in violation of sec. 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 USC 13, as was held of the multiple basing point system in the *Cement Institute* case, as those questions are not before us. The practice unquestionably constitutes evidence to be considered, along with other facts and circumstances, as tending to establish the conspiracy charged; and that was the only purpose for which it was considered by the commission.

We conclude the discussion on the sufficiency of the evidence by adverting again to the indisputable fact that through the business practices followed by petitioners it has resulted that in an industry of which they control 85% there has been no price change in ten years and absolutely no price competition whatever. The product has been so standardized that there is no choice of any sort between the products of different producers, and a purchaser anywhere in the country can purchase at the same price including freight from any producer. It is argued that all this is the result of the free play of economic forces, but the commission did not think so; and this is just the sort of question that Congress intended the commission to decide. As was said by the Supreme Court of a similar argument in the *Cement Institute* case:

> "The commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary—that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices."

Petitioners contend that even though the order of the commission be upheld, the fifth paragraph, which relates to the practice of freight equalization should be stricken therefrom on the ground that it will interfere with the independent use of the practice of freight equalization by petitioners individually. The prohibitions of paragraph 5 have application, however, only to acts done in carrying out a "planned common course of action, understanding, agreement, combination or conspiracy". We dealt with the question here involved in *American Chain & Cable Co. v. Federal Trade Com'n*, 4 Cir., 139 F. 2d 622, where petitioner had suggested to the commission, without success, that it clarify a similar order by inserting a declaration that nothing therein was intended to prevent a manufacturer from independently continuing to engage in a given course of action. In affirming the action of the commission, this court, speaking through Judge Soper, after pointing out the history of the present form of the order and the fears of arbitrary action entertained by the petitioner, said:

> "It does not seem to us that the order needs further clarification. It is of course true that a cease and desist order must be certain and unambiguous in its prohibitive terms because business men must operate under it at their peril. * * * But, there can be no doubt that to sustain a charge of violation of the order in this case it must be shown that the prohibited acts have been performed as the result of an agreement or conspiracy, or as the result of a common course of action, that has been agreed upon or planned between two or more persons. If, as the result of such agreement or plan, the petitioners continue to co-operate in a common course of action which has been found to violate the statute, they make themselves liable to the prescribed penalties; and they have no just cause for complaint if in appraising the evidence in any case the triers of fact

seek to determine whether there is any relation or connection between their past illegal acts and the conduct under examination. If such a relation or connection is found it may properly be condemned as a continuance of an unlawful conspiracy. Of course the influence of changed business conditions must be taken into account in reaching a decision; but there is no reason to believe that the Federal Trade Commission will fail in its duty in this respect or that the courts will hesitate to modify or reverse an order that is based on inferences not supported by the evidence."

As we have already indicated, the commission consents that its order be modified so as to eliminate the individual petitioners. We think it should be modified, also, to eliminate its application to cork discs. There is no sufficient evidence of any conspiracy or combination in restraint of trade with respect to cork discs, and no finding sufficient to support the application of the order to dealings therein. The evidence discloses that most of the manufacturers of crown bottle caps manufacture the cork discs which they use; and the inclusion of the latter commodity in the order does not seem to have any practical significance.

The order of the commission will be modified by striking therefrom the names of L. C. McAuliffe, E. J. Costa, Joseph C. Feagley and Benno Cohn and by striking the words "or cork discs" from the main body of the order and from the paragraph numbered one; and, as so modified, the order of the commission will be affirmed and enforced.

[¶ 62,484] Bruce's Juices, Inc. v. American Can Company.

In the United States District Court in and for the Southern District of Florida, Tampa Division. No. 569-Civil T. August 10, 1949.

Clayton Act, Robinson-Patman Act

Discrimination Between Fruit Juice Companies—Quantity Discounts—Freight Equalization Policy.—Treble damages were ordered to be paid by a can manufacturer to compensate a fruit juice company for injury received as a result of price discriminations made between the latter company and its competitors in regard to their purchases of cans of like grade and quality. Giving quantity discounts to large customers and allowing them to pool their purchases as well as offering them freight equalization rates while refusing to deal with the smaller complaining firm on this basis was declared to constitute a violation of the Clayton Act as amended by the Robinson-Patman Act.

See the Clayton Act annotations, Vol. 1, ¶ 2024.49, 2024.57, 2024.62, and the Robinson-Patman Act annotations, Vol. 1, ¶ 2212.305, 2212.385, 2212.770.

For the plaintiff: Fowler, White, Gillen, Humkey and Yancey, Tampa, Florida, and R. W. Shackleford, Tampa, Florida.

For the defendant: John M. Allison, Tampa, Florida, and G. A. Gesill, New York, New York.

Findings of Fact

Entered by WILLIAM J. BARKER, District Judge.

[*Digest*] 1. That plaintiff, Bruce's Juices, Inc., is and was during the period involved, a Florida corporation, incorporated in 1928, with its principal place of business at Tampa, Florida, and engaged originally in the canning of citrus juices and later apple and tomato juices, all of which were sold through grocery stores.

4. That the defendant, American Can Company, is a New Jersey corporation, with its offices in New York City, engaged in the manufacture and sale principally of cans, including packers or sanitary cans. Such cans were sold throughout the United States, the Hawaiian Islands and Alaska. (Answer to Plaintiff's Interrogatory No. 1).

5. That both the plaintiff and the defendant were, during the period in question, engaged in Interstate Commerce.

6. That during the entire period in question, plaintiff purchased all of its cans, with a single minor and unimportant exception, from the defendant. (R. 43).

7. That those who sold fruit and vegetable juices in the grocery trade, in the same area,

were in competition, whether selling the same juice or not. Those who sold fruit and vegetable juices in the iscan, in the same area, were in competition, whether selling the same juice or not. (R. 341, 667, 668, 720).

14. That in the latter part of 1936 and the early part of 1937 the defendant proceeded to group or classify its customers into three general classes, which it designated as "A", "B" and "C". (R. 899, 900, 901). The "A" customers being those whose purchases from the American Can Company of packers or sanitary cans exceeded $7,000,000 annually; the "B" customers being those whose purchases were from $500,000 to $7,000,000 annually; and the remaining "C" customers being those who purchased under $500,000.00.

15. That competitors of Bruce's Juices purchased cans substantially under contracts identical in many places. (Defendant's Answers to Interrogatories Nos. 5 and 6), including Hawaii and Alaska, where the competitors had canneries, and the American Can Company in determining the quantity discount allowed to plaintiff's said competitors totaled all purchases, regardless of where same were made. (Def. Ans. to Int. 49).

16. That the plaintiff's purchases of cans, during each of the years in question exceeded the respective purchases of the California Packing Corporation and Stokely Brothers, at Tampa, in every year except 1941, each of which corporations had a plant in Tampa, and each of which was engaged in the canning of juices.

17. That defendant gave no consideration to the differing costs of sales in any of the districts into which it divided the United States and its territories, nor was consideration given to the various classes of customers in the different localities and that commissions and other expenses were incurred in some districts and not in others.

18. That the discounts allowed by the American Can Company to California Packing Corporation, Stokely Brothers, Libby, McNeill & Libby, Morgan Packing Company, Hawaiian Pineapple Company, Ltd. and The Great Atlantic and Pacific Tea Company, competitors of Bruce's Juices constituted discriminations in price between purchasers of commodities of like grade and quality, and made other than only due allowance for difference in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold or delivered to its customers above named.

19. That the quantity discounts granted to plaintiff's competitors on their purchases of cans of like grade and quality, were based upon the aggregate dollar volume of annual sales rather than upon individual transactions.

20. That the purchases of cans made by said competitors of Bruce's Juices from the defendant, upon which said purchasers received quantity discounts, were made within relevant periods of time as plaintiff's purchases and the said companies and the plaintiff were selling the respective juices in open rivalry in the same markets or communities, and at the same times or within relevant periods of time.

21. That the quantity discount schedule and the defendant's subsequent classification of its customers into classes "A", "B" and "C" was not a good faith effort to formulate a plan whereby discounts would be functionally available to all.

22. That the system provided in defendant's quantity discount schedule, which it carried out in actuality, whereby large customers were permitted to pool or aggregate their purchases made in various plants throughout the country, constantly enabled such customers to purchase their cans for less money than was required to be paid for cans by plaintiff and other independent merchants who operated only one plant.

23. That the result and effect of defendant's quantity discount schedule and its operations thereunder was to enable defendant's larger buyers—larger customers Class "A" and Class "B", California Packing Corporation, Stokely Brothers, Libby, McNeill & Libby, Morgan Packing Company, Hawaiian Pineapple Company, Ltd. and The Great Atlantic and Pacific Tea Company, plaintiff's competitors—to secure a competitive advantage over plaintiff, solely because of the large buyer's quantity purchasing ability.

24. That the granting of the quantity discounts to plaintiff's said competitors resulted in actual and substantial injury and damage to the plaintiff.

26. That Engelman Gardens was in competition with Bruce's Juices in the sale of juices in Iscans during the period in question.

27. That Morgan Packing Company was in competition with Bruce's Juices in the sale of juices in Iscans from June, 1940, through 1942.

31. That the effect of the granting of this quantity discount and the lower price thereby secured by said competitors of Bruce's Juices may be to substantially lessen competition or may tend to create a monopoly or to injure, destroy or prevent competition.

32. That the cannery of Morgan Packing Company at Austin, Indiana, was during the period in question connected with a plant of the defendant company by means of a runway.

33. That such runway effected savings in transportation only in the event the cans so transported were manufactured at Austin, Indiana.

34. That defendant allowed the Morgan Packing Company a discount of 45¢ per thousand on all cans transported across the runway, although a substantial number of grocery cans and all Iscans were manufactured in plants of the American Can Company situated at a point or points other than Austin, Indiana.

37. That the runway allowance granted to Morgan Packing Company on cans which were not manufactured by defendant in its plant at Austin, Indiana, enabled said Morgan Packing Company to purchase its cans for less money than was paid for cans of like grade and quality by the plaintiff and thus gave to Morgan Packing Company a competitive advantage over plaintiff.

38. That the price differential which resulted from the defendant's granting of the runway allowance to Morgan Packing Company and the practical operation thereof made other than due allowance for differences in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which its products were sold or delivered. (Plaintiff's Exhibit 46, Defendant's Exhibit A-44).

39. That the granting of the runaway allowance to Morgan Packing Company resulted in actual and substantial injury to the Plaintiff.

40. That the effect of the discrimination in price resulting from the granting of the runway allowance to Morgan Packing Company may be to substantially lessen competition and may tend to create a monopoly or to injure, destroy or prevent competition.

42. That the freight policy of the defendant was that regardless of where the cans were manufactured freight was equalized to a point where the nearest plant of the American Can Company was located, and freight from the location of the nearest plant of the American Can Company to the customer's canner was paid by the customer.

46. After the low price was given Engelman Gardens it greatly increased its volume of purchases of cans, accelerated its advertising, and inaugurated an ambitious sales program.

47. That Engelman Gardens in the year 1939-40 overpacked, which resulted in it not being able to sell the increased volume of its juice, forced it to store great quantities in warehouses, and caused it to carry over one-half of its pack into the next season. As a direct result of its action the Iscan market became flooded and chaotic, which caused injurious competition to the plaintiff.

49. That the defendant refused to sell Bruce's Juices the 3.12 can in accordance with its long established policy of paying the freight from Baltimore to its Tampa plant, but informed Bruce's Juices that it would have to pay the freight from Baltimore to Tampa.

51. That the action of the American Can Company compelled Bruce's Juices to abandon its planned operations in Delaware and Texas for 1940 and thereby injured and damaged Bruce's Juices.

53. That the American Can Company continued its policy of paying freight from Indianapolis, Indiana, to Austin, (Defendant's Exhibit A-44), yet at the same time it violated its own freight policy with Bruce's Juices in that on the same 3.12 Iscan as purchased by Morgan Packing Company it refused to pay the freight from Baltimore to Tampa for Bruce's Juices.

56. That the defendant's refusal to equalize the price of the various Iscans, and likewise its refusal to follow its price established freight policy, occasioned injury and damage to Bruce's Juices.

57. That the rate of growth of the industry of canning citrus juices in Florida greatly increased between the years 1937 and 1942. (Pltf. Exhibit No. 35)

58. That for several years prior to 1937-38 Bruce's Juices increased its business at a greater rate than did the canning industry

as a whole in the State of Florida. In the year 1937-38 its business had increased to a point where it sold 798,000 cases of grocery size cans. (Plaintiff's Exhibit 40).

59. That after said date Bruce's Juices rate of growth fell substantially behind that of the industry and likewise fell far below its own rate of sales in grocery size cans, as follows:

1938-39	694,000 cases
1939-40	331,000 cases
1940-41	496,000 cases
1941-42	259,000 cases

60. That the failure of Bruce's Juices to maintain pace with the growth of the citrus industry in Florida and likewise its failure to maintain its prior volume of sales of grocery size cans directly resulted from the injuries following the discriminations of the American Can Company, as hereinbefore set forth.

61. That in February, 1942, the Government put into effect a regulation known as Order M-81, as the result of which the quota system was thereafter enforced, and which limited a canner's pack to 125% of his 1940-41 pack.

62. That the unlawful discriminations of the American Can Company resulted in reducing the number of cans sold by Bruce's Juices in the base year 1940-41, and had the effect of restricting its quota for the duration of the war.

63. The discrimination of the American Can Company as aforesaid having reduced the number of grocery and Iscans which Bruce's Juices sold in the base year 1940-41 caused Bruce's Juices to receive a quota allowing it a lesser number of cans than it otherwise would have obtained.

64. That in the areas where both the grocery and Iscans were sold the promotional activities incident to the sale of Iscans resulted in a substantial increase in the volume of sales of grocery size cans. Any reduction in the sales of Iscans was reflected in loss of sales in the grocery trade.

65. That Bruce's Juices had throughout the years of its business activities built up a good name, reputation and good will, which were of substantial and real value. That as a result of defendant's discriminatory practices this good will was injured and Bruce's Juices sustained damage thereby.

Conclusions of Law

1. That the court has jurisdiction of the parties hereto and of the subject matter of this cause.

2. That the defendant was, during the period in question, engaged in commerce and the discriminations referred to in the Findings of Fact arose in the course of such commerce.

3. That the purchases referred to in the Findings of Fact were of commodities, i. e., cans, which were of like grade and quality, and said purchases were in commerce and the cans were sold for use or re-sale in the United States.

4. That the effect of defendant's discriminations set forth and referred to in the Findings of Fact were in violation of Section 13 of Title 15 of the United States Code Annotated.

5. That the defendant's actions and conduct, as enumerated and referred to in the Findings of Fact constituted unlawful discriminations violative of the Clayton Act as amended by the Robinson-Patman Act.

6. That the effect of the discriminations and each of them, as set forth in the Findings of Fact, injured the plaintiff in its business or property.

7. That as the result of the injuries sustained by the plaintiff from the defendant's said unlawful discriminations, plaintiff is entitled to recover against the defendant its actual damages suffered thereby.

8. That in accordance with the Clayton Act, Section 15, Title 15, of the United States Code Annotated, the plaintiff is entitled to recover treble the actual damages sustained, and plaintiff having sustained damages in the minimum sum of Sixty Thousand Dollars ($60,000.00) is entitled to have judgment in the sum of One Hundred Eighty Thousand Dollars ($180,000.00), together with a reasonable attorney's fee, which heretofore has been found to be Thirty-five Thousand Dollars ($35,000.00).

9. That the plaintiff is not entitled to interest from the time of the sustaining of any of its injuries to the time of entering of judgment.

Opinion

Opinion of WILLIAM J. BARKER, District Judge.

[*Digest*] I am satisfied from the evidence adduced by the plaintiff—indeed no countervailing evidence was brought forward—that the various cans which are herein question were of "like grade and quality". Proof on this issue established that the cans were all of commercial grade and quality and gave substantially identical performance. Certainly all of the cans were adapted for the function for which they were sold and purchased, to wit, as containers of juice, and they were "the same kind of goods".[1]

The proof establishes and indeed the court will take judicial knowledge that all fruit and vegetable juices sold through grocery stores are competitive with each other. Likewise the evidence has established that defendant's customers mentioned in this opinion were in competition with the plaintiff inasmuch as each of said companies packed their juices in defendant's cans and sold same—in open rivalry—in the same markets during relevant periods of time. To labor this point would be but to confuse the obvious.

Consideration of the entire record convinces me that the defendant's transgressions of the Act of necessity did have an adverse effect upon competition.[2]

It stands admitted, that under the system employed by the defendant, prior to the passage of the Robinson-Patman Act, that the same favored customers received discounts ranging as high as 14%. The fundamental purpose of the Congress[3] in amending the Clayton Act was to abrogate the very practice which defendant was at that time routinely pursuing. I can reach no other conclusion than that the quantity discount system which the defendant subsequently adopted was motivated by defendant's keen desire to retain the accounts and good will of its largest customers. It sought to, and in fact did, achieve this purpose by continuing said customers in a favored discount position.

Defendant's classification of its customers was bottomed merely on the dollar volume of their purchases and the classification bore little or no relation to the actual cost of selling. The end result of defendant's discount system, as it was operated, thus appears from the record: 98% of defendant's customers failed to qualify for any discount; of the 2% which received a discount, only three qualified for the 5% discount in any one of the years here in question. The evidence warrants no other conclusion than that the cost of selling was not proportioned or allocated by customers or even by plants, but was arbitrarily made and favored a few large customers.

Realizing the burden placed upon it by the Act, the defendant has sought to justify its system by urging on the court that it charged or allocated each of the various classes of its customers certain expenses which it contends were incurred by that class. This contention cannot prevail as it is evident to me that the plan followed by the defendant completely disregarded the actual expense incident to selling its individual customers.

As an example of the manner in which this scheme actually functioned, I note that in Florida commission charges were allocated to the Class "C" customers, those who received no discount, notwithstanding that no commissions whatsoever were incurred in this state.

A further example is disclosed by defendant's Exhibit A-28 wherein it appears that in 1940 it cost $7.02 to sell $100.00 worth of merchandise to a "C" customer—the smaller purchaser—and only 57¢ to sell an "A" customer—the largest purchasers.

I can not see how judicial sanction can be given to a plan which disregarded all particular transactions and ignored the actual cost of serving individual customers. Inasmuch as defendant's records demonstrate that only a fractional percentage of its customers has ever been able to qualify for even the minimum discount, I see no escape from the conclusion that the defendant has completely failed to carry the burden

[1] *U. S. v. Wallace,* 116 U. S. 398, 29 L. Ed. 675, 676; *F. T. C. v. Cement Institute,* 333 U. S. 683, 92 L. Ed. 1010; *Bureau v. Horner,* 47 F. (2d) 358 (Ct. of Cust. & Pat. App.); *McWhirter v. Monroe etc. Co.,* 76 F. S. 465 (D. Ct. Mo.); *Jones v. Croswell, Inc.,* 60 F. (2d) 827 (4th CCA); *Van Camp v. American Can Co.,* 278 U. S. 245, 73 L. Ed. 31; Toulmin's "Trade Agreements & Anti-Trust Laws," page 282; Michigan Law Review, Vol. 46, page 450 at 456, and Michigan Law Review, Vol. 35, page 708.

[2] *F. T. C. v. Morton Salt Co.,* 334 U. S. 37, 92 L. Ed. 1196; *Corn Products Ref. Co. v. F. T. C.,* 324 U. S. 726, 89 L. Ed. 1320, 1334.

[3] Dwight Patman's treatise on the Robinson-Patman Act, page 293.

resting upon it of justifying the price discrimination resultant from the allowance of the discounts.

In view of the fact that only a fractional percent of defendant's customers were at any time able to reach the lowest rung of the discount ladder, the following observation of Mr. Justice Black in *Federal Trade Commission v. Morton Salt Co.,* 334 U. S. 37, 92 L. Ed. 1196, is peculiarly apposite:

> "Theoretically, these discounts are equally available to all, but functionally they are not".

The further announcements of the court in said opinion clearly condemn defendant's discount system.[4]

An additional and compelling reason for my condemnation of defendant's discount plan is that the discounts actually allowed were based upon the aggregate purchases of its nationwide customers rather than upon orders filled from a single plant. It is clear that such plan does not—indeed could not—accurately reflect actual differences in cost of selling individual customers. Under defendant's system, it was impossible for any small customer to escape his discriminatory classification, irrespective of the degree of efficiency accomplished in the operation of his plant.[5]

The proof discloses that the canning business is one of volume and of short profit, that the cost of containers represents a large percentage of the total cost of the finished product. The right which was extended to customers to pool their purchases made for their widely scattered plants in determining the volume of their purchases enabled said favored few to secure discounts. Thus with the exception of a mere handful, all of defendant's purchasers were placed in an economic strait-jacket from which escape could be accomplished only by a miraculous increase in their needs and purchasing power. Such a system is violative of the essential and fundamental purpose which the Congress had in mind, i. e., that a lower price could be granted only in the event it could be shown to have resulted from an actual savings in cost.[6]

Defendant urgently insists that even though this court is of the opinion that a discriminatory lower price was granted and paid to plaintiff's competitors than allowed plaintiff, that such fact would not entitle the plaintiff to a money judgment. Defendant grounds its position upon the alleged failure of the plaintiff to establish that it had sustained special injury and damage from the granting of the lower price. I find the proof to the contrary. Moreover, I am not in accord with defendant's contention which, in my opinion, is contrary to the rule of reason, as well as the recent trend of judicial thought. I am in full accord with the inference resulting from the searching question posed by Mr. Justice Jackson during the oral argument of the *Morton Salt* case: "If you sell salt to a one-horse grocer for $1.50 and sell it to the A & P on the opposite corner for $1.35, how can you have a difference of that kind that doesn't hurt?"[7] Also I am impressed by his further statement: "A fellow who has got to pay more, has got less left—less in profit, less to carry on the business". Here admittedly a small canner has paid more for his merchandise than his larger competitor. The price differential was clearly available to the large competitor for innumerable competitive, and therefore harmful, purposes and of necessity the small canner, who has paid more, has thereby sustained direct injury. Argument to the contrary is but to say that a lower price is not beneficial.

My conclusion that proof of special damage is not essential to recovery finds support

[4] "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price."

[5] Plaintiff's purchases from defendant's plant in Tampa exceeded the purchases of California Packing Corporation and Stokely Bros. from their respective Tampa plants in every year except 1941. The plaintiff received a discount of 1% in one year and no discount in any other year. California Packing received a 5% discount each year and Stokely received discounts ranging from 3% to 5%. It was admitted that these discounts were available to plaintiff's competitors only by aggregating or pooling purchases made for their plants elsewhere. (Defendant's Answers to Interrogatories 103, 106, 121, 124, Plaintiff's Ex. 36, and Rec. 1696).

[6] *Corn Products Ref. Co. v. F. T. C.,* 324 U. S. 726, 89 L. Ed. 1320; *F. T. C. v. Cement Institute,* 333 U. S. 683, 92 L. Ed. 1010; *F. T. C. v. Staley Mfg. Co.,* 324 U. S. 746, 89 L. Ed. 1338.

[7] *U. S. Law Week,* Vol. 16, No. 36, issue of March 16, 1948, pages 3276 and 3277.

in the announcements of the Supreme Court in the case of *Bruce's Juices, Inc. v. American Can Company*, 330 U. S. 743, 91 L. Ed. 1219.[8] The principle of "general damage" is likewise supported by numerous well reasoned decisions.[9] Thus I am convinced that defendant's quantity discount system and the lower prices granted thereunder to plaintiff's competitors which were not received by plaintiff was violative of the Act and occasioned actual injury and dollar damage to the plaintiff.

[*Damages Assessed*]

I am in full accord with the philosophy and sound reasoning of the "wrongdoer rule", last enunciated and amplified in the case of *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 90 L. Ed. 652. Inasmuch as I am convinced that the American Can Company here falls in the category of a "wrongdoer", I feel no hesitancy in applying the principle enunciated in the above case in the following language:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his wrong has created".

And where—as is true in connection with certain of the discriminations depicted in the record—the decline in business is "not shown to be attributable to other causes", I am of the opinion that a dollar mark should be placed on the plaintiff's loss even though the dollar amount of the loss is not depicted in the record with absolute exactness.

From the discriminations hereinbefore mentioned, it is my considered opinion that the record establishes with that degree of certainty here reasonably possible that the plaintiff sustained actual injury and damage in the following particulars:

The unlawful allowance of the quantity discounts to plaintiff's competitors, which were practically not available to and were not received by the plaintiff, occasioned it very substantial damage.

The same is true with reference to the illegal runway allowance granted to plaintiff's competitor, Morgan Packing Company.

I have given careful consideration to plaintiff's claim of damage resulting from its loss of sales and profits incident to its ISCAN business and likewise from the retardation of its growth and expansion in that field. I am of the belief that the defendant's discriminations in connection with the 312 can injured Bruce's Juices, and in fact occasioned it to lose substantial sales that it otherwise would have made. It also appears from the proof that Bruce's Juices' growth in the ISCAN field was definitely retarded by the competition which it confronted as a result of the low price given by defendant to Engelman Cardens, its refusal to equalize the price of other ISCANS, particularly the 314, and its subsequent denial to plaintiff of the absorption of freight from Baltimore to Tampa, in accordance with its theretofore uniform policy. Notwithstanding my above stated conclusions, I am not satisfied that the proof as to the amount of profit which the plaintiff made on ISCAN is sufficient to enable me to translate the particular damage resulting from this injury into dollars, and I am, therefore, not including in my judgment any sum for this claim. However, the injury thus sustained did, in my opinion, directly contribute to occasioning the damage hereinafter discussed.

Plaintiff further contends that the combined and aggregate effect of defendant's three discriminations, i.e., quantity discount allowances, runway allowances to Morgan Packing Company and the discrimination with reference to the 312 can, adversely and seriously injured its overall business structure and operation and that the damage so resultant is reflected and should be reasonably admeasured in dollars by (a) its failure to maintain progress in line with the growth of the citrus industry in Florida in grocery size cans and (b) by the decided drop in its own sales of grocery size cans during the years immediately following the stated discriminations.

[8] "For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination."

[9] *Gus Blas v. Elizabeth Arden*, 150 F. (2d) 988 (8th CCA); *American Can Co. v. Ladoga*, 44 F. (2d) 763 (7th CCA); *City of Atlanta v. Chattanooga etc.*, 127 F. 763 (6th CCA); *Straus v. Victor Talking Machine Co.*, 297 F. 791 (2nd CCA); *Main Realty Co. v. Blackstone etc. Co.*, 193 A. 879 (R. I.); *Sullivan v. Minneapolis etc. R. Co.*, 142 N. W. 3 (Minn.); *Seaman v. Minneapolis etc. R. Co.*, 149 N. W. 134 (Minn.); *National Radiator Co. v. Penn. R. Co.*, 143 A. 85 (N. J.).

I am in accord with this contention and am of the opinion that the plaintiff's proof measures up to and brings this issue within the theory approved in the *Bigelow* case.

Not only does the evidence not warrant the inference that the plaintiff's falling behind the growth of the industry, as well as its own prior pace, "was attributable to other causes", but the converse is true. While there is some degree of uncertainty as to the amount of injury and damage thus occasioned the plaintiff, I am of the opinion that such uncertainty as may exist by reason of "the absence of more precise proof" is a risk which properly here falls upon the defendant. I am satisfied that defendant's various discriminatory acts culminated in and occasioned substantial damage to the plaintiff and that said damage is reflected and shown with "a reasonable degree of accuracy, which is all that the law requires".[10]

I . . . find as a fact that the plaintiff has sustained actual damages in the sum of Sixty Thousand Dollars, as a direct result of the defendant's violations of the provisions of the Act. It is my considered judgment that said sum is the minimum amount of plaintiff's damage which was occasioned by the defendant's unlawful discriminations.

If anything in the foregoing opinion is in conflict with any finding of fact or conclusion of law heretofore made, the statement in the opinion may be taken as modifying the findings or conclusion.

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[10] *Goldman Theatres, Inc. v. Loews, Inc.*, 69 F. S. 103, 108 (D. Ct. Pa.). See also *Bigelow* case, *supra; Rankin Co. v. Assoc. Bill Posters, etc.*, 42 F. (2d) 152 (2nd CCA); *Palmer et al. v. Conn. Ry. etc. Co.*, 311 U. S. 544, 85 L. Ed. 336; *Eastman Kodak Co. v. So. Photo Materials Co.*, 273 U. S. 359, 71 L. Ed. 684; *Wawak & Co. v. Kaiser*, 129 F. (2d) 66 (7th CCA); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544; *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (7th CCA); *Roseland v. Phister Mfg. Co.*, 125 F. (2d) 417 (7th CCA); *Frey & Son, Inc. v. Welch Grape-juice Co.*, 240 F. 114, 117 (4th CCA).

[¶ 62,485] Opinion of the Attorney General of Wisconsin.

Addressed to William J. McCauley, District Attorney, by Thomas E. Fairchild, Attorney General. April 26, 1949.

Wisconsin Unfair Sales Act

Cash Payment after Quantity Purchase—Rebate as a Factor of Cost.—It is possible to determine whether a scheme whereby a customer would receive 50 cents in cash upon presentation of a card representing the purchase of 25 gallons of milk would violate the act prohibiting sales below cost only upon a consideration of the cost factors as specified in that act. The rebate here proposed, the Attorney General of Wisconsin advises, goes to make up the final sale price of the milk and should be considered in determining whether or not there has been a sale below cost.

See the Wisconsin Unfair Sales Act annotations, Vol. 2, ¶ 8948.05.

[*Facts*]

You have called our attention to the following set of facts: A dairy retail store operator proposes to issue a free card to customers which contains 25 marks upon its face. It is his plan to punch one of these marks each time the holder of the card purchases a gallon of milk. When the 25 punches have been made, the card is redeemable for 50 cents in cash. This is stated upon the face of the card. You ask whether or not this scheme is in violation of either the trading stamp law, sec. 100.15 of the Wisconsin statutes, or the unfair sales act, sec. 100.30.

[*Trading Stamp Law Violation*]

It is my opinion that this scheme would not be in violation of the trading stamp law because of the following portion of sec. 100.15 (1):

"* * * except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket, or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same * * *"

[*Rebate, a Factor in Cost*]

The unfair sales act prohibits the practice of sales below "cost," as therein defined, in order to attract patronage. It is not possible to determine whether the sale of milk under this scheme would be in violation of this law without knowledge of the "cost" factors. The "cost" factors specified in sec. 100.30 (2) (a) for retailers are: Invoice cost within 30 days or replacement cost, whichever is lower; trade discounts, if any; freight and cartage charges and markup to cover a proportionate part of the cost of business. Obviously, the rebate here proposed goes to make up the final sale price of the milk and should, therefore, be considered in determining whether or not there has been a sale below "cost."

[¶ 62,486] South Bend Drive-In Theatre Co., Inc. v. Paramount Pictures, Inc., et al.

Benal Theatre Corporation v. Paramount Pictures, Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division, No. 49 C 757, No. 48 C 1599. September 1, 1949.

Sherman Antitrust Act

Motion Picture Industry—Production of Correspondence Between Film Company and Film Association—No Attorney-Client Privilege.—Upon considering two motions made in two civil actions against motion picture distributors, an order was made by the Court requiring the distributors to produce correspondence received from a motion picture association; a request to have a similar order vacated was denied. The correspondence sought was not privileged by reason of an attorney-client relationship.

See the Sherman Act annotations, Vol. 1, ¶ 1640.624.

For the plaintiff: Seymour F. Simon, Chicago, Illinois.

For the defendant: Miles G. Seeley, Bryson P. Burnham, Mayer, Meyer, Austrian & Platt; Edward R. Johnston, Samuel W. Block; Jacob I. Grossman & Alfred B. Teton; Mathews & Springer; Aaron L. Stein, Rosenberg, Stein & Rosenberg, all of Chicago, Illinois.

Memorandum

Opinion of JOHN P. BARNES, District Judge.

[*Digest*] In each of the above-entitled cases the plaintiff has alleged that

> "the defendants have exchanged information between themselves regarding the clearances they have granted or proposed to grant over the plaintiff's theatre, and their method of licensing picture in the City of Chicago, through the Motion Picture Association of America, Inc., or through employees of the Motion Picture Association of America, Inc. * * *"

In each case the defendants have denied the allegation. In each case the plaintiff has filed a motion asking that defendants be required to produce for inspection and copying all correspondence received by each of the defendant distributors from the Motion Picture Association of America, Incorporated, or any of its agents, officers or employees, since certain specified dates prior to the filing of each action, regarding the theatre operated by the plaintiff or the licensing of motion pictures for exhibition in the city where such theatre is located.

On June 29, 1949, the court granted plaintiff's motion in the *Benal* case. A motion to vacate has been made. The court has considered the written briefs and arguments of counsel. Oral argument has been waived.

The court has * * * concluded that the order should stand in the *Benal* case and that a like order should be made in the *South Bend* case. The court has no intention of permitting a violation of the attorney-client privilege rule or the rule laid down in *Hickman v. Taylor*. The fact is that this court has at all times followed the rule announced in *Hickman v. Taylor*, and that even before it was announced by the Supreme Court in that case. But the correspondence sought in the case at bar is not covered by either the attorney-client privilege rule or by the rule announced in the case of *Hickman v. Taylor;* and the plaintiff has the right to have the court, rather than counsel for defendants, pass upon whether or not the material sought is competent, relevant and material.

[¶ 62,487] Keller-Dorian Colorfilm Corporation v. Eastman Kodak Company.

Keller-Dorian Colorfilm Corporation v. Eastman Kodak Company, Technicolor Motion Picture Corporation.

In the United States District Court for the Southern District of New York. Civ. 48-168, Civ. 48-169. August 25, 1949.

Sherman Antitrust Act

Order in Which Litigants May Examine—Motion To Vacate Denied—Motion To Stay Proceedings Denied.—A photographic supply company, defendant in a private action based on antitrust violations, failed to persuade the Court that as a general rule the defendant had the right to examine the other party first. A motion to vacate an order granting leave to the plaintiff to serve notice of taking depositions was denied. A motion to stay proceedings until determination of a government civil suit was also denied when it was held that the plaintiff had a right to pursue its cause of action separately and apart from the cause of the Government.

See the Sherman Act annotations, Vol. 1, ¶ 1640.593.

For the plaintiff: Fitelson, Mayers and London; Bertram A. Mayers, Harold J. Sherman, Milton Black, C. O. Donahue.

For the defendant Eastman Kodak Company: Donovan, Leisure, Newton, Lumbard & Irvine, William J. Donovan, J. Edward Lumbard, Jr., James R. Withrow, Jr., Nixon,

Hargrave, Middleton & Devans, T. Carl Nixon, Arthur L. Stern, Ira C. Werle, Lloyd F. MacMahon, Joseph J. Laub.

For the defendants Technicolor, Inc. and Technicolor Motion Picture Corporation: Fulton, Walter & Halley; Hugh Fulton, Joseph W. Burns, George T. Frampton.

Opinion of CONGER, District Judge.

[*Nature of Motions*]

[*Digest*] Motions by defendant Eastman Kodak Company in each of the above cases:

(1) Vacating and setting aside the order of November 19, 1948 granting plaintiff leave to serve notice of taking of depositions of Thomas Jean Hargrave and Edward P. Curtis and the plaintiff's notice dated November 19, 1948;

(2) That depositions shall not be taken by the plaintiff of Thomas Jean Hargrave nor Edward P. Curtis nor of any officers, employees or agents of the defendant Eastman Kodak Company until issue is joined herein and until after taking by the defendant Eastman Kodak Company of the depositions of certain present or former officers, directors, or agents of the plaintiff.

[*Alleged Priority of Defendant*]

Defendant contends that plaintiff has no right to an examination at this time; that plaintiff has shown no fact, reason or circumstances whatever for granting leave to serve the notice to take the depositions asked for, simultaneously with the service of the complaint; that the order permitting the service of the notices of examination should be vacated.

Defendant appeared in these actions through its attorneys on November 30, 1948. Issue has not yet been joined.

In support of its contention defendant argues that by the procedure initiated by plaintiff, defendant is being deprived of its substantial right to examine first and that "the normal and usual procedure is that the defendant first examine the principal officers and witnesses of the plaintiff."

I know of no such rule or procedure.

[*Rule 26 as Amended*]

Rule 26 (a) was recently amended to provide that any party might take the deposition of any person, including a party after commencement of the action except that a plaintiff may not, without leave of the Court, take such depositions if notice of the taking is served by the plaintiff within 20 days of the commencement of the action.

This created a radical change in the old Rule. I have been unable to find any case interpreting this amendment.

[*Former Rule Broadened*]

The report of the Advisory Committee on Amendments to Rules does shed some light on the subject. See "Note. Subdivision (a)" following New Rule 26 (5 F. R. D. 453). In the absence of clarity in the Rule itself, the Reviser's notes are most persuasive. As I read the note, it indicates an intent to broaden the former Rule so that now either party may start taking depositions after the complaint is served but with a 20 day delay period against the plaintiff, (except by order of the Court), and this only as the note says because it is a protection for a defendant who has not had an opportunity to retain counsel and inform himself of the nature of the suit.

[*Protection of Defendant*]

I believe that the Rule makers in that case intended that the plaintiff should go to Court for leave so that the Court might protect such a defendant, one without an attorney and one who was not informed of the nature of the proceeding.

This defendant did not need the protection of the Court in those respects. It had attorneys and it appeared in the action before the expiration of the 20 days and about 2 weeks before the date set for the taking of the deposition. There can be no question but that this defendant at a consultation with its attorney, with the complaint before them, could have been and must have been informed of the "nature of the suit." My interpretation of the intent of the Rule is corroborated by the last sentence of the Reviser's note which reads as follows:

> "The modified practice here adopted is along the line of that followed in various states. See, e. g., 8 Mo. Rev. Stat. Ann., 1939, Section 1917; 2 Burns' Ind. Stat. Ann., 1933, Section 2-1506."

In both Indiana and Missouri the statutes and the cases interpreting the statutes, either party without limitation, has the right to take deposition, anytime after the suit is pending and/or after the complaint is served.

[*Motions Denied*]

I, therefore, deny the motions made by defendant Eastman Kodak Company.

A similar motion has been made in the second action by Technicolor, Inc. and Technicolor Motion Picture Corporation. The above opinion applies to them as well as to Eastman Kodak Company. The motion of these defendants is denied.

If, as claimed by these defendants, my ruling against them will cause undue and great hardship, they of course may apply for relief to the Court under other and appropriate provisions of the Federal Rules of Civil Procedure.

[*Motion For Stay of Proceedings*]

The defendants Technicolor, Inc. and Technicolor Motion Picture Corporation further move that all proceedings be stayed as to them in the second action until determination of Civil Action No. 7507-M brought against these defendants under the Anti-Trust laws by the United States of America in the District Court of the United States for the Southern District of California.

I can see no good reason at this time to stay this action. Plaintiff has a private statutory right to bring the action. Plaintiff has a right to pursue its cause of action separately and apart from the cause of the Government. The case of the Government may take a long time to try. Plaintiff's case certainly should not be stayed at this early stage to await the determination of the Government's case.

This branch of the motion is denied.

[¶ 62,488] Richard A. McGhan, d/b/a Arrow Radio & Record Shop, Duane R. Kuhn and Winifred H. Johnston, d/b/a Studio Record Shop v. F. C. Hayer Company, The Roycraft Company, Decca Distributing Corporation, Capital Records Distributing Corp., Reinhard Brothers Company, Radio Corporation of America, Columbia Broadcasting System, Inc., Decca Records Incorporated, Capital Records, Inc., Loew's Incorporated, Record Dealers, Inc., Campus Record Shop, Century Record & Camera Sales, Inc., Henry L. Abbey, d/b/a Disc and Needle, Edina Record & Television Shop, Gabbert, Inc., Don Leary's, Incorporated, Melodee Record Shop, D. E. McGowan, d/b/a McGowan's Music Co.

In the United States District Court for the District of Minnesota, Fourth Division, Civil No. 2973. May 25, 1949.

Sherman Antitrust Act

Relationship Between Parent and Subsidiary—Affidavit Evidence—Jurisdictional Question and Hearing on the Merits.—In an action based on antitrust violations in which damages and an injunction were sought, a motion to dismiss, supported by affidavit evidence, was denied. The Court directed that the jurisdictional issue which involved the relationship between a parent company and its subsidiary and whether the parent transacted business through its subsidiary within the Court's jurisdiction, be disposed of on another preliminary hearing where evidence could be taken or else await the submission of the case on the merits.

See the Sherman Act annotations, Vol. 1, ¶ 1640.291.

For the defendant Capital Records, Inc. in support: Joseph H. Colman, Charles F. Noonan, and J. E. Hanthorn (Dorsey, Colman, Barker, Scott & Barber) Minneapolis, Minnesota.

For the plaintiffs in opposition: Lee Loevinger (Larson, Loevinger, Lindquist & Freeman) Minneapolis, Minnesota.

[*Nature of Motion*]

Opinion of GUNNAR H. NORDBYE, District Judge.

[*Digest*] This action arises out of alleged antitrust law violations. 15 U. S. C. A. Sec. 1, *et seq.* Plaintiffs seek damages and an injunction. Defendant Capitol Records, Inc., has moved for a dismissal as to itself, alleging (1) wrong venue and (2) lack of proper service. The second part of the motion was

abandoned at the hearing of the motion, however, so the venue question is the only issue now before the Court.

[*Jurisdictional Issue*]

The parties hereto use the term "venue" and "jurisdiction" interchangeably at times, but the basic question nevertheless is one of jurisdiction. That is, the Court has jurisdiction of the person of defendant Capitol Records, Inc., if venue under Section 15 of 15 U. S. C. A. can be established in this district. Otherwise, the service on the moving defendant in California does not vest this Court with jurisdiction.

The defendant offers the affidavit of its president in support of the motion. The parts of it particularly relevant to this question declare:

"(3) That Capitol Records, Inc., is a corporation organized and existing under the laws of the State of California and is an inhabitant thereof, with its principal office and place of business at Los Angeles, California; that Capitol Records, Inc. has no agents in the State of Minnesota; that Capitol Records, Inc. is not transacting business in the State of Minnesota, nor has it appointed an agent for the service of process in the State of Minnesota.

"(4) That Capitol Records Distributing Corp. is not an agent of Capitol Records, Inc., but a separate entity operating and doing business under the management and supervision of its own officers and directors."

[*Grounds of Opposition*]

Plaintiffs oppose the motion upon the ground that "a bald denial by affidavit of an essential allegation of the complaint" cannot be the basis for a dismissal by motion. The complaint alleges that defendant Capitol Records, Inc., distributes records in Minnesota through its agent, Capitol Records Distributing Corporation. Whether the agency necessary to jurisdiction in this Court exists, plaintiffs contend, must await trial and determination of the case on its merits.

[*Failure to Set Forth Facts*]

Obviously, defendant's affidavit in support of the motion does not allege facts. It alleges conclusions. For whether the defendant is transacting business in Minnesota, is found in Minnesota, or is an inhabitant or has an agent in Minnesota are conclusions which are based upon the factual situation interpreted in light of the statutes and decisions. It is fundamental that this Court should not dismiss an action unless it is clear and certain that this Court can award no relief. This is true whether the basis for dismissal is one of jurisdiction, *Bell v. Preferred Life Assur. Society,* (1943) 320 U. S. 238, 64 S. Ct. 5, or whether the complaint fails to state a substantive claim for which relief can be granted. *Dennis v. Village of Tonka Bay,* (8 C. C. A., 1945) 151 F. 2d 411. The same policy and reasoning justifies the same conclusion with respect to venue. Conclusions cannot create the certainty required with respect to a factual question. They state the result which is in question, not the premise which justifies the result.

Although, as defendant contends, the burden of sustaining jurisdiction and venue rests upon plaintiffs, they are only obligated to plead in the complaint ultimate facts which sufficiently allege venue so as to sustain the Court's jurisdiction. Reasonable time should be afforded them in which to sustain the burden of establishing jurisdiction if it is challenged. Interrogatories and other discovery proceedings may be used by plaintiffs after filing their complaint for the purpose of obtaining facts which will sustain the burden imposed upon them when an appropriate hearing on the question of jurisdiction is held.

[*Merits May Be Involved*]

In the instant situation, the motion of the defendant may go to the merits of the action. That is, it involves the relationship between the parent and the subsidiary, the method of doing business between these two concerns, and whether the parent, through its subsidiary, transacts business in this State. It seems clear that these matters pertain to a consideration of factual questions and issues which should not be disposed of at a summary hearing based upon affidavits, especially where the affidavits set forth mere conclusions rather than facts which buttress the conclusions indicated. As stated, plaintiffs should be afforded a reasonable opportunity to prove by interrogatories and depositions or otherwise the factual basis upon which they rely for the jurisdiction of this Court. The Court understands that interrogatories are now being submitted by the plaintiffs. Whether in the instant case the question of jurisdiction will be so merged with a determination of the merits of the cause of action that that question must await trial, cannot be determined until the ques-

tion is properly before the Court. In any event, it seems clear that, on this showing, the Court would not be justified in upholding the moving defendant's contention as to lack of jurisdiction. This is the type of case where the question of jurisdiction must await a more complete showing, either on another preliminary hearing where evidence may be taken and considered, or await the submission of the case on its merits to the Court. In view of the premises and the reasons stated, the present motion is denied without prejudice.

[¶ 62,489] Bridgeport Brass Co. v. Modell's Sporting Goods Co., Inc.

In the New York Supreme Court, New York County. Special Term, Part III. 122 N. Y. L. J. 617, September 27, 1949.

New York Fair Trade Act

Non-Signing Parties to Fair Trade Contracts—Closing Out Sales—Injunction To Enjoin Price Cutting Denied.—The Court denied a motion for a temporary injunction to enjoin sales at prices below those established in a fair trade contract. Retailers who were not parties to such an agreement were not bound by a provision in it to offer to sell the product back to the manufacturer before selling at less than fixed prices in order to close out stock. They were bound by the contract only to the extent that the New York Fair Trade Act made the contract binding upon them.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.40, and see the Resale Price Maintenance Commentary, Vol. 2, ¶ 7278, 7306.

MR. JUSTICE RABIN. The defendants claim that the merchandise which is being sold at less than the prices fixed by plaintiff is all part of a single purchase made in January, 1949, and that the sales are being made for the purpose of closing out the defendants' stock with the intention of discontinuing further dealings in the article. The fact that the sales have continued over a fairly long period of time does not alter the statutory rights of the defendants to resell at less than the fixed prices for the purpose of closing out their stock. Defendants may continue to make sales, if their purpose is to close out the stock and not to deal in plaintiff's product thereafter, until they have disposed of the entire lot purchased by them in January, 1949. The claim that defendants cannot avail themselves of the statutory exception because they have not first offered to sell the products back to plaintiff at the price which they paid originally is without merit. The statute contains no such qualification. It is true that plaintiff's fair trade contract contains such a provision, but it is at most binding upon those who became parties to the contract. The present defendants did not become parties to the contract and they are bound by it only to the extent that the statute makes the contract binding upon them (see section 369-b, General Business Law). The motion for a temporary injunction is denied. The brief submitted by the attorneys for defendants, in effect, consents to immediate trial of the issues. Plaintiff, if it so elects, may obtain an early trial, the election to be indicated upon the settlement of the order. Settle order.

For the reasons indicated on the companion motion, decided simultaneously herewith, this motion for a temporary injunction is denied. Plaintiff may obtain an early trial if it so elects, such election to be indicated upon the settlement of the order. Settle order.

[¶ 62,490] **The Container Company v. Carpenter Container Corporation v. Continental Can Company.**

In the United States District Court for the District of Delaware. Civil Action No. 1053. April 21, 1949.

Sherman Antitrust Act

Separation of Causes—Antitrust and Patent Claims—Interest of Justice.—A motion to separate antitrust and patent claims was granted. The issues, proof and witnesses of the two causes were substantially different.

See the Sherman Antitrust Act annotations, Vol. 1, ¶ 1640.605.

For plaintiff and additional defendant: Richard F. Corroon (Sutherland, Berl & Potter) of Wilmington, Del., and Mark F. Hughes and Raymond C. Murphy (Wilkie, Owen, Farr, Gallagher & Walton) of New York, New York.

For the defendant: Alexander L. Nichols (Morris, Steel, Nichols & Arsht) of Wilmington, Del., and Daniel H. Kane (Duell & Kane) of New York, New York, and Marvin C. Harrison and Allan Hull (Harrison, Thomas, Spangenberg & Hull) of Cleveland, Ohio.

Opinion of RODNEY, D. J. [*Digest*] Plaintiff and the additional defendant have moved under Rule 42(b), Federal Rules of Civil Procedure, for an order directing a separate trial of the two claims asserted in the defendant's counterclaim. The motion is supported by two affidavits, and no affidavits in opposition have been filed.

This action was instituted by Container under the Federal Declaratory Judgments Act for a declaratory judgment of the invalidity and non-infringement by it of Patent No. 2,382,858 owned by Carpenter. The amended complaint substantially alleges that Carpenter has charged Container with infringement of the said patent, that Container does not in fact infringe it, and that the patent is invalid.

The affidavits in support of the motion assert that the second claim or cause of action in the counterclaim relates solely to patent law, whereas the first claim or cause of action relates solely to the anti-trust laws of the United States. The affidavits assert four grounds in favor of separation: (1) the anti-trust issues, proof and witnesses are entirely different from the patent issues, proof and witnesses; (2) the anti-trust issues will be tried by counsel different from those trying the patent issues, at least so far as Container and Continental are concerned; (3) Continental is only concerned with the anti-trust issues and is not a party to the patent claim; and (4) a joint trial of the issues would greatly delay the trial of the patent issues to the prejudice of Container.

No opposing affidavits were filed by Carpenter, but it is strongly urged by Carpenter that disposition of the motion should be deferred until more facts are gathered and presented to the court, it being argued that the two claims in the counterclaim do in fact overlap in many respects and that a compilation of all the pertinent facts in the case will enable the court to determine more adequately and properly whether or not separation is warranted. Carpenter argues that pre-trial discovery preparation would be greatly hampered if separation is now granted, because the parties would undoubtedly not be able to agree as to whether certain requested material is relevant to the first or second cause of action. Carpenter also urges that since both causes overlap on many facts there will be a duplication of preparation as to these facts if separation is ordered at this time.

Rule 42(b) provides that:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim . . . [or] counterclaim . . . or of any separate issue or of any number of claims . . . counterclaims . . . or issues."

An order under this rule is clearly a matter lying in the sound discretion of the court.[1]

This motion is sufficiently complete to compel me to grant the motion to separate.

[1] *Cofax Corp. v. Minn. Mining & Mfg. Co.*, S. D. N. Y., 1948, 8 F. R. D. 303, 305; *Western Constr. Co. v. Nat. Surety Corp.*, 4 Cir., 1947, 163 F. 2d 456, 458; *U. S. Industrial Chem., Inc. v. Carbide & Carbon Chem. Corp.*, S. D. N. Y., 1943, 7 Fed. Rules Serv. 57.3, Case 3, pp. 843, 845; *Soc. of European State Authors & Composers, Inc. v. WCAU*, E. D. Pa., 1940, 35 F. Supp. 460, 461.

It seems clear that the issues, proof and witnesses in the anti-trust claim are substantially different from and foreign to the issues, proof and witnesses in the patent infringement claim. While Carpenter urges that the two claims do overlap, the only example of such overlapping which has been given is the allegedly attempted suppression by Container and Continental of patent 858 as indicated by their active litigation of the interference proceedings in the Patent Office on such patent. Carpenter contends that these interference proceedings are relevant not only to the patent infringement claim but also to the anti-trust claim because they are evidence of the alleged violation by Container and Continental of the anti-trust laws through attempted suppression of the patent.

We not only have an uncontroverted affidavit that the two claims will be entirely different in their issues, proof and witnesses, but it also seems probable to the court that such is substantially the fact. The issues in the patent infringement claim will be whether or not patent '858 is valid and, if so, is it infringed as alleged.[2]

If the two claims do overlap with respect to certain facts, it does not necessarily follow that separation will require a duplication of preparation in connection with pre-trial discovery. Material gathered by one party in discovery proceedings on one claim would certainly be available to that party in preparation of the other claim and would seem to lessen the work required by such party in preparing such other claim.

Carpenter contends that disposition of this motion now is premature and should be deferred until all the facts are gathered in preparation for trial. The court observed at oral argument, and it is still the opinion of the court, that if separation is to be granted in this action at all, it should be granted at this stage of the proceedings.

Rule 42(b) justifies separation to further convenience or avoid prejudice. Since it appears from the record that the issues, proof and witnesses will be substantially different for each claim, the convenience of both the parties and the court will be served by separation. Insofar as Container and Continental are concerned, counsel trying the anti-trust claim will not try the patent infringement claim, and Continental is not concerned as a party with the latter claim. Convenience to these parties would thus be served by separation for this reason also. Finally, there is on record a sworn statement that Container is ready now for trial of the patent infringement claim and will not be ready for some months for trial of the anti-trust claim. Assuming that Carpenter is or will soon be in a like position, it would seem prejudicial to Container to defer determination of the patent claim until the anti-trust claim could also be determined, because if Container should lose on the patent claim damages would have been accruing during all this time when Container was ready to have its rights determined upon such matter. Separation now would avoid this prejudice.

This action involves three claims: the claim asserted by Container in the complaint for a declaratory judgment, the anti-trust claim in the counterclaim, and the patent infringement claim therein. The issues involved in the claim in the complaint for a declaratory judgment and in the patent infringement claim in the counterclaim are identical, and if the two claims in the counterclaim are separated for trial, the trial of the patent infringement claim will also dispose of the issues raised in the complaint.

While only the furtherance of convenience and the avoidance of prejudice are mentioned in Rule 42(b) as justifying separation, it is inherent in such rule that separation must also serve the ends of justice. Of course, the purpose of the Rules is to simplify judicial procedure, and they should be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A. The spirit of the Rules would seem to require a separation here as requested.

The instant case is extremely similar to *Soc. of European Stage Aut. and Comp., Inc. v. WCAU*, E. D. Pa., 1940, 35 F. Supp. 460, wherein the court ordered separation as being consonant with justice, in furtherance of convenience, and in avoidance of prejudice.

Carpenter has indicated a possibility of a desire for a jury trial of the anti-trust claim if separation is directed as requested. It is asserted upon Carpenter's behalf that a jury trial had not been demanded by it as of right because at the time it was assumed

[2] See *Lyophile-Cryochem Corp. v. Chas. Pfizer & Co.*, E. D. N. Y. 1947, 7 F. R. D. 362.

that all issues would be determined in one trial.

Rule 39(b) provides that the court upon motion and in its discretion may order a trial by jury notwithstanding the failure of a party to make a timely demand therefor under the Rules. There being no such motion before the court, nothing can be determined upon the point at this time.

[¶ 62,491] Local 36 of the International Fishermen and Allied Workers of America, Jeff Kibre, Gilbert Zafran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLaughlin, Robert M. Phelps, Burt D. Lackyard and Ray J. Morowski v. United States.

In the United States Court of Appeals for the Ninth Circuit, No. 11,638, September 28, 1949.

Upon appeal from the United States District Court for the Southern District of California, Central Division.

Sherman Antitrust Act, Clayton Antitrust Act

Price-Fixing Conspiracy — Exclusion of Producers from Market — Sufficiency of Indictment. — A verdict of guilty to a charge of conspiracy to fix prices for all fish caught by any fisherman and sold to any dealer was affirmed. On appeal, the holding was attacked on behalf of a fisherman's group and fourteen individuals on the ground that the indictment failed to state a crime. Even assuming, the Court reasoned, that the appellants' immunity either as a labor union or as members of a cooperative had not been expressly negatived on the face of the indictment, the remaining allegations stated a crime. Conspiracy to fix prices is in and of itself a violation of Section 1 of the Sherman Act and no group can be permitted to combine for this purpose even though it is sought to be achieved by applying pressure only in the interstate fishing ports. In denying the appeal, the Court held that the allegations of the indictment were fully proved by evidence which showed in addition to price-fixing activity a concerted action to exclude certain producers from the market and to prevent certain dealers from obtaining supplies of fish. Evidence of picketing, boycotting, and threats of violence and pressure, methods used to achieve the desired end, were properly received, the Court ruled, for the limited purpose of showing the participation of the individuals in seeking to obtain a price-fixing contract.

See the Sherman Act annotations, Vol. 1, ¶ 1630.271, 1630.601, and see the Clayton Act annotations, Vol. 1, ¶ 2026.10, 2026.22.

For the appellants: Gladstein, Andersen, Resner & Sawyer, Gallagher, Margolis, McTernan & Tyre, Kenny & Cohn, Ben Margolis, Robert W. Kenney, and George R. Anderson, San Francisco, California.

For the appellee: William C. Dixon, Special Assistant to the Attorney General, Walter M. Lehman, Special Attorney, Ernest A. Tolin, Chief Assistant U. S. Attorney, Los Angeles, California; Herbert A. Bergson, Assistant Attorney General, Holmes Baldridge, Special Assistant to the Attorney General, Washington, D. C.

Before Stephens and Bone, Circuit Judges, and Fee, District Judge.

[*Grounds of Appeal*]

James Alger Fee, District Judge: The United States initiated this criminal action against the defendants by indictment charging the violation of the Anti-Trust Act. The cause was tried before a jury. A verdict of guilty was found. This appeal has been taken upon the main grounds that (1) the indictment does not state a crime, (2) that evidence vital to defense was rejected, (3) that the verdict was against the evidence, (4) that the Court did not properly instruct the jury, and (5) that the method of drawing the juries in this district was improper and that a conviction in this case cannot stand, irrespective of the fairness of the trial. These general classifications of exceptions will be dealt with in this order. At the argument before this Court, counsel for appellants took the position that the suffi-

ciency of the indictment was the vital point of the appeal.

[*Allegations of Indictment*]

The indictment charges a conspiracy to restrain and an actual restraint of trade, over a large territory in the southwestern United States,[1] in one of the most highly important and highly perishable articles of food given to mankind, namely, fresh fish and crustaceans, coming into "fishing ports"[2] for sale to dealers. The fishing areas, according to the indictment, include the waters, both territorial and foreign, off Southern California south of Morro Bay and the territorial waters of the west coast of Mexico.[3] It is then alleged:

> "Approximately 75% of all fishermen in the fishing area defined herein are members of defendant Local 36, IFAWA."[4]

These fishermen are alleged to be the:

> "* * * individual or group of individuals who own, lease or operate a particular boat for the purpose of engaging on their own account in the business of catching fresh fish and crustaceans in the fishing area, and bringing them to fishing ports for the purpose of sale to dealers."

The charge as to the nature of the association is that:

> "The fishermen who are members of Local 36, IFAWA are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit. No employer-employee relationship exists between these fishermen and the dealers to whom their catch is sold. The fishermen members of Local 36, IFAWA, sell their catch directly to dealers, and do not act collectively through Local 36, IFAWA, in catching, producing, preparing for marketing, processing and handling their catch."

The gist of the charge is that defendants have:

> "* * * knowingly and continuously engaged in a wrongful and unlawful combination and conspiracy * * * to fix, determine, establish, and maintain arbitrary, artificial and noncompetitive prices for the sale to dealers of fresh fish and crustaceans caught in the fishing area, and to prevent dealers who do not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans, which combination and conspiracy has been in restraint of the aforesaid trade and commerce, in violation of * * * the Sherman Act."

Elaboration in detail of this charge is presented in the indictment.

In summary, the means and methods of carrying out the conspiracy as charged consisted of a continuing agreement and concert of action, the substantial terms of which were that appellants (1) agree to fix minimum prices to be charged for the sale of fresh fish and crustaceans caught by the fishermen in the fishing area and sold to dealers, (2) agree that these prices so charged by fishermen members of the local shall be stabilized and noncompetitive, (3) agree to draw up a written contract form,

> "and to impose said contract upon fish dealers who refuse to sign the same by picketing and boycotting methods, and to prefer fish dealers who sign said written contract, and to refuse to sell or deliver any fish caught by fishermen members of Local 36, IFAWA to fish dealers who do not enter into said contract;"

(4) agree to prevent non-cooperating dealers from obtaining fresh fish from any other source by similar methods, (5) agree to prevent such dealers from shipping or transporting any fish, (6) agree to boycott any concern or individual accepting from such dealers fish for shipment in or outside California, (7) agree to picket and boycott any concern delivering fish shipped from brokers or others in or outside California to such dealers, (8) agree to prevent nonmember fishermen from fishing or delivering fish to any than a cooperating dealer, and only to such dealer:

> "after said non-member fishermen had picketed non-signing dealers, or in lieu thereof, had paid to Local 36, IFAWA a stipulated picket fee."

It is specifically alleged that "defendants by agreement and concerted action have done the thing which, as hereinbefore alleged, they conspired to do," for the purpose of forming and effectuating the conspiracy and com-

[1] "Western States of California, New Mexico, Arizona, Nevada, Colorado, Utah and Idaho."

[2] "Southern California ports located between Morro Bay and the Mexican border, including, but not limited to, Morro Bay, Santa Barbara, Santa Monica, Redondo Beach, San Pedro, Newport Beach, and San Diego."

[3] Mark the difference between fishing areas and territory of distribution.

[4] Local 36 of the International Fishermen and Allied Workers of America.

bination set up for the purpose of forcing and coercing fish dealers into signing the aforesaid form of contract, threatened to withhold and have withheld from said dealers, supplies of fresh fish and crustaceans, and by boycott and picketing methods have attempted to prevent and have prevented said dealers who refused to sign said form of contract from securing fresh fish or crustaceans from any other source.

The result of the combined action then, according to the allegations of the indictment, was that:

> "Except for the illegal restraints described hereinafter, a much greater volume of fresh fish and crustaceans would have been brought to the fishing ports named herein and sold, processed and distributed from these ports in interstate commerce."

and also the effect was that:

> "The aforesaid agreement and concerted action of the defendants, pursuant to and in furtherance of the conspiracy herein alleged, has had the effect, as intended by the defendants"

(1) of preventing fishermen from carrying on normal fishing operations in the area, (2) of preventing fish from being sold to the non-cooperating fish dealer and "as further resulting in the fixing of arbitrary and non-competitive prices" for the fish sold by the members of the local to cooperating dealers, and has prevented the public in the territorial area from receiving a normal and usual supply of fresh fish, and "has unreasonably restrained the interstate and foreign trade and commerce described * * *."

The contract specifying the prices proposed between the fishermen and the dealers is attached to the indictment. We have no occasion to consider whether, standing alone, a charge of the execution of this contract by dealers and fishermen belonging to the organization would have stated a violation [5] of the statute or not. But the indictment must be considered as a whole.[6] A charge which indicates that 75% of the fishermen, as independent businessmen belonging to the organization, agreed not to let any fishermen fish in the high seas and in the territorial waters of Southern California and Mexico or to deliver fish to any other than a cooperating dealer except on the specified conditions, whether by their consent or not, is a charge of a conspiracy in direct and illegal restraint of interstate and foreign commerce. Fishing in such waters falls into the rubric of such commerce. Transportation of the fish to the market at the specified cities from the high seas and territorial waters is commerce. All the fishermen were engaged in interstate and foreign commerce. This was developed by allegation as an integral part of the scheme. The charge that appellants, with such control, intended to and effected such a restraint over production in interstate and foreign commerce, was alone sufficient. This is the selection of only one feature from the indictment. There is also charged a conspiracy to control all of the fishermen of the fishing area and all the fish dealers of the territory involved, with the intent of obtaining a monopoly of the catching and selling all fish by restraining all fishermen, dealers, carriers and outside suppliers of fish. The purpose to grant preferential and equal rights to the signing dealers and to exclude non-signing dealers from the market is likewise set up. But the gist of the accusation is the allegation of a conspiracy to fix arbitrary, artificial and non-competitive prices [7] for all fish so caught and sold by any fisherman to any dealer.

It is true the application of pressure is charged only in the interstate fishing ports, but that is sufficient.

[*Immunity Argument*]

The main focus of the attack upon the indictment is that, taken in connection with other facts not alleged therein, the allegations do not state a crime. The thesis is that appellants were "working, original producers combined for the purpose of fixing the price of the products of their own labor" and therefore were protected by the Clayton and Norris La Guardia Acts as a labor union, and were protected by the Fishermen's Marketing Act "as members of a cooperative." The confusion of thought of counsel for appellants in these conflicting claims is manifest. Even if the Court took judicial knowledge of the "facts" assumed, the indictment still states

[5] *United States v. Swift & Co.*, 46 F. Supp. 848, 852.

[6] *McCoy v. United States*, 9 Cir., 169 F. 2d 776, 780; *United States v. New York Great Atlantic & Pacific Tea Co., Inc.*, 5 Cir., 137 F. 2d 459, 464; *United States v. Ellis*, 43 F. Supp. 321, 326. Cf. *Glasser v. United States*, 315 U. S. 60, 80; *United States v. Sorrentino*, 78 F. Supp. 425, 428.

[7] *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296; *United States v. St. Joseph Stock Yards Co.*, 44 F. Supp. 31, 34.

a crime. But the existence of an employer-employee relationship between the fishermen and the dealers is therein expressly negatived It is distinctly denied also that the union was acting as a cooperative bargaining agent for the fishermen with the dealers. It is distinctly stated that the fishermen are independent businessmen dealing with the fish for their own profit and advantage. Appellants contend that, "from the face of the indictment, plus facts of which the Court may take judicial notice," no public offense is stated, which amounts to a speaking demurrer. In construing an indictment, on demurrer the courts cannot consider extraneous matter.[8] Finally, the allegations are such that, even without these negatives, no group could be permitted to combine for the purpose therein set up of restraining production of, transportation of and trade in food fish in a vast territory.[9] The indictment stated a crime.

Once these facts are alleged and the effect of these two statutes and similar acts removed from contemplation, independent businessmen have no immunity to enter into agreements and combinations with the intent and purpose of restraining interstate commerce, which have the actual effect of restraint. The indictment was not vulnerable to the attack made. If proved beyond a reasonable doubt, including the negatives, the allegations of the indictment would warrant conviction.

[*Adequate Evidence*]

The evidence showed that the allegations of the indictment were fully proved as to scope of the conspiracy. The proof tended to show a concert by the appellants to compel by force uniform action by dealers and fishermen to establish a stabilized, arbitrary price for fresh fish in the area. It is significant that the dealers did not enter into the agreement suggested voluntarily, but only when subjected to compulsion. Some of them took the ground that they had been advised such a combination of organized workers and businessmen dealing in the product would be illegal. If the fishermen had been members of a labor union, the position would have been sound according to the underlying principle of the *Brims* case,[10] the *Columbia River Packers* case[11] and *Brotherhood of Carpenters v. United States.*[12]

The allegations of the indictment were fully proved as laid as to the scope and intent of the conspiracy.[13] The combination and concert of action were established with the primary objective of fixing and maintaining "arbitrary, artificial and non-competitive prices" and a subsidiary objective of excluding from the market non-cooperative dealers by preventing such dealers "from obtaining, selling or shipping any fresh fish." The corollary also charged established by proof that fishermen not belonging to the association were prevented from fishing at all on the high seas or in territorial waters unless they were subservient to the conspirators. The evidence showed that non-cooperating boats owned by independent fishermen were dubbed "unfair" and were warned to conform.

It was also proved as charged that incidental services, such as ice, were withheld by pressure from "unfair" boats and non-cooperating dealers. Deliveries to non-cooperating dealers of fresh fish shipped to them were stopped by pressure and threatened violence to express agencies, railroads, truck lines and other carriers, according to the record. There was evidence also of appeals broadcast to fishermen in other states to stop the flow of fresh fish into this area in interstate commerce.

[*Interstate Commerce*]

The operations of the fishermen and dealers were proved to be in interstate and foreign commerce. The record shows fresh fish were shipped by the dealers to points in many southwestern states, and fresh fish was shipped into Southern California, not only from Northern California but from Oregon and Washington. Not only members of the local, but the independent fishermen as well, fished off the shores of California in the territorial waters of Mexico and on the high seas. Their boats then mingled with ships on open highways of the world and the fish from there landed at the fishing ports was a product in foreign commerce.[14]

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[8] *United States v. Empire Hat & Cap Mfg. Co.*, 47 F. Supp. 395, 401.

[9] The statute does not confine its protection to consumers. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493.

[10] 272 U. S. 549.

[11] 15 U. S. 143.

[12] 330 U. S. 395.

[13] *Glasser v. United States*, 315 U. S. 60, 80; *United States v. Sorrentino*, 78 F. Supp. 425, 428.

[14] *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531, 533; *The Abby Dodge*, 233 U. S. 166, 176; *Lord v. Steamship Company*, 102 U. S. 541, 544.

[*Local Restraint*]

Besides, there was an effective restraint applied at the local level,[15] which was intended to and did have an effect upon interstate and foreign commerce. It was proved that both members of the union and independent fishermen were restrained from fishing in the areas above mentioned and were placed under various restrictions by the "strike" committee, as to where the fish so caught should be disposed of. Certain independent fishermen were compelled to dump their catch, in violation of the law of California[16] and the moral dictates against waste of food. There is then evidence that the squeeze was applied all along the line, and, even if the source and application of the restraint were intrastate, it could be found that the necessary effect was "to stifle or restrain commerce among the states." *United States v. Women's Sportswear Assn.*, 336 U. S. 460, 464.

The ends desired by the appellants according to the evidence were accomplished by picketing and boycotting and by unconcealed threats of violence and pressure. Appellants objected to this evidence, but it was properly received. The Clayton Act does not operate by prescribing silence on the issue and preventing the production of evidence. Even where a union is involved, evidence as to picketing and boycotting may be introduced if the case is submitted to the jury with the proper instructions. *Brotherhood of Carpenters v. United States,* 330 U. S. 395.

This combination had substantial proportions according to the record. The association and fourteen individuals appeal. There is evidence that by far the greater number of the fishermen who catch in the fishing area are members of the association. About twenty million pounds of fresh fish are caught annually in this fishing area and sold to dealers in these ports. In the neighborhood of one million pounds of fresh fish were shipped to dealers in these designated ports from places outside of California. There is considerable fresh fish caught by fishermen in the fishing area which is shipped to other states of the Southwest. The restraint of interstate and foreign trade imposed for a month at these points might have been found from the evidence to have been substantial, to have been direct and effective, and to have been unreasonable if such findings were required.

The written agreement in the form in which the dealers were required to sign was drafted so as to appear innocuous upon its face and to be couched in self-serving language indicating beneficent design upon the part of the organization. The proof gave ground to belief that the combination and conspiracy had a broader purpose of domination in the territorial area and at the fishing ports and the fixing of arbitrary prices and the exclusion of non-cooperative dealers and independent fishermen. The evidence supported every charging phrase of the indictment. There was no other objection to this evidence now relied upon, save one. The Court permitted introduction of summaries of the contents of books of account concerning volume of fish handled by dealers. In view of the situation that the dealers were engaged in a difficult economic situation and that unfriendly relations were shown, there was no obligation on the Trial Judge to permit examination at large of the records by hostile appellants without supervision. In some cases, the witness testified from memory, and the Court refused to allow examination as to books or their contents. All this was proper in the discretion of the Trial Judge. In neither instance do appellants show that there was any prejudice. The Trial Judge was not bound to assume the demand for complete examination of the books of dealers in a highly explosive situation was without ulterior motive. Cross-examination was not otherwise limited.

The defenses are the same matters which were urged as defects in the indictment. Appellants claim they were entitled to the protection of the Clayton Act and the Fishermen's Marketing Act. The argument upon this question is highly theoretical and is made with entire disregard of the state of facts shown in the record, and proceeds upon the assumption that Local 36 is a labor union. But the application of the statutes must be made, not by scholastic reasoning divorced from the record, but from the facts.

[15] The amount of the industry control by a group throughout the country is immaterial so long as control is exercised effectively in the area concerned. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236; *United States v. Yellow Cab Co.*, 332 U. S. 218, 225; *Indiana Farmers' Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268, 279; *Montague & Company v. Lowry*, 193 U. S. 38, 46. Cf. *Steers v. United States*, 6 Cir., 193 F. 1, 5.

[16] Deering's California Code, Ch. 5, Art. 4, § 1064.

A large proportion of the members of the association owned and operated their own boats and gear. Well over half of these members classify themselves as self-employed fishermen. The ownership of boats and gear differentiates the owner from the other fishermen in this respect, that the operation of boat implies repairs, reconditioning and expenses of various types. The payment for this upkeep and profit for the operation of the boat, including amortization of investment, and gear is obtained, where there are more fishermen engaged, by an agreed share of the catch. But there are numbers of these boats which have only the operator and owner himself aboard. In this instance, the work of the owner and the profit and investment are all paid for by the price of the fish. It may be agreed that the owner and operator of a truck garden, who employs no labor and who sells his produce to local markets, is in a much similar situation. There can be no doubt the fisherman and the truck gardener are independent businessmen. The fishermen themselves consider the boat the important factor. The evidence here shows that, when this difficulty was going on, the so-called "strike committee" brought pressure to join in their activities, not on the individual fishermen but upon the "boat." The records refer to thirty-five boats to be contacted, and, if they do not help in the strike, "action is to be taken against them." This unquestionably reflects the actual condition. The evidence indicates that the boatowner or captain ordinarily on this account does the bargaining with the dealer for the sale of the catch. The reason for this is clear. Bargaining must be done by one person. But the evidence shows that the dealer pays the captain or owner, who receives the compensation for the full catch. Although there was a possibility of employment between the captain and the fishermen in the same boat, that was not the attitude of the fishermen themselves. It is noteworthy that, as to the time upon which they embark upon a fishing trip, the locality to which they go, the type of fish which they intend to take depends upon agreement between the individual fishermen in a boat and the captain. Although there is no direct evidence upon the point, it is inferential that the share of the boat and the individual fisherman depends likewise upon such an agreement. Judge McLaughlin, of Hawaii, draws this inference in dealing with a similar situation. He says:

"Defendants argued that since fishermen's—crewmen's—wages are dependent upon the price at which the boatowner sells the catch, the crewmen who share in the proceeds cannot possibly get an increase in wages unless the price of fish is raised, therefore this is a 'labor dispute' relating to fishermen's wages.

"This is nothing but specious reasoning. In the first place the facts do not reveal that the crewmen are negotiating the subject of wages or percentage shares of the proceeds with the boatowners by whom they are employed, and further it just is not so that the only way crewmembers could get increased wages would be to effect an increase in the price of fish. Defendants overlook the position of the boatowner and adjustments and absorptions he might make to increase wages without affecting the price of fish." *Hawaiian Tuna Packers, Limited, v. International Longshoremen's and Warehousemen's Union (C. I. O.), et al.*, 72 F. Supp. 562, 566.

The arrangement under the record in this case is a joint adventure of the fishermen, including the owner or captain, the details depending upon mutual consent of all. So much for the internal economy of a "boat."

The fish are sold by the bargaining agent of the boat to the dealer. There is no compulsion. Any one of the dealers may be chosen by the "boat," or the fish may be used or stored in ice. It is true that the boat usually brings the catch to the same dealer. By inference, we may conclude that an order from a distance could be accepted by the "boat" also. In any event, the price is arrived at by open negotiation between the representative of the fishermen of the "boat" and the dealer whom they have selected. This price is paid in cash. The individual fishermen do not receive this price, but it goes to the bargaining agent of the "boat" and is later divided according to the agreed scheme. The transcript shows such transactions are referred to universally as "purchases" and "sales." The dealers are called "buyers" and the fishermen "sellers." The results of such sales are called the "price." The price for the catch depends upon skill in bargaining and the available supply and also the orders which the particular dealer has on hand. The fishermen, whether boatowners or not, are independent of any dealer. No fisherman regards himself as under orders, directions or controls of any dealer. On the other hand, he regards himself as only bound to agree with the other persons in his boat as to operations.

There is no evidence of any negotiations for sale of fish or receipt of price by Local 36 on behalf of any boat or any fishermen, whether members or not. If one were disposed to rationalize, it might be conceived that members of a particular boat could choose a different "employer" each time they brought in a different catch. Some household employees do day work in this fashion, selecting a different employer day by day. But it is difficult to discover any evidence of relation and employment to be submitted to a jury here where sale and purchase of a commodity were involved and the price was the measure of value thereof. To translate this into "wages" requires a complicated computation. The result of this resume of the evidence is that no inference that Local 36 is a labor union could be drawn. The facts are not compatible with the proposition that the fishermen who own and operate their own boats are employees of anyone. It might be contended that a fisherman who works in a boat of which he is not the owner is an employee of the boatowner. It is only by distortion of the evidence of the record here that this induction could be drawn.

A finding of fact to the effect that the boatowners or the affiliated fishermen were employees of one or more dealers would be a diametric contradiction of all evidence on the subject. In accordance with the charge of the indictment, it might properly have been found that there was no relation of employer and employee between dealer and fisherman, and that appellants were independent businessmen dealing in fish for their own profits.

[*Price-Fixing Combination*]

On the evidence, however, a finding that the fishermen members of the association were "independent businessmen engaged in business on their own account and who operate fishing boats for their own account and profit" was justified. It might also have been possible to find that Local 36 was an association under the Fishermen's Marketing Act and that the members were joined together for the collective purpose of carrying on legitimate objectives of "catching, producing, preparing for market, processing, handling and marketing fish caught by their members." Although it was not possible to find from a review of the record that in this instance the association was acting as the marketing agent for the members, still the evidence does not show that so long as the efforts of the members and the Local were confined to an agreement among themselves and the dealers, arrived at by negotiation and setting of certain price levels for fish to be caught, but having no coercive force behind it, no action was taken by the Government. This is also the explanation of the dismissal of the prosecution in a case based upon that feature alone.[16a] This position may be subject to question, but at least it does not affect the problem here. However, the record shows that the fishermen here viewed as members of a cooperative had much broader purposes underlying the concert of action above outlined.

In *United States v. Steel Co.*, 334 U. S. 495, 522, it is said:

> "A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that defendants have engaged in price fixing or have concertedly refused to deal with nonmembers of an association or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*."

The price fixing combination was here directed toward a complete destruction of competition in prices in this area. Unless specifically authorized by legislation, a conspiracy to fix prices is in and of itself a violation of the first section of the Act.[17] No inquiry as to substantiality, directness, effectiveness or reasonableness of restraint

[16a] *United States v. Columbia River Fishermen's Protective Assn.*, No. C-16087, D. C., District of Oregon (unreported).

[17] In *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, Note 59, it is said: "In view of these considerations, a conspiracy to fix prices violates § 1 of the act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." This opinion distinguishes the case of *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, which is the main reliance of appellants. In the latter case, the Court said, at page 373: "The plan cannot be said either to contemplate or to involve the fixing of market prices," and at page 367: "No attempt was made to limit production."

is permitted. The section is violated by the agreement to fix prices standing alone under such conditions. But the price fixing phase of the concert did not stand alone. As often happens, it was intermeshed with a purpose to exclude certain producers from the market and to prevent certain dealers from obtaining any supplies of fish. Judge Learned Hand has crystallized the law on this point in *Fashion Originators Guild v. Federal Trade Commission,* 114 F. 2d 80, 85:

> "Price fixing is not, however, the only means unlawful *per se;* the interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade.' It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers or to the producers who remain. (Citing cases.) A successful combination among a part of the producers to exclude others, even when not accompanied by an agreement fixing prices puts into their hands collectively the power to control the supply and with it the price."

Again, exclusion of producers and dealers from the market according to prearranged plan is a violation of the statute, in and of itself.

There is, it is true, a dictum of the Supreme Court which may give color of legality even to such acts when done by a labor union or its members in pursuit of legitimate objectives, because of the synthetic effect of the Norris-LaGuardia Act. *Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797. But in that opinion there is definitive exclusion of this type of organization from the immunization of unions for such acts by pointed reference to *Columbia River Packers Assn. v. Hinton,* 315 U. S. 143.[18]

If then the boatowners were acting in voluntary conjunction with the fishermen employees of their boats in such a combination, their activities would certainly be illegal. *United States v. Women's Sportswear Manufacturers' Association,* 336 U. S. 460. If, on the other hand, the boatowners and other fishermen, as independent businessmen, were acting in voluntary combination with certain dealers, the concert would be in violation of law. *Brotherhood of Carpenters v. United States,* 330 U. S. 395. If, in fact, in all they did, as the evidence shows, they were acting as members[19] of a marketing cooperative, it would afford them no sanctuary for collaboration with others outside the association. *United States v. Borden Farms,* 308 U. S. 188.

As pointed out above, if the dealers did not voluntarily cooperate with the fishermen as members of a marketing cooperative and the restraint of trade was applied only by organized compulsion of picketing and boycotting by the members of the association, the excuse which might have availed union members because of the Norris-LaGuardia Act would not have availed the confederates of Local 36.[20]

[*Type of Evidence Rejected at Trial*]

The next question is whether the picture would have been changed if the Court had not excluded certain proffered evidence claimed to show that the fishermen in 1942 had accepted lower prices than otherwise would have been obtained in order to conduct experiments in canning of barracuda. This was a self-serving venture. But even if the appellants had entered into a cooperative venture in 1942, they had no license to violate the law in 1946. The appellants also offered to prove by expert testimony that the fisherman and farmer are in parallel economic situations and that a large number of farmer associations do carry on collective bargaining without evil resulting. These offers were not relevant, since the Court was concerned with acts of the appellants in restraint of trade. If the acts of the farmers were lawful, it did not tend to prove the acts of appellants were lawful. If unlawful, the fact that another had violated the law would not excuse appellants. In any event, it would require the Court to try an entirely separate case. The Court was not bound to do this. On the other hand, no evidence was offered to the effect that farmers had ever entered an association of the structure of Local 36, or that, using such association as a shield, farmers had ever restrained interstate com-

[18] Footnote 12 of *Allen Bradley* case, page 807.

[19] The "membership device" will not protect them. *Associated Press v. United States,* 326 U. S. 1, 19.

[20] "A restraint of interstate commerce cannot be justified by the fact that the object of the participant in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint." *Anderson v. Shipowners Association of The Pacific Coast,* 272 U. S. 359, 363.

merce in grain by any similar agreement and combination such as the evidence shows here.

Appellants complain of the rejection of a letter from Local 36 to all Southern California fish dealers, purporting to outline the purpose and intent of the union and inviting the dealers to a meeting where it was proposed to discuss stabilization of the industry about June 5, 1944, two years before the combination charged by the indictment as of May 1, 1946. Another exhibit rejected was a similar letter circulated a bit later (July 10, 1944), asking the dealers to enter into negotiations for an agreement relative to price and conditions of delivery of fresh fish. The Court also rejected the National War Labor Board award of February 19, 1945, and also another of the War Stabilization Board. The measures necessary for war do not excuse a violation of the law now. Furthermore, appellants offered to prove the history of unionization and strikes and agreements relating to price agreements between fishermen and dealers from 1886 to the present time, together with recognition of the contentions by many national administrative boards. These matters were all remote in time and irrelevant to the charges in the indictment. None of this historical matter was of any value in determining whether appellants were guilty or not guilty of the crime charged in the indictment. All was properly rejected since it would only have tended to confuse the jury.

Expert testimony that a fisherman is a laboring producer was offered. This offer spotlights the fundamental error of counsel for appellants. This was a question of fact, not a matter of opinion. As such question of fact, it was submitted to the jury who found against appellants. It would, of course, have been improper to allow an expert to advise the jury on a matter not subject of opinion testimony.[21]

A question is raised by the offer of the document of June 12, 1946, in the midst of the restraint of trade by Local 36, called "A Message to All Market Fishermen," purporting to show the character and aims of the association. This manifesto was rejected as self-serving, and properly so.

There was another series of offers of proof in great detail. These related to the economic condition of the fishermen, their failure to get advance orders for fish, when the state law requiring them to have a secured market before fishing, that collective bargaining increases the harvest of fish, that by collective bargaining the price for fishermen had been raised on occasion and lowered to the consumer, that a large value of fish comes in from areas outside of Southern California than is caught in that area, that the dealers there pay the same price to fishermen, that there are tremendous drops in price in a single day, that the price paid to fishermen bears no relation to the amount charged by the fish dealers to consumers, that the fisherman is in the same economic position as the farmer, who gets Governmnet help while the fisherman gets none, and as distinguished from the dealer. Market fish competes with other proteins. The fresh fishermen get but little money from their catch annually, and the boatowners not enough to maintain and repair boats. The theory of the offered proof was that the "rule of reason" controlled and to the proposition that original working producers are not prohibited by the Anti-Trust laws from combining originally for the purpose of fixing prices, and that all factors must be considered by the jury. A great deal of evidence was received which was offered by appellants as to the supply of fresh fish in the markets of Southern California, which, in general, indicated that the greater part of the supply comes from Northern California, Mexico, Oregon, Washington and other places in interstate commerce. The general conditions as to supply, methods of bargaining, sale and distribution were all presented. Such evidence bore directly upon the proposition as to the relationship of the fishermen among themselves and with the dealer and the nature of the operation whereby fish were transferred to dealers from the fishermen. The tendered evidence was not relevant for the puropse of showing whether the relationship of the fishermen were workers, producers or independent businessmen or employees of the dealers.

There is complaint made of the action of the Court in quashing a *subpoena duces tecum* to require the record of dealers to be produced but this has already been dealt with under rejected evidence. The appellants urge that the finding of guilt was contrary to law and to the evidence which is insufficient to support the verdict that the Court

[21] *Farris v. Interstate Circuit, Inc.*, 5 Cir., 116 F. 2d 409, 412.

should have directed a verdict or stricken out all exhibits and testimony. Error is also alleged in denying a motion in arrest of judgment and for a new trial. All these have been considered and the subject matter reviewed. The Trial Court was not in error, as the previous discussion shows.

[*Exceptions to Instructions to the Jury*]

Appellants first excepted to the instruction to the effect that, if the Government proved beyond a reasonable doubt that appellants, or any two or more of them, had combined and conspired for the purposes and in the manner charged in the indictment, they might be found guilty. Such an instruction is, of course, one which must be given in every criminal case. The proof must support the allegations of the indictment. The Court had defined reasonable doubt. If either of these instructions had been omitted, unquestionably there would have been reversible error. However, this exception is the gist of all claims of error. It is an extension of the original position that the indictment does not state a cause of action because appellants were operating under the Fishermen's Marketing Act and were exempt under the Clayton Act, and that, even if the government prove the facts set forth in the indictment, still, as a matter of law, appellants were immune. All exceptions to instructions given and requests refused are based on this theory, which only indicates the confusion of mind of counsel for appellants.

One point made was that the Court failed to instruct properly regarding the Fishermen's Marketing Act. Of course, the Court was bound to present the theories of defense in that respect. The Court charged the jury the finding that appellants were "independent businessmen who are engaged in the business" of catching and selling fish to dealers on their own account was a prerequisite to conviction. In that connection, the Court then read portions of the Fishermen's Marketing Act and told the jury that the law permitted such an association and collective organization and bargaining therein, and permitted the collective fixing of prices thereby on behalf of itself or as sales agent for its members. But the Court did instruct the jury that neither such an association nor its members could legally force [22] any buyer of fish to enter into such a price fixing contract "by practices and tactics which are not free and voluntary." And the Court charged that, even if they were acting as independent businessmen under that statute and entered a combination to fix the price of fish and to prevent dealers who refused to pay such prices from obtaining fresh fish from them or from other sources, the scheme would be illegal. The Court left the question to the jury as to whether Local 36 was such an association and whether appellants were acting under the terms of the statute in question. In *United States v. Universal Milk Bottle Service, Inc.*, 18 L. W. 2033, it was held, in referring to a conspiracy to fix prices on milk in a local area, the agreement was not immunized by the Agricultural Marketing Act of 1937 or orders of an executive department thereunder. The decisions show that farmers cannot fix prices in the manner which was attempted here [23] according to the jury verdict.

In connection with the instructions as to the Fishermen's Marketing Act, the Court instructed the jury that picketing and boycotting "in and of themselves are not contrary to or in violation of any law," but, if such acts were found to have occurred, these could be considered in determining whether the denfendants "did or did not conspire as alleged in the indictment. If you find defendants did not so combine or conspire, then you should acquit the defendants." This instruction is a complete answer to the contention of appellants. The use of picketing and boycotting did not give sanctuary to appellants for an illegal conspiracy,[24] as counsel for appellants seem to

[22] In *Eastern States Retail Lumber Dealers Association v. United States*, 234 U. S. 600, 611, it is said: " 'Section 1 of the act, * * * is not confined to voluntary restraint, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty—to engage therein.' *United States v. Patten* [226 U. S. 525]."

[23] *United States v. Borden Company*, 308 U. S. 188, 204. See also *Duplex Printing Press Company v. Deering, Individually and as Business Agents of District No. 15 of the International Association of Machinists*, 254 U. S. 443, 469; *Swift & Co. v. United States*, 196 U. S. 375, 396; *United States v. King*, 250 F. 908, 910; *Mid-West Theatres Co. v. Co-operative Theatres of Michigan, Inc.*, 43 F. Supp. 216, 222.

[24] *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 469; *Lynch v. Magnavox Co.*, 9 Cir., 94 F. 2d 883, 889.

think. It is only that, in pursuit of a legitimate object of a laboring union, picketing and boycotting are not illegal.

Further, it was said that all evidence as to strikes, boycotts and picketing were to be disregarded, as "The law is not concerned with any means used by the defendants but is only concerned with whether the agreement itself is in unreasonable restraint of trade." Again, the jury was told that, if the operations of the appellants came within the terms and protection of the Fishermen's Marketing Act, they must find the defendants not guilty, and "if it is reasonably possible for you to conclude that the acts of the defendants have the protection of such Act, it is your duty to so find and acquit the defendants," and, in considering the question, "You should ignore the evidence relating to picketing, boycotting, interstate commerce and strikes." The Court also said, "Such evidence was only admitted for the limited purpose of showing the participation of the various individual defendants in seeking to obtain a price fixing contract, and this contract alone determines legality or illegality of the acts of appellants," and, if it were one which they were legally permitted to enter into, "then you must disregard the evidence of boycotting and picketing for any purpose and find the defendants not guilty." It is obvious enough that, with cautions of this type, the evidence as to picketing and boycotting was a part of surrounding circumstances without which a complete picture could not have been shown. The effect was carefully limited by the Court. The instruction was much too favorable to appellants unless the jury had found they were members of a labor union pursuing legitimate objectives of labor. Certain refused requests on this point carried the "worker-producer" theory to the extreme and would have required the jury to find all the acts done by the appellants as shown by the evidence to be legal if, as members of an association although not "a cooperative, as that term is understood," was "a bargaining agent or sales representative for the fishermen, and the members therein were acting together "for the purpose of catching fish" and "of securing markets and market prices." These requests do not give any play to the illegality of combinations for the purpose of fixing prices or exclusion of producers and prospective purchasers of fish from the market. The Court properly instructed the jury that an organization formed under the act might enter into a contract with a buyer of fish, which fixes the price "at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer." This charge fairly set out what the appellants could ask lawfully.

[*Analogy Between Fishermen and Agriculturists Fails*]

The next request refused is to the effect that appellants are "in the same category as agriculturists and horticulturists." Even if they were, that would be no defense. It was not the intention of Congress that the agricultural laborers paid by a share of the crop produced on his land could combine with the farmer to force the wheat dealer to pay a price fixed by such combination. There is a similar defect in the next request, which indicates that a "working producer," who joins solely with other similar "working producers to fixe the price of articles produced by them," is immune. Again, there is no law which permits the farmer who does his own work on his own farm to combine with other farmers similarly situated to raise the price of grain by picketing all grain dealers or the dealer of their choice at the time.

The Court also read the Clayton Act to the jury, and instructed concerning the rights of labor under this statute and the Norris-LaGuardia Act. In this connection, the Court said it was not important whether one of the appellants owned his boat or fished for a lay, but that the application of the act was to be determined by the relationship of the association fishermen "to the fish dealers and not to one another or to any other person." Under the charge, the jury was required to find for conviction that appellants are "independent businessmen" catching and selling fish "for their own account and profit" and not employees of the dealers. The Court expressly said:

> "An association of independent producers or of persons who are self employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercise over a person who is an employee, would not be a labor union."

It was expressly emphasized that it made no difference that Local 36 called itself a labor

union,[25] since the facts as to the charged conspiracy must control, but, if the membership of the association consisted of persons who stood in the relationship of employees to the fish dealers, they might legally combine together and legally carry on acts to effect changes in the terms and conditions of their employment, even though such acts affected or obstructed interstate commerce. The Trial Court also very carefully gave to the jury an instruction based upon the suggestions contained in *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U. S. 395. This was a commendable precaution which showed that the Court was attempting to protect all legitimate rights of defendant because, if the jury found defendants were independent businessmen and Local 36 was an association thereof, the instruction was not applicable.

The Court went on to say that, if the membership of the association, Local 36 IFAWA, consisted of persons who stood in the relationship of employees to the fish dealers, "the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective," but that such obstructive acts could only be performed if first there were a labor dispute between the members and the fish dealers. If "the controversy is solely one over the price at which the members of Local 36 shall sell their fish," and the employer-employee relationship were not the matrix of the controversy, then the rules relating to a labor dispute would not immunize acts which were otherwise illegal.[26] It is clear this was a sufficient explanation. As we have already seen, there was substantial evidence from which it might have been found as a question of fact that there was not an employer-employee relationship. Under this instruction, the jury has found this proposition as a fact. But the Court by these instructions gave the jury free choice. It should not disparage the verdict that the jury took a common-sense view of the evidence without theoretical refinement.

The request to the Court to instruct that, if Local 36 were a labor union, acting solely in self interest and not in collusion with other economic groups, the action of appellants would be legal is, of course, fully covered by the instructions. The evidence gave firm ground for the finding that it was not an employer-employee relationship and that the fishermen were either in collusion and concert with their employers, the boatowners, or that all the members of the association, as independent businessmen, were compelling independent dealers in fish to pay prices arbitrarily fixed.

In this field, instructions were proposed to the effect that the fishermen acquire no title to the fish but only the right to use or sell them. The implication is that, since there is no ownership, the fisherman has only his labor in the fish. This vein runs through several other requests. The propositions are advanced that the "worker-producer" is selling his services at wages to be determined by the price of fish delivered and that the employer-employee relationship does not depend upon the existence of a payroll providing for pay at stated intervals. There is interwoven into another request the idea that, if appellants acted as members of an organization in which labor was the basis or one of the chief factors, "they did not act in restraint of trade." These ideas were generally embodied in theoretical homilies worthy of medieval scholasticism. The Court was therefore bound to submit none of them. As has been noted, all the relevant situations as to employment were carefully covered. As to the product price being set for a standard of wages, the same argument would apply to practically all products—certainly, to pears and apples, objects made by hand and, without much deviation, to sales of cattle.

[25] Each court which has dealt with these various associations of fishermen and boatowners on the Pacific Coast has noted peculiar characteristics of the particular organization. *Columbia River Packers Association, Inc. v. Hinton,* 315 U. S. 143; *Columbia River Packers Association, Inc. v. Hinton,* 34 F. Supp. 970; *Hawaiian Tuna Packers, Limited, v. International Longshoremen's and Warehousemen's Union* (C.I.O.), 72 F. Supp. 562; *Manaka v. Monterey Sardine Industries,* 41 F. Supp. 531; *United States v. Columbia River Fishermen's Protective Assn.,* No. C16087, D. C., District of Oregon (unreported). Each calls attention to the necessity of basing conclusions in regard to such organizations on facts found and not on occult theory.

[26] The labor union is not given indulgence by the statute if it is the intent and effect to establish any form of market control of a commodity and to "monopolize the supply, control its price or discriminate between its would be purchasers." *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 512.

The "rule of reason" was the basis of many requests. On this score, another request was that, if the agreement was one which reasonably might be "considered as a normal or usual agreement for the marketing of their products," then appellants could not be found guilty. In considering whether the restraint was reasonable, appellants also requested the jury be instructed to weigh the state laws preventing waste of fish, the apparent necessity of having a price for a catch set in advance, whether the intention of the fishermen in what they did was to limit the production and sale of fish or to increase production and procure greater markets and whether they were attempting to set the resale or consumer price of fish or trying to stabilize the industry. There was also an attempt to have the charge state that the jury was to consider the history, the difficulties and the intention of appellants in the restraint of fish marketing in the light of the public interest, and that there was no effect on consumer prices.

The Court did instruct that, if the appellants were in fact businessmen who conspired to fix the price, then it was immaterial "whether the price so fixed by agreement among the defendants was reasonable or unreasonable." [27] It was also said the price fixing includes more than the establishment of uniform prices and is proved, if set at a certain level or on ascending or descending scales or if they are to be uniform or stabilized by various formulae, by placing a floor to increase stability and firmness of market prices and which may prevent the determination of those prices by free competition alone. The Court then said that elimination of competitive evils in an industry is not a legal justification for price fixing contracts otherwise illegal.

The appellants contend and except to the instructions given by the Court on the ground that the restraint imposed by such a conspiracy must have been direct, and that the Government "must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish." The fixing of prices always has a direct effect upon commerce in the article.[28] Here the intent charged was not only to fix prices but also to prevent independent fishermen from fishing on the high seas and in foreign waters and from selling the catch so obtained to non-cooperative dealers in the territorial area. Besides preventing shipments from other states to such dealers, any instruction as to reasonableness or substantial or direct interference with trade and commerce under these circumstances shown by the evidence and charged in the indictment would not have stated the law and would have amounted to a direction to pardon the appellants. It is true likewise that the public interest is involved in such a case and the ultimate aim is to protect the purchasers and users of the product. The jury here necessarily found under the instructions that the intent and necessary effect of the conspiracy was to enable the appellants to restrain or control the supply and the price of the commodities sold or moving in interstate commerce and to discriminate between those attempting to purchase the product.

The Court covered fully all legitimate features contained in requests of appellants. The theories of the defense were set forth in detail and on occasion in much too favorable a light as questions of fact. The proposition that the actual activities and conduct of appellants were within the legal objectives of a fishermen's marketing association or a labor union was left to the jury as a question of fact. There was no error. The only criticism of appellants is based upon an assumption that Local 36 is a labor union and a marketing association entitled to the farflung privileges of both.

Since these factors were all correct, we affirm the action of the Court in denying a motion in arrest of judgment. The assignment as to new trial is, of course, not well taken.

So far as the indictment, the admission and exclusion of evidence and the instructions of Judges, the trial was fair and impartial. But appellants attack the method by which the juries, grand and petit, were drawn. It is said no criticism is directed at the juries who indicted and tried appellants, either as to composition or attitude. This leaves a choice between black and white. If the particular juries, grand and

[27] *United States v. Trenton Potteries Company*, 273 U. S. 392, 396; *United States v. Masonite Corporation*, 316 U. S. 265, 274; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 222; *Ethel Gasoline Corporation v. United States*, 309 U. S. 436, 458.

[28] See *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 310; *United Leather Workers International Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Company*, 265 U. S. 457, 471.

petit, who considered the charges against appellants were in fact fair and impartial, then the only available ground for attack is that the Court lacked jurisdiction because of the use of any jury drawn by the system in use.

The contention then is made that the jury panel of the Southern District of California, Central Division, was drawn in a manner so inherently defective and unfair that, even if a fair and impartial jury was obtained for this particular trial, still the cause must be reversed. This, upon analysis, seems to be a claim of no jurisdiction in the Court. Juries drawn from the same sources have been serving over a period of years in this District. If the position is correct, the Court had no jurisdiction in any case, civil or criminal, tried by jury because the existence of an unfair system of jury selection injures these defendants as appellants say in their briefs. Refutation is contained in the statement of the claim.

There was no complaint made of the character of the jury which tried the case. In fact, the record of the examination of the panel upon *voir dire* was not brought up on the appeal. We have means of knowing neither who the jurors were nor how they earned a living nor whether each was of "fair character and proved integrity and sound judgment," as required by the California Code of Civil Procedure, § 205.

The institution of the jury was anciently and through a course of evolutionary development has remained palladium of the liberties and rights of individuals in criminal cases. It has deservedly attained the high encomiums of the legal writers and theorists during the course of centuries. But it is not upon these that its value to a modern world is based. The tremendous vitality of the institution through the centuries and its adaptability to meet treacherously shifting conditions has enabled it to survive like the Sequoia in a world geologically metamorphized. From a group of the "upper class" men in barbaric societies, convened to protect legal rights and prerogatives of the ruler, it became a group of persons who could say the truth of their own knowledge regarding the possession of land. By subtle blending, it came to take the character, so far as the common man was concerned, of those peers whom the barons of the Magna Charta insisted should pass judgment upon them and their rights as against the crown.

For centuries the jury was subject to intimidation by judges and by the crown and in later times by popular violence. But after the revolution of 1649 and 1688, in the form in which we have received it in America, it has become a bulwark against encroachments by the government and a protection of the rights of individual citizens. In certain instances, the appellate courts have shown a notable distrust of the jury system in criminal cases in recent years. In one, Jehovah's Witnesses were prevented from placing before the jury a valid defense of arbitrariness and prejudice of the local draft boards.[29] In another, the citizen in business was prevented from placing before the jury of the vicinage the defense of arbitrariness and factual invalidity of regulations, which instead was tried in the Emergency Court of Appeals.[30]

However, in flagrant instances, the jury has always exercised the pardoning power, notwithstanding the law, which is their actual prerogative. This feature is of more importance here, since the jury, notwithstanding the arguments regarding economic oppression, did not see fit to acquit appellants. We have not yet arrived at the point where the doctrine of Theodore Roosevelt, that a single district judge cannot construe an indictment against the Government, has been applied to the verdict of a jury. In its modern form, therefore, the juries which reflect common sense and the sentiment of local communities do, in fact, modify the doctrine of law. Such a process is still going on.

The jury system has constantly changed in order to meet the needs of the society in which it has flourished. It is now subject to another challenge. We agree with appellants that, if there is a fundamental defect in the system of selection of the jury panel in a particular district, that in and of itself should be sufficient to vitiate all verdicts returned by a panel so drawn. This is not out of feeling for guilty defendants, but is based on one of the fundamental foundations of the system. One of the imponderables which has contributed to the survival of the institution of jury trials in criminal cases is that it lets each individual who has

[29] *Falbo v. United States,* 320 U. S. 549.
[30] *Yakus v. United States,* 321 U. S. 414.

a chance to be drawn feel that he has a share in the Government, and brings home to each that there are duties as well as rights connected with citizenship. One of the pertinent criticisms here then is the fact that for this jury panel no one is drawn who does not return his questionnaire. A still more subtle form of such denial of a share in the Government and a share in responsibility is the excuse of the tired business executive who desires to go to Hawaii or Bermuda, the topnotch mechanic who is making ten times as much as the jury fee for attendance, and of day laborers. However, these defects should not overthrow the panel and vitiate all verdicts unless at least there be a clear and present danger that the right of the individual to participate in the burden and the benefit shall be systematically denied. This is not shown in the present case.

Even in the time of Bracton,[31] jurors were to be free and impartial and neither too friendly to either of the parties nor drawn from the enemies of either. It is strange to find that the extremes produce the same tendencies. Jury duty was regarded as oppressive. As today, the rich and powerful received exemptions from service,[31a] and the very poor were often let off because of their situation.[31b] The conscience of democracy and the greater education of the members of the body politic in the necessities of government has neither been sufficient to overcome the feeling nor to prevent the results. The banker who wishes to go to Jamaica or Hawaii and the day laborer are still problems. But the only method of curing such tendencies lies with the trial judges.

The jury of criminal cases is the epitome of democracy in our modern state. The attack in this instance on the jury system is an attack on democracy itself. Here, with great elan, by sharp onset it is attempted to overthrow the jury system by the injection of the concepts of class conflict. Our democracy is founded upon the proposition of equality of each citizen to each other as far as political rights are concerned. This ideal has never been realized, but we assume that the great bulk of the people are devoted to its realization. It has been said that the juries could be drawn from the habitues of the park benches. Firmly, we believe that the jury so drawn under the direction of a competent trial judge, administering justice under the law, controlling the court and by his very presence impressing the jury with the equality of everyone before the law, can administer justice. A jury likewise of socialites and blue-stockings can be trusted to render justice to those downtrodden by either political or economic forces. Our experience in democracy has shown that the presence of the name of an official in the social register has not prevented overwhelming masses from voting for him, nor has it prevented him from being a leader in humanitarian movements. The social register has upon its pages the names of highminded idealists devoted to the causes of humanity, the maudlin sentimentalists as to crime and poverty, as well as the birth-proud irreconcilable. All trial judges know there is no economic cleavage in jury systems. If in a sporadic instance it did happen to be so, still the trial judge, who is on the ground, has control of the verdict.

Class war has no place in America. The very contention itself contains a paradox. Yet here it was urged with tremendous force upon the Trial Judge and with earnestness and circumstantially. The result was a travesty proving the possibility of abuse of the freedom accorded by democratic institutions. The Trial Judge, in order to preserve fairness of demeanor, spent days in investigating the basis of this contention and wrote a long opinion showing its absurdity. Urged as it was, the result was an impertinent obstruction of justice and the progress of the trial. We believe, if it had not been for the conscientiousness of the Trial Judge, faced with certain appellate expressions, the matter could have been disposed of almost summarily.

The attempt, we believe, was to bring the administration of the law into disrepute. The preposterous and outlandish tactics of

[31] Bracton De Legibus Angliae, Fourth Book, Chap. XIX, f.185. The whole passage is surprisingly modern in feeling, and states the grounds of challenge for cause with particulars still applicable.

[31a] A Statute of Marlborough, 52 Henry III, c. 14 (1267) by Owen Ruffhead, Esq., London 1763, V. 1, p. 36.

[31b] 21 Edward I, c. 1, Ibid., V. 1, p. 129, where the distinction between "diverse persons, being of least ability of his Realm," who are continually troubled by Sheriffs in impanelling them on juries and "the rich People and such as be more able," whom the Sheriffs "do spare" is dramatically drawn. Relief for the former was provided by setting up a property qualification. See also Statute of Westminster Second, 13 Edward I, c. 38, Ibid., V. 1, p. 103.

the defense amounted to an obstruction of justice in and of itself. Such tactics upon the part of defense attorneys, in our opinion, deserve censure. We now pass it. If any shade of prejudice came upon this jury, it was, in our opinion, due to these stage effects of counsel. But, as we have seen, the evidence fully warranted conviction. The conduct of the Trial Judge, although over-conscientious, was impeccable. It is true that the jury commissioner should be careful to follow the principles laid down by the Supreme Court of the United States with regard to jury selection. And it is surprising, after the years which have elapsed since some of these criticisms were announced,[32] that we find them at least in the letter violated. We find the commissioner here accepting a list of names furnished by a woman's social organization at his request. Apparently, use was made of some names of persons obtained from the Labor Temple, also lists supplied by some Railroad Brotherhoods, the Social Registers and membership rosters of country and social clubs.[33] The excuse that he was not paid enough is more startling. Insufficient compensation is no excuse in any public official for failure to perform his full duty. Jurors serve at slight compensation and often at great sacrifice. But the deviations here were comparatively minor and laid no field for the attack which has been made. If the voting lists are used, it must be noted our system permits socialites and communists to vote for President.

The names which were drawn from such sources were an extremely small portion of his list, which was largely selected from the telephone book. Each name on the commissioner's list was balanced by a name drawn by the Clerk from a list of approximately thirty thousand former jurors. This method of getting Federal jurors from lists of former jurors of State and Federal courts has often been used in the past. It is generally satisfactory unless there are peculiar local conditions where policies of exclusion have been followed.

The record here does not show any lack of due process since there was no systematic or arbitrary exclusion or discrimination of any persons or class of persons such as the Supreme Court found in *Theil v. Southern Pacific*, 328 U. S. 217, and *Ballard v. United States*, 329 U. S. 187.

It is assumed that, if the appellants attain their objective, each citizen would have to be tried by members of his own particular segment of the population, selected according to his dictates. Catholics would have to be tried by Catholics, Masons by Masons, Jews by Jews, bankers by bankers and bricklayers by bricklayers. But it must be remembered that this will not always be satisfactory to a defendant. In former days, a bootlegger would much rather trust his fate to a straightlaced prohibitionist minister than to a former saloonkeeper. Indeed, the defendants, at the time of trial in the instant case, asked for instruction that there was to be no consideration given by the jury to any conflict which might have been shown between the American Federation of Labor and the Congress of Industrial Organization. This instruction was properly refused, as it was not pertinent. It highlights the fact that, to the appellants even, there was much more chance for prejudice against them among the members of their own "class" than there was from the general panel which was drawn. If the judges or officials of the Court had shown discrimination against members of the Congress of Industrial Organizations or a packing of the panel with members of the American Federation of Labor, there might have been a real point.

The appellants did not prove that they could suffer any prejudice. Nor did they prove that any one of them belonged to a class against which there was any discrimination. In fact, the appellants do not complain of the jury which tried them. They have not brought before us any list of the members with their economic classification, nor have they even brought to this Court the examination on *voir dire*.

As a capable Trial Judge says of the jury system in the Federal Courts:

> "Those who are critical of the historic make-up of the jury panel say it must be made more 'representative' and more of a 'cross-section' of the Community.
>
> "This would seem to be not objectionable provided that it is not the be-all and end-all of jury selection. A bricklayer should not go into the jury panel because

[32] *Glasser v. United States*, 315 U. S. 60, 83-87.

[33] Other sources were: Personal property assessment lists, telephone directory, lists of automobile owners, bank employees, Congress of Parent and Teachers, Negroes, Chinese-Americans, Japanese-Americans, Los Angeles Country Club and University Club members.

he is a bricklayer; nor should a bank officer because he is a bank officer. Both are eligible if they have integrity and intelligence enough to listen, retain in their memories the evidence presented, weigh it and honestly decide the cause submitted. We do not need more bricklayers or less bank officers to administer justice.

"I see no objection to seeking out Federal jurors in all groups, provided there is no tampering with the traditional requirement of integrity and intelligence. For a jury panel to be successfully challenged only because it consists of too many of one communal group or too few of another would inevitably completely abort justice. 'The right to challenge is the right to reject, not to select a juror.' *Hayes v. Missouri,* 120 U. S. 68 at page 71, 7 S. Ct. 350 at page 352, 30 L. Ed. 578.

"Mr. Justice Brewer said in *Brown v. New Jersey,* 175 U. S. 172, at page 175, 20 S. Ct. 77 at page 78, 44 L. Ed. 119: '* * * the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury.'"—Judge Goodman, "Federal Jury Selection," 6 F. R. D. 253, 254.

The Trial Judge, in the exercise of sound discretion, extended to appellants, under the Criminal Rules, ten peremptory challenges in place of the three to which they were entitled. It is true, appellants exhausted all ten of these challenges in order to be in the proper technical position to challenge the array. It is true, as a gesture, appellants asked for more challenges, which were refused. All trial judges know that the key point in selection of an impartial jury is the power of exclusion. In this case, the Trial Judge, in our opinion, went too far, but it was error of which the appellants have no right to complain. The jury which tried the appellants was apparently fair, even on their own standards, and any slight variations from the proper methods of drawing a panel are not deleterious as far as they are concerned. Therefore, the objections and motions against the panel were properly overruled.

The judgment is affirmed.

[¶ 62,492] Dipson Theatres, Inc. v. Buffalo Theatres, Inc., Bison Theatres Corporation, Vitagraph, Inc., Loew's Inc., Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, United Artists Corporation and Vincent R. McFaul.

In the United States District Court, Western District of New York. Civil Action No. 3058. September 26, 1949.

Action to recover triple damages and attorneys' fees for alleged violation of Sherman and Clayton Acts. Judgment for defendants.

Sherman Act, Clayton Act

Film Distributors and Exhibitors—Treble Damage Suit Dismissed—Discrimination and Conspiracy Not Established.—An independent theatre operator failed to substantiate its allegations that distributors and exhibitors unlawfully conspired to monopolize the first- and second-run films and practiced certain discriminations, thereby causing it to suffer financial losses in regard to the operation of two of its theatres. It was alleged that the monopoly was accomplished when distributors and exhibitors contracted so as to grant special privileges to the latter not available to the plaintiff; that by these contracts the plaintiff was deprived of the first-run and second-run features; that unreasonable terms of run and clearance were imposed on this theatre operator and that the revenue producing possibilities of pictures were greatly reduced since a moveover run had been granted to certain favored exhibitors. The action for treble damages was dismissed for failure to establish any damages or violation of the Sherman or Clayton Acts. The Court was of the opinion that, when acting separately, distributors had the legal right to select their customers and to deal or not to deal with any customer as they saw fit. No evidence was presented that established that the distributors did not act independently.

See the Sherman Act annotations, Vol. 1, ¶ 1220.192, 1220.273, 1220.431, 1640.335, 1640.411.

For the plaintiff: Borins & Hoffman (Louis Borins and Dwight Campbell, Jr. of counsel), of Buffalo, N. Y.

For the defendants: Raichle, Tucker & Moore (Frank G. Raichle, James O. Moore, Jr. and C. Stanley Thompson of counsel), of Buffalo, N. Y., for Buffalo Theatres, Inc., Bison Theatres Corp., Loew's Inc., and Paramount Pictures, Inc.; O'Brien, Driscoll, Raftery & Lawler (Edward C. Raftery and George A. Raftery of counsel), of New York City, for Universal Film Exchanges, Inc., United Artists Corp. and Warner Bros. Pictures Distributing Corp. (formerly called Vitagraph, Inc.); Sidney B. Pfeifer of Buffalo, N. Y., and Dwight, Koegel, Harris & Caskey (John F. Caskey of counsel), of New York City, for Twentieth Century-Fox Film Corp.; Sidney B. Pfeifer, of Buffalo, N. Y., and Harry M. Pimstein, of New York City, for RKO Radio Pictures, Inc.; Schwartz & Frolich (Louis D. Frolich, Everett A. Frolich and Max Rose of counsel), of New York City, for Columbia Pictures Corp.; Brown Kelly, Turner & Symons (Edmund Kelly and John E. Leach of counsel), of Buffalo, N. Y., for Vincent R. McFaul.

Opinion of KNIGHT, Chief District Judge.

Allegations

[*Digest*] Plaintiff sued 11 defendants, demanding $5,125,472 triple damages plus reasonable attorneys' fees for alleged violations of 15 U. S. C., sections 1-7, and 15 U. S. C., sections 12-17. Plaintiff alleged three causes of action. By order of this court, dated November 1, 1948, they were all dismissed as to defendant Columbia Pictures Corporation and the third cause of action was dismissed as to all defendants.

Of these 10 defendants, three (Buffalo Bison and McFaul) are sued as *exhibitors*—the remaining seven as *distributors.*

Plaintiff's *first* cause of action alleges unlawful discrimination against its Bailey Theatre, located at 2163 Bailey Avenue, Buffalo, N. Y., by defendant exhibitors, who operated it until August 1, 1939; that their lease expired July 31, 1939; that, on April 19, 1939, Dipson-Basil Theatres, Inc., which became Dipson Realty Co., Inc., purchased this theatre subject to the unexpired lease and operated it from August 1 to August 31, 1939, when D. & B. Operating Co., Inc., which by change of name became the plaintiff herein, leased it, began operating it on September 1, 1939, and has continued such operation. Plaintiff demands damages from September 1, 1939, to September 17, 1945, for "actual operating losses, based upon income from admissions * * * $19,115; and losses of net income * * * $126,878, totalling * * * $145,993." (Par. 25.)

Plaintiff's *second* cause of action concerns the Century Theatre, located at 511 Main Street, Buffalo, N. Y., and the Riviera Theatre, located in Tonawanda, N. Y. It alleges that defendant exhibitors operated the Century for about 10 years prior to August 1, 1939, when their lease expired; that it was then leased for 10 years by Century Theatrical Enterprises, Inc., which took possession August 1, 1939, and operated both it and the Riviera until November 20, 1940, after which plaintiff operated both theatres until June 26, 1941, when lessee was forced by defendants to surrender both leases to the respective lessors. It is alleged that, on or about November 25, 1941, Century Theatrical Enterprises, Inc. assigned to plaintiff all its claims and causes of action against defendants. Plaintiff alleges that, during 23 months (August 1, 1939, to June 26, 1941) it and said Century Theatrical Enterprises, Inc. suffered an operating loss of $58,240.67 (Par. 36) and, "except for the unlawful combination and conspiracy of the defendants," would have earned a net income between September 1, 1939, and August 31, 1949, of $1,423,788 (Par. 36) from the Century, and a net income between June 27, 1941, and July 31, 1949, of $56,570.60 from the Riviera (Par. 38).

Plaintiff alleges that "all of the defendants have combined and conspired to attempt to and to monopolize trade and commerce among the several states by securing to Defendant Exhibitors the sole and exclusive right to first-run and second-run of feature pictures at Buffalo, New York," in violation of sections 1 and 2 of the Sherman Act; that "the precise date or dates of origin of the said combination and conspiracy * * * are unknown to the plaintiff" but they "were in existence during the months of April through September, inclusive, 1939, having been formed prior to such period, and they have been in existence continuously since such period." (Par. 17.)

Plaintiff further alleges: "Such monopoly and restraint of trade have been accomplished, among other methods, by: contracts between Defendant Distributors and * * *

Exhibitors granting special privileges to (latter) not available to the plaintiff nor to other exhibitors; contracts between (them) making available to (Defendant Exhibitors) a supply of feature pictures far in excess of their reasonable needs, thus depriving the plaintiff and other exhibitors of the first-run and second-run of such features; contracts imposing unreasonable terms of run and clearance on plaintiff and other exhibitors for the benefit of Defendant Exhibitors; refusing to contract with plaintiff and other exhibitors for the purpose of preserving a monopoly to Defendant Exhibitors; permitting (latter) to move a picture from one theatre when its run has been completed, to another theatre operated by them, for a so-called "moveover" run, thus postponing all subsequent runs by plaintiff and other exhibitors, and reducing the revenue-producing possibilities of the picture at subsequent runs; threatening, and otherwise interfering and attempting to prevent the sale or lease to plaintiff or other exhibitors of theatres qualified to exhibit at first and second run in Buffalo; discriminating in film rentals by granting lower rentals to Defendant Exhibitors; contracts fixing minimum admission prices at subsequent run theatres for the purpose of preventing competition with Defendant Exhibitors." (Par. 17.)

It is alleged that "Defendant Exhibitors have attained a buying power which they exert to continue their monopoly and to restrain competition." (Par. 18.) There are many other allegations which will be cited in the body of this opinion.

Circumstantial Evidence, Only

Plaintiff admits in its brief: "There is no direct proof in the record of the existence of a conspiracy or an attempt to monopolize." Relying wholly on circumstantial evidence, it cites *Interstate Circuit v. U. S.*, 306 U. S. 208, and *William Goldman Theatres v. Loew's, Inc.* (C. C. A. 3d), 150 F. 2d 738. In its reply brief, it leans heavily on *Ball v. Paramount Pictures, Inc.* (C. A. 3d), 169 F. 2d 317. Witnesses who had charge of the film distribution in this area testified for all the distributors that they did not participate in and knew of no monopoly or conspiracy to injure the plaintiff. McFaul so testified for the exhibitors.

Burden of Proof on the Plaintiff

Plaintiff has the burden of establishing the alleged monopoly, conspiracy and restraint of trade. If the "proven facts give equal support to each of two inconsistent inferences," the plaintiff must fail. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 339; *Schad v. Twentieth Century-Fox Film Corp.* (C. C. A. 3d), 136 F. 2d 991, 996. Plaintiff must not only establish the fact of damages but must also offer sufficient proof of their amount. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 251, 266; *Twin Ports Oil Co. v. Pure Oil Co.* (D. C. D. Minn.), 46 F. Supp. 149, 152.

Right to Select Customers

Plaintiff claims no damage to the Riviera Theatre prior to the alleged forced surrender of the lease on June 26, 1941. It there had for exhibit on exclusive first run all the products of Loew, Paramount, Fox, RKO, United and Warner Bros. Pictures Distributing Corporation, formerly called Vitagraph. During the operation of Century Theatre by plaintiff and its predecessor no pictures of Loew or Paramount were there shown. These defendants were majority stockholders in Buffalo and had a financial interest in the theatres operated by Buffalo. Their witnesses admitted that they favored their own theatres. It does not appear that Loew or Paramount are financially connected in any way with any of the other five defendant distributors or that these are interested in Buffalo's theatres, except that Buffalo was an old customer. Defendants Universal, Vitagraph and United in their brief cite many cases in support of the proposition that a distributor has the legal right to select its own customers and to deal or not deal with any customer as it sees fit. Among these citations is *Federal Trade Commission v. Paramount* (C. C. A. 2d), 57 F. 2d 152. Defendants Fox and RKO in their brief also stress the right of a distributor to do business with whom it pleases in the exercise of its own judgment and cite many cases.

The federal rule and its exception are well stated in *Binderup v. Pathe Exchange*, 263 U. S. 291.

Plaintiff urges that the seven defendant distributors did not act independently and that the evidence discloses that Vitagraph, RKO, Fox, Universal and United were dominated by the powerful "Shea Group", comprising Loew, Paramount and McFaul, so that plaintiff suffered financial loss at its Century and Bailey Theatres. The evidence

however discloses that at the Century it got all of RKO's first-run feature pictures with the exception of one picture—Pinocchio—and all of RKO pictures it requested at the Bailey to be shown immediately after the run at Buffalo's competing Kensington Theatre. At the Century it also got about one-half (18 pictures) of the Warner (Vitagraph) product. It claims that this was not enough for successful operation; that in consequence of defendants' conspiracy and monopoly it lost money at the Century and the lessee was forced to surrender the lease, which was tied up with the Riviera lease, which also had to be abandoned at the same time.

Defendants Not Responsible for Surrender of Lease

Plaintiff offered no proof that the two leases were interrelated. There is no reference in one lease to the other. The two landlords were wholly independent corporations. The only connection between them is that one Max Yellen was president of the Riviera landlord corporation and general manager of the Century corporate landlord.

There is no evidence that Max Yellen was agent of any of the defendants. They should not be held liable for any loss to plaintiff resulting from the Riviera lease surrender.

Failure to Establish Damages

Plaintiff's *second* cause of action concerning the Century and Riviera Theatres must be dismissed for failure to establish any damages. This leaves for consideration plaintiff's *first* cause of action dealing with the Bailey Theatre.

The *first* cause of action alleges that while the Bailey and Kensington Theatres were operated by defendant exhibitors until August 1, 1939, they "had the same run, that is thirty (30) days after first run in the downtown Buffalo theatres. In practice, Defendant Exhibitors showed the more profitable pictures at the Bailey * * * first and showed such pictures at the Kensington from four (4) to eleven (11) days after the completion of the Bailey * * * showing" (Par. 20); that on April 19, 1939, Dipson-Basil Theatres, Inc. purchased the Bailey, that Defendant Exhibitors became aware of this and, not later than April 24, 1939, "immediately changed their operating policy as to the two theatres," advertised this change "and, on May 7, 1939, put it into effect by showing 'A' features at the Kensington ahead of the Bailey. This practice was promptly extended to all features, and was continued during the remainder of the term of (their) lease of the Bailey Theatre." (Par. 22.)

Paragraph 23 makes specific charges against the several defendants as follows:

> "Twenty-Third: In negotiating contracts for features at the Kensington * * * for the 1939-1940 and subsequent seasons, Defendant Exhibitors demanded a clearance in favor of the Kensington over the Bailey Theatre. By contract they obtained a clearance of * * * (7) days over the Bailey * * * from defendants (Loew, Paramount, RKO Universal and United). For the seasons 1939-40 and 1940-41 defendant (Vitagraph) contracted to furnish half of its features * * * to the Kensington * * * with a clearance of * * * (7) days over the Bailey * * * and to furnish the remaining half to the Bailey * * * with a clearance of * * * (7) days over the Kensington * * * . After October, 1942, this system of 'splitting' product was terminated and at all subsequent times (it) imposed a clearance in favor of the Kensington * * * against the Bailey * * * . By contract with defendant (Fox) for the seasons 1939-40 and 1940-41, the Bailey * * * was to obtain film immediately after the run at the Kensington * * * , but in practice (it) delivered film to the Bailey only upon a clearance of * * * (4) days after the Kensington * * * run * * * ."

Plaintiff offered official evidence of a steady population increase in the vicinity of the Kensington and a decrease in the Bailey vicinity during this period (Exhibits 43 and 44). There is no evidence that more than a part of Defendant Exhibitors' pictures were ever played on a prior run at the Bailey.

D. & B. Operating Co., Inc., which by change of name became Dipson, leased the Bailey and began operating it September 1, 1939, and plaintiff demands damages for losses from that date until September 17, 1945, in the total of $145,993. (Par. 25.) These were not absolute losses, as in the case of the Century operation from November 20, 1940, to June 27, 1941, where plaintiff went into the red. Plaintiff made some profit during said interval at the Bailey but claims it would have profited more on prior runs, of which it was deprived by defendants' monopoly and conspiracy.

No defendant in this case has objected to the court's jurisdiction.

The Court referred to the case of *Apex Hosiery Co. v. Leader,* 310 U. S. 469, at pages 497-498 and also Section 13 (a) of 15 U. S. C.,

which expressly provides for the right to select customers. Passages from the following cases were quoted: *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (C. C. A. 2d), 227 F. 46, 49; *United States v. Colgate & Co.*, 250 U. S. 300, 307; *Brosius v. Pepsi-Cola Co.* (C. C. A. 3d), 155 F. 2d 99, 101-102; *Green v. Victor Talking Mach. Co.* (C. C. A. 2d), 24 F. 2d 378, 382.

In *United States v. Colgate & Co., supra*, the Supreme Court said:

"in the absence of any purpose to create or maintain a monopoly, the (Sherman Act) does not restrict the long recognized right of trader or manufacturer engaged in any entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

This doctrine was applied to motion pictures in *Westaway Theatre, Inc. v. Twentieth Century-Fox Film. Corp.* (D. C. D. Md.), 30 F. Supp. 830, aff'd on opinion of court below, 113 F. 2d 932, at pages 836-837.

The *Westaway* case is distinguished in *Ball v. Paramount Pictures* (C. C. A. 3d), 169 F. 2d 317, which plaintiff's counsel quote at length in their reply brief.

In the instant case there is no evidence of any threat to deprive plaintiff of any first run features at the Century or prior showing at the Bailey and no evidence that plaintiff offered any of the distributor defendants more favorable terms than its competitor. Plaintiff did, at the Century, get all of RKO's first run features, except one picture, and one-half of Warners (Vitagraph). Its lessee took over a run-down theatre, which required about $50,000 repairs. Buffalo had lost money on the Century during the two years prior to the expiration of the lease and declined to renew it.

The two further cases relied on by plaintiff's counsel can be distinguished. In *Interstate Circuit v. United States*, 306 U. S. 208, see pages 221 and 225.

In the instant case such denials were emphatically made by all the defendant distributors and by defendant Vincent R. McFaul.

In *William Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738, 164 F. 2d 1021, cert. den. 334 U. S. 811, plaintiff in 1940 decided to enter the first-run business and leased the Erlanger Theatre in Philadelphia, Pa., for 10 years at an annual rental of $12,000. See pages 742 and 743-744.

It appears in that case that Warner Brothers on September 4, 1942, reopened its Mastbaum Theatre one block away from plaintiff's Erlanger and since then "the receipts have amounted to approximately $1,000,000 a year." P. 742. See also page 745.

See also Circuit Court decision, 164 F. 2d 1002, and 306 U. S. at p. 227.

In the instant case there is no evidence that plaintiff offered to pay defendant exhibitors "much higher prices for pictures" than the Shea group or that any of the defendants invited or encouraged the others "to participate in a plan." The Century was an old theatre when Buffalo let its lease expire and required substantial repairs before it could operate. The Bailey and Kensington Theatres are 1.7 miles apart. Before Buffalo gave up the Century, defendant distributors preferred and sometimes insisted that their pictures be played in Buffalo's Hippodrome, Great Lakes or Buffalo Theatres for first run. Moreover the Kensington-Bailey clearances were not uniform after the Dipson interests acquired the Bailey.

As to the Bailey Theatre, plaintiff in its amended complaint claimed a total loss of $145,993 between September 1, 1939, and September 17, 1946, the date of the commencement of this action. This is based on the estimate of its witness William Smith, C. P. A. At the trial an error in arithmetic was disclosed in this estimate and plaintiff's counsel in their brief state that the corrected amount of damage is $145,228.

This Smith estimate is based on the ratio of Bailey admissions for "1938—last full year operated by Shea $143,214" to "1940—first full year operated by Dipson $110,098." The first is 130.08% of the last. The actual admissions at the Bailey are given in eight periods—9/1—12/31/39, 1940-1945, inclusive, and in 1946 to September 17. 130.08% of each is figured as the estimated admissions for each period. The estimated film rent is based on the ratio of the actual film rents and admissions and each estimated admission is multiplied by this ratio, which varies between the limit of 26.59% and 41.27%. The estimated operating expenses are based on the actual amounts for rent and C. O., which witness Smith said means contact office or general office expense. Counsel for defendants strenuously contested the probative value of this estimate. It assumes that the ratio of film rent to the admissions for a given period would be the same if the actual admissions were increased 130.08% for the same period and that the estimated operating expenses for a given period would

be the same as the actual expenses plus the small addition of actual rent and C. O. for the same period.

This basis of computing damages differs entirely from either of the two methods sanctioned in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251.

The evidence discloses that plaintiff played all of Columbia Pictures Corporation and one-half of the Warner (Vitagraph) pictures at the Bailey ahead of the Kensington. Universal pictures were available to plaintiff for exhibition ahead of the Kensington but it did not license them.

Defendants offered in evidence (Exhibits 47 and 48) a complete list of all pictures played at the Kensington ahead of the Bailey and the converse from August 18, 1939, to August 27, 1946. Defendant's Exhibit 47 lists 127 pictures that played the Kensington ahead of the Bailey with a unit total of $32,764.32 and an average unit gross of $258 received at the Bailey. It lists 128 pictures that played the Bailey ahead or clear of the Kensington with a unit total of $27,302.58 and an average gross of $213.30 received at the Bailey. Defendants' Exhibit 48 lists the same pictures but with a different mode of computation, which is thus summarized: "Pictures played clear or ahead of Kensington Theatre: 508 units for a total gross of $112,124.76—average unit gross—$220.72. Pictures played after Kensington Theatre: 3,221 units for a total gross of $743,664.80—average unit gross—$230.88."

Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint and has also failed to give satisfactory proof of damages. The first and second causes of action of the amended complaint must be and are dismissed as to all the defendants. Findings may be submitted to accord with this opinion.

[¶ 62,493] Russell P. Harshberger v. Sidney A. Tarrson, et al.

In the United States District Court for the District of Illinois, Eastern Division. No. 49 C 132. September 22, 1949.

Sherman Antitrust Act

Patented Razor Devices—Exclusive License to Manufacture and Sell—Action for Patent Infringement Dismissed.—A licensee having exclusive right to manufacture, sell, and otherwise dispose of a patented razor device under his own brand name, consented when his manufacturer pledged 45,000 of the patented and trade-marked blades as security for a loan. Upon default of the loan the blades were assigned to the creditor who sold them below prices established by fair trade agreements. An action was thereupon instituted by the patent owner for infringement. It was found that the licensee acted within the terms of his license when he contracted with the manufacturer for the fabrication of the blades and also when he consented to the pledging of the razors to the defendant finance company. Since the razors in question were, the Court ruled, manufactured before termination of the license they were free from the patent owner's monopoly. The patent owner having become entitled to a royalty cannot now assert such articles to be subject to his patent. The defendants' motion for summary judgment was granted.

See the Sherman Act annotations, Vol. 1, ¶ 1270.101, 1270.251.

Illinois Fair Trade Act

Action by Patent Owner—Illinois Fair Trade Act—No Protection of Goodwill Arising Out of Patent.—A patent owner who had licensed the right to manufacture and sell a patented razor device under the licensee's trade-mark sought damages under the Illinois Fair Trade Act for injury to goodwill when the patented devices were sold at prices below fair trade agreements between the licensee and its distributors. The Court ruled that this Act was only intended to protect goodwill arising out of the use of the trade-mark and since plaintiff did not own the trade symbols used to sell the article, he could not recover. Motion to dismiss this part of the complaint was sustained.

See the Illinois Fair Trade Act annotations, Vol. 2, ¶ 8224.06, 8224.30, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7361.

For the plaintiff: Carlson, Pitzner, Hubbard & Wolfe, Chicago, Illinois.

For the defendants: Albert F. Mecklenburger, Sidney Newman, Arthur B. S. Seibold, Jr., Thiess, Olson & Mecklenburger, Chicago, Illinois.

Memorandum

Opinion of WALTER J. LA BUY, District Judge.

[*Digest*] Defendants have filed a motion to dismiss the complaint and for summary judgment based on the pleadings and affidavits of Kellerher and Tarrson and other exhibits.

The facts giving rise to the dispute are as follows: On February 10, 1940, plaintiff, Harshberger, granted an exclusive license to Perry G. Stahly, who, subsequently in accordance with the license terms, assigned it to Birdsell Laboratories, now Stahly, Inc. The license granted Stahly the "exclusive right and license throughout the world under said inventions, said Letters Patent . . ., said applications for Letters Patent, and the Letters Patent to issue therefrom, to manufacture, use and sell razor devices and replacement parts therefor." The license further provided:

> "Royalties shall be considered earned and payable on all razors, razor beds, and handle assemblies (embodying any or all of the inventions forming the subject matter of this Agreement) and on all blades manufactured, sold, consigned, transferred, shipped, stored, warehoused, delivered, or otherwise disposed of by Stahly, or by any party or concern acting under his direction or with his consent."

A supplemental agreement in October 1942 modified the royalty schedule.

On February 1, 1946 and October 31, 1946, Stahly, Inc. contracted with Aircraft & Diesel Equipment Corporation for the latter to manufacture for it about 125,000 patented safety razors at the rate of 10,000 a month. In said contract Aircraft admitted the validity of the patents on the Stahly razor and agreed not to manufacture or sell such razors to anyone except Stahly.

The trademarks "Stahly" and "Live Blade" were registered in 1942 by Birdsell Laboratories and Stahly, Inc. is alleged to be the owner thereof in the companion case of *Stahly, Inc. v. Tarrson, et al.*, 48 C 1849. In making the razors for Stahly, Inc. Aircraft used dies furnished it by Stahly, Inc., which dies also impressed the marks "Stahly" and "Live Blade."

It is averred in the affidavit of B. Ch. Kellerher, President of Aircraft, that Aircraft manufactured the 125,000 razors during or prior to February, 1948. Of the 125,000 so manufactured, Stahly received and paid for 80,000, leaving in the possession of Aircraft 45,000 razors. These are the razors which are the cause of the dispute. As to these 45,000 razors an effort was made to work out some plan whereby Stahly could take and pay for, or sell to others so as to relieve the serious financial condition of Aircraft and Stahly.

On June 18, 1948, Harshberger alleges that because of the default of Stahly to maintain timely payment of earned royalties, plaintiff terminated the exclusive license of Stahly, Inc.

On July 9, 1948, Perry G. Stahly, President of Stahly, Inc., communicated with Mr. Kellerher of Aircraft wherein he indicated that the "Premium and Prize outlets" would be the answer to the disposal of this inventory and thus relieve the parties' financial straits. None of the plans materialized and Aircraft secured a loan from General Factors Corporation to whom Stahly, as president of Stahly, Inc., wrote on July 21, 1948, stating:

> "We understand that Aircraft & Diesel Equipment Corporation has on hand approximately 45,000 Stahly Live Blade Razors which are in the possession of said Aircraft & Diesel Equipment Corporation subject to our order as to shipment.
>
> "In consideration of your making a loan to said Aircraft & Diesel Equipment Corporation, we hereby consent to and agree that we will not assert any rights or claims contrary to your rights to realize upon such security as pledgee thereof in the event of non-payment of the loan."

Aircraft defaulted on its note for $50,000 secured by 45,000 Stahly Live Blade razors and thereupon said collateral was assigned and transferred to Sidney Tarrson "for valuable consideration" in cancellation of the note of Aircraft. Tarrson's affidavit states that more than ten days before selling or offering to sell to the public, he offered to sell to Stahly, Inc. at a price of $2.75, which offer was refused, that he was closing out his entire stock of these 45,000 razors and when sold would no longer deal in them. Harshberger alleges in his complaint that "General Finance Corporation" on October 29, 1948, represented the balance due from Aircraft to be $130,000 and offered to sell the 45,000 razors to plaintiff and others at a price slightly less than $3.00 and alleges "immediately informed General Finance Corporation of his patent rights in said razors" both verbally and later in writ-

ing. On December 8, 1948, the plaintiff alleges he notified defendants of his patent rights in said razors.

The unlawful acts charged to defendants are alleged to be (1) notwithstanding the notice of December 8, 1948, defendants proceeded in willful and wanton disregard of plaintiff's rights to sell said razors and to offer them for sale, (2) defendants have been selling and offering for sale the accused razors at cut-rate prices drastically below the minimum wholesale and retail prices, (3) plaintiff avers on information and belief that many of the razors contain inherent defects likely to cause failure in their mechanisms after a short period of service, and (4) the unauthorized appearance on the market of quantities of the razors together with rumors circulated in the trade have shaken the confidence of plaintiff's customers and dealers. Plaintiff requests appointment of some person to examine issues as to the sales made by defendant and the damages to which plaintiff would be entitled, for injunction to restrain defendant's infringement of plaintiff's patent by using and selling without plaintiff's consent or license, and injunction to restrain further violation by defendants of the Illinois Fair Trade Act (Smith Hurd Ann. Ch. 12½).

The grounds of defendant's motions are (1) failure to state a claim since the complaint while alleging an exclusive license to Stahly, manufacture thereof by Aircraft, and disposal thereof by Aircraft with Stahly's consent, does not deny the razors were made under the license and were therefore freed from plaintiff's patent monopoly, (2) as the license agreement was effective during the time the razors were manufactured by Aircraft said razors were free from the monopoly of plaintiff's patents, (3) plaintiff's only claim is against Stahly for nonpayment of royalties, (4) plaintiff is not a party entitled to bring suit under the Illinois Fair Trade Act since plaintiff has no interest in any name, mark, label or brand under which said razors are sold, (5) defendants have not violated the Illinois act for the transaction complained of comes within the express exception of the Act where goods are being closed out, (6) plaintiff is estopped from suing under the Illinois act because Stahly, Inc., its exclusive licensee waived any rights of action with respect to said razors.

The rule in an action by an owner or assignee of a patent against a purchaser of the patented article has been expressed in *Keller v. Standard Folding Bed* (1894) 157 U. S. 659; and again in *Mitchell v. Hawley,* 83 U. S. 544.

It is clear that Stahly was within his license rights in having the articles manufactured by Aircraft and Harshberger does not claim otherwise herein.

On June 14, 1948, with the termination of Stahly's exclusive license, the issue arises whether the 45,000 razors in question were manufactured during the period of the license with Stahly giving effect to the royalty provision and thereby removing the patented article from the plaintiff's patent monopoly pursuant to the rule announced in the above cases. To this end, the affidavit of B. Ch. Kellerher, president of Aircraft, is submitted wherein he avers that said razors "were all completed on or prior to the month of February, 1948." Plaintiffs in their brief state they are in no position to disprove such allegation without discovery, but have not controverted the affidavit either in their pleadings or affidavits. Under such a situation, the fact so stated in Kellerher's affidavit, who as president of Aircraft would be competent to testify to the fact, must be taken as true. *Hummel v. Riordan,* (D. C. Ill. 1944) 36 F. S. 983; *Gray v. Ameroda Petroleum Corp.* (C. C. A. Tex. 1944) 145 F. (2d) 730. So, where plaintiff neither filed a controverting affidavit nor offered opposing proof, the contention that a substantial controversy of fact existed between the parties cannot be considered on plaintiff's own statement.

It is therefore taken by this court to be the fact that said razors were manufactured before the license agreement was terminated. That being so, the rule as stated by the United States Supreme Court applies and the razors are free from the plaintiff's patent monopoly.

The royalty clause which takes into account the situation under which royalty is deemed earned and payable, "or otherwise disposed of by Stahly or by any party or concern acting under his direction or with his consent" contemplates and intends that Stahly have complete control of the licensed product, with a restriction only on sublicensing. His action in consenting to the pledging of the razors to General Factors Corporation was within the rights given him by his license.

Does the fact that plaintiff notified General Factors Corporation in October 1948 of

its patent rights alter this right of unconditional disposal of the product exercised by Stahly and would the fact that General Factors and Aircraft may be chargeable with knowledge of plaintiff's patent rights operate to restrict the use of said razors by Tarrson? There was no restriction placed by the license agreement upon the manner of the disposition of the razors and plaintiff's having become entitled to their royalty cannot now assert such articles to be subject to its patent monopoly.

The court is of the opinion that plaintiff's pleadings, affidavits and exhibits on file in support of its cause for patent infringement raise no issue of fact to be tried and as to this claim the defendant's motion for summary judgment is granted, and an order has this day been entered in accord herewith.

Plaintiff also alleges damages arising from the alleged violation by defendants of the fair trade agreements entered into by Stahly, Inc. and its distributors and dealers for the maintenance of certain prices. In *Boston Store v. American Graphaphone Co. et al.*, (1917) 246 U. S. 8, the court certified certain questions to the Supreme Court, one of them being:

> "Can a patentee, in connection with the act of delivering his patented article to another for a gross consideration then received, lawfully reserve by contract a part of his monopoly to sell?"

The Supreme Court answered the question in the negative and in arriving at this conclusion, said:

> "* * * In addition, through perhaps an abundance of precaution, we direct attention to the fact that nothing in the decided cases to which we have referred, having regard either to the application of the general law or of the patent law, deprives an inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly of the patent law can be extended beyond the scope of that law or, in other words, applied to articles after they have gone beyond its reach. The proposition so earnestly insisted upon, that, while this may be true, it does not fairly consider the reflex detriment to come to the rights of property of the inventor within the patent law as a result of not recognizing the right to continue to apply the patent law as to objects which have passed beyond its scope, is obviously not one susceptible for judicial cognizance. This must be, since whether, for the preservation of the rights which are within a law, its provisions should be extended to embrace things which it does not include, typically illustrates that which is exclusive of judicial power and within the scope of legislative action."

Has the Illinois Fair Trade Act given such a right of extension to a patent owner who is not the owner of a trademark, is not a manufacturer nor producer or vendor? Plaintiff contends that Section 2 of the Act gives him such a right since his interest in the property and goodwill attached to his invention has been damaged. See Section 2.

In *Triner Corporation v. McNeil,* 363 Ill. 559, the purpose of the Act is aptly set forth at page 577; and again at page 579.

It appears clear, therefore, the protective cloak of the act extends to the protection of the property interest in the good will represented by brands, trademarks and trade names. The plaintiff asserts a goodwill arising separate and apart from that occasioned by the use of any symbol; that goodwill is alleged to arise through the invention itself, separate and apart from the name used to sell it. Plaintiff is the owner of the patent, but is not the owner of the trade symbols "Stahly" and "Live Blade" used to market the device. While it is true such goodwill could be injured through alleged price cutting of the trademarked article it does not appear that the Illinois act covered or intended to cover anything other than the goodwill arising from the use of the trademark by the injured party. Plaintiff's notice given to defendants and to General Factors cannot serve to extend his monopoly to sell when in fact under the license agreement he made no provision for its extension beyond the royalty and sublicensing phase.

There being no cause of action alleged under the Illinois Fair Trade Act, defendant's motion to dismiss that part of the complaint is sustained, and an order has this day been entered dismissing the action.

[¶ 62,494] Stahly, Inc. v. M. H. Jacobs Co., Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 1849. September 22, 1949.

Illinois Fair Trade Act

Trade-mark Infringement—Unfair Competition—Waiver of Rights under Illinois Fair Trade Act.—In the absence of an allegation that the use of a trade-mark has been assumed without authority, a complaint does not state a claim for trade-mark infringement. It was held that a owner of a trade-mark had waived his right to enforce fair trade prices against the defendant finance company when the former wrote "in consideration of your making a loan . . . we hereby consent not to assert any rights contrary to your rights to realize upon such security . . .".

See the Illinois Fair Trade Act, annotations, Vol. 2, ¶ 8224.06, and see the Resale Price Maintenance Commentary, Vol. 2, ¶ 7359.

For the plaintiff: John Rex Allen & Jules L. Brady, Chritton, Schroder, Merriam & Hofgren, Chicago, Illinois.

For the defendants: Thiess, Olson & Mecklenburger, Chicago, Illinois.

Memorandum

WALTER J. LA BUY, District Judge: In the companion case of *Harshberger v. Tarrson,* 49 C 132, the facts concerning the dispute have been set forth.

The motion to dismiss herein leaves for determination the sufficiency of the complaint to state trade-mark infringement and unfair competition through violation of the Illinois Fair Trade Act. It alleges defendant obtained possession of 45,000 razors bearing plaintiff's trade-marks, which razors are in defective condition and were never the property of the plaintiff; that plaintiff is informed and believes defendants are about to sell these razors as those of plaintiff and such sale would infringe the plaintiff's trade-marks.

Infringement of a trade-mark consists in unauthorized use or colorable imitation of a mark already appropriated by another. The present complaint does not allege defendants were guilty of either. It is stated that denial by plaintiff that it was the owner of the razors or that the razors were never the property of the plaintiff establishes that the trade-marks used thereon are either copies or counterfeits and that the sale of them bearing plaintiff's mark is an actionable wrong no matter how the marks happened to become applied to the goods. While this may be true, such a denial of ownership of goods does not allege that defendant without authority assumed the usage of the trade-mark and in the absence of such an allegation it cannot be said that the complaint states a claim for trade-mark infringement. It is the usage of the trade-mark in an unauthorized manner which is the basis of a trade-mark infringement action.

The amended complaint further alleges violation by defendants of fair trade agreements fixing the prices of the razors in that defendants have sold, offered to sell and intend to sell said razors at prices below the minimum prices established by plaintiff and its distributors and dealers. The pertinent question is whether Stahly waived the right to proceed in protection of that contract right by virtue of the letter sent to General Factors Corporations on July 21, 1948.

The salient part of the letter reads:

> "In consideration of your making a loan to said Aircraft & Diesel Equipment Corporation, we hereby consent to and agree that *we will not assert any rights or claims contrary to your rights to realize upon such security as pledgee thereof, in the event of non-payment of the loan.*"

Waiver has been defined as a "voluntary and intentional relinquishment or abandonment of a known existing right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; . . ." 67 Corpus Juris 289. The question of consideration appears settled in the letter itself, being the granting of a benefit to a third party. The court is of the opinion the above paragraph of the letter constitutes a waiver and abandonment of all rights plaintiff could assert as to the razors without regard to future possession by any other person.

An order has this day been entered sustaining the defendant's motion to dismiss the plantiff's amended complaint.

[¶ 62,495] Opinion of the Attorney General of Minnesota.

Addressed to Mr. James W. Clark, Commissioner, Department of Business Research and Development, by J. A. A. Burnquist, Attorney General, Charles E. Houston, Assistant Attorney General. September 15, 1949.

Minnesota Fair Trade Act

Closing Out Sales—Notice and Offer to Resell—Strict Compliance with Section 325.11. —A retailer's right to close out his stock of a particular commodity without being bound by his fair trade contract in respect to such commodity, has limitations, in the opinion of the Attorney General of Minnesota. The retailer is required first to give to the producer or distributor of the commodity prompt and reasonable notice in writing of his intention to close out stock and an opportunity to purchase such stock at the original invoice price. Without giving notice to the manufacturer of his intention to close out the stock, the mere offer to resell to the manufacturer is not a strict compliance with this requirement.

See the Minnesota Fair Trade Act annotations, Vol. 2, ¶ 8424, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7278.

Your letter of September 8 presents for consideration these

Facts

A retailer, who had purchased from a manufacturer certain goods, the retail price of which, it was agreed between them, was governed by a contract which fixed the minimum price for resale in conformity with MSA 325.08, made an offer to the manufacturer of the goods to resell to the manufacturer such goods at the original invoice price. The manufacturer refused to accept the offer to repurchase. The retailer then resold the goods to another retailer. The second mentioned retailer thereupon, without notice to the manufacturer, sold such goods at retail at less than the price stipulated in the contract aforesaid.

Upon these facts you submit the

Question

Was the sale by one retailer to another in conflict with MSA 325.11 (1)?

Opinion

We first consider MSA 325.08. This section permits the making of a contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor, which commodity is in free and open competition with commodities of the same general class produced or distributed by others. This section provides that such a contract shall not be considered in violation of the laws of this state because it contains a provision that the buyer will not resell such commodity at less than the minimum price stipulated by the seller. It shall not be considered in violation of the laws of this state because it contains a provision that the buyer will require any dealer to whom he may resell such commodity an agreement that he will not in turn resell at less than the minimum price stipulated by the seller. It is not in violation of the law because it provides that the seller will not sell the commodity to a wholesaler unless the wholesaler agrees not to resell the same to a retailer unless the retailer will, in turn, agree not to resell the same except to consumers for use at not less than the stipulated, minimum price, and the wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell. Such contract is not contrary to law because it contains a provision that the person to whom the goods are sold will not sell to any retailer unless the retailer will agree not to sell the same except to consumers for use and at not less than the stipulated, minimum price.

Sec. 325.11 refers to Sec. 325.08. It provides that a contract made under the provisions of Sec. 325.08 shall not be considered to preclude the resale of any commodity covered thereby without reference to the contract when the owner of a stock of merchandise is closing out his stock for the *bona fide* purpose of discontinuing dealing in that commodity and he gives plain notice of that fact to the public. His right to close out his stock of a particular commodity without being bound by his fair trade contract in respect to such commodity has limitations.

He is required to first give to the producer or distributor of the commodity prompt and reasonable notice in writing of his intention to close out such stock and an opportunity to purchase such stock at the original invoice price.

In the facts under consideration the retailer who had made the contract under Sec. 325.08 offered to resell the protected goods to the manufacturer, but the statement of facts does not show that he gave the manufacturer notice in writing of his intention to close out the stock.

My conclusion would, therefore, be that upon these facts if the retailer, who purchased from the manufacturer, gave the manufacturer notice in writing of his intention to close out such stock, his sale to the second retailer was not governed by the contract made under Sec. 325.08. Merely offering to resell to the manufacturer was not enough. Without giving notice to the manufacturer as provided in Sec. 325.11 of his intention to close out the stock, the mere offer to resell to the manufacturer was not a compliance with Sec. 325.11.

[¶ 62,496] Ball, Trustee v. United States, Paramount Pictures, Inc., et al.

In the Supreme Court of the United States. October Term, 1949. No. 122. October 10, 1949.

Sherman Antitrust Act

Film Industry—Motion to Intervene Denied—Order Upheld on Appeal.—An order denying an application of a trustee for motion picture interests to intervene in an antitrust action charging eight prominent film companies with violations of the Sherman Act, and to have the District Court include in its judgment provisions for the public interest protecting the petitioner, was affirmed.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273, 1530, 1590.

PER CURIAM: The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE CLARK took no part in the consideration or decision of this case.

[¶ 62,497] Partmar Corporation v. United States.

In the Supreme Court of the United States. October Term, 1949. No. 175. October 10, 1949.

Sherman Antitrust Act

Film Industry—Intervention in Regard to a Consent Decree—Order Upheld on Appeal.—A district court required a motion picture company to divest itself of interest in a number of theatres and separate its exhibition business from its production and distribution business. Subsequently an application was made to intervene to have the court enjoin the restrictive contracts as to the distribution and use of the motion picture company's pictures and to require that the theatre of which the petitioner was a lessee be divested as an illegal fruit of the defendant movie company's monopoly. The application was denied and affirmed on appeal.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273, 1530, 1590.

PER CURIAM: The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE CLARK took no part in the consideration or decision of this case.

[¶ 62,498] Opinion of the Attorney General of North Carolina.

Addressed to Mr. R. W. Winston, Chairman of the State Board of Alcoholic Control by Harry McMullan, Attorney General. August 4, 1949.

Sherman Antitrust Act

Liquor Distributors—Enforcement of Liquor Laws—Agreement Not to Supply.—The refusal by whiskey distillers to supply distributors who sell to exporters dealing with North Carolina bootleggers would not be a violation of the Sherman Antitrust Act, in the opinion of the Attorney General of North Carolina.

See the Sherman Act annotations, Vol. 1, ¶ 1660.

I received your letter of July 30th enclosing to me a memorandum outlining the request made by you to the Distillers on a recent trip to New York, seeking to secure their cooperation in discontinuing supplying distributors or jobbers who were in turn selling to exporters or wholesalers, who in their turn were selling to bootleggers of North Carolina. You further state in your memorandum as follows:

> "It was requested that the Distillers write a letter to their Distributors and/or Jobbers advising them that if they were selling whiskey to exporters or wholesalers engaged in selling to North Carolina bootleggers that such practice must be stopped, further that if they learned of any future practice of this nature that the Distillers would discontinue furnishing them with their proceeds. It was requested that a copy of such letter from the Distillers to the Distributors and/or Jobbers be mailed to the Chairman of the N. C. ABC Board."

I note that the question has been raised by one of the Distillers as to whether or not compliance with your request would be a violation of the Anti-Trust Laws.

I have had an investigation made on the subject by a member of my staff, Mr. John R. Jordan, and I enclose to you a copy of this memorandum. You will observe that Mr. Jordan's memorandum states in conclusion that while the cases do not offer a definite answer to the query, it appears from a survey of analogous cases that the refusal by whiskey distillers to supply distributors who sell to exporters dealing with North Carolina bootleggers would not be a violation of the Sherman Anti-Trust Act.

I am of the opinion that this conclusion is correct and that the Courts would certainly hold that the policy which was outlined by you for the distillers would not be in any sense a violation of the Sherman Anti-Trust Law. I am so confident of this position that I think you would be entirely justified in treating any distillers who refused to comply with your reasonable request as disclosing an unwillingness to cooperate with North Carolina authorities in enforcing its laws against the sale of intoxicating beverages in this State. Under such circumstances, I think you would be justified in taking such action as to the products of such distillers as you would feel was warranted.

[¶ 62,499] Opinion of the Attorney General of Michigan.

Addressed to Mr. P. H. Anderson, Acting Director, Purchasing Division, Department of Administration, by Stephen J. Roth, Attorney General. May 2, 1949.

Michigan Fair Trade Act

Fair Trade Act for Special Benefit—Restraint of Competition—State Not Bound by Restrictive Statute.—Since the Michigan Fair Trade Practice Law is, in the opinion of the Attorney General of that State, an act for the special benefit of manufacturers interested in restraining competition, it is restrictive in nature. The State, therefore, should be held not to be bound by this Statute or contracts made pursuant to its authority. To make the benefits of competition available to the state as a buyer, the seller must also be free from the restrictive provisions of the Act and of contracts made thereunder.

See the Michigan Fair Trade Act annotations, Vol. 2, ¶ 8404, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7288.

This will acknowledge receipt of your letter of April 20, 1949 requesting the opinion of the Attorney General as to whether the so-called Fair Trade Practice Law applies to sales of merchandise to the State of Michigan. The statute in question, Section 19.321, M. S. A. Supp.; Section 445.151, *et seq.*, Compiled Laws of 1948, provides:

> "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of Michigan by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity at less than the price stipulated by the vendor.
>
> 2. That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell at less than the price stipulated by such producer or vendee.
>
> * * *
>
> "Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby, and may be enjoined by a court of competent jurisdiction."

A part of Section 1 not quoted above deals with certain exceptions not here material.

This statute, if it applies at all to sales to the State of Michigan, permits private parties to dictate by contract between themselves, the minimum price at which the state may purchase practically every item of merchandise needed by it which is found in the open competitive market because while the state is not in terms prohibited from purchasing from one willing to sell at less than the price fixed by a statutory agreement, the means exist whereby nearly all sellers may be restrained by injunction from selling to the state for a price below that fixed by the statutory agreement, a method quite effective in setting the price at which the state may buy in the open market.

A legislative intent to place such control over a large element of the cost of the operation of the state government in the hands of private parties may not lightly be inferred.

> "It is the general rule that the State is not bound by the general words of a statute which if applied would operate to trench on its sovereign rights, injuriously affect its capacity to perform its functions or establish a right of action against it, unless the contrary is expressly declared or necessarily implied." *Lewis' Sutherland on Statutes & Statutory Construction*, Vol. 2 (2d) par. 514. *Butler v. Merritt*, 113 Ga. 238.
>
> "General words of a statute do not include or bind the government by whose authority the statute was enacted, where its sovereign rights, prerogatives or interests are involved. It is bound only by being expressly named or by necessary implication from the terms and purposes of the act." *Black on Interpretation of Statutes*, pgs. 119-120.
>
> "The sovereign rights are never impaired by general legislative encroachment unless the statute expressly declares such intent." *Lyman v. Old Age Assistance*, 373 Ill. 27.

See also: *Miller v. Board of Road Com'rs*, 297 Mich. 487; *Wyandotte v. State Board*, 278 Mich. 47; *City of Big Rapids v. Mecosta County Supervisors*, 99 Mich. 351; *People v. Ingalis*, 238 Mich. 423.

Theoretically, at least, all statutes are for the public good. However, the statute under consideration is not one for the public good within the meaning of the exception to the rule that restrictive statutes do not apply to states. It is rather an act for the special benefit of manufacturers and others interested in keeping up the price of their products. It legalizes certain contracts in restraint of competition and the beneficial effect thereof is limited almost, if not entirely, to the parties to such contracts and the statute operates to the detriment, financially at least, of everyone else. The state, therefore, should be held not to be bound by this statute or by contracts made pursuant to its authority.

The purpose served by holding that the state is not bound by the Fair Trade Practice Act is to permit the state to buy commodities in an unrestricted competitive

market where the benefits of natural competition will be reflected in the price the state will be required to pay. As indicated in the request for this opinion, the effect of freedom from the restrictions of the act under consideration will in the case of some commodities reduce the price to be paid by the state as much as 15 percent. To make the benefits of such competition available to the state as a buyer, the sellers must also be free from the restrictive provisions of the act and of contracts made thereunder. To say to the state "You are free to buy in a competitive market but no one is free to sell to you in such market" is to say to the state in effect that it may not buy in a competitive market at all. The only conclusion which constitutes realistic interpretation of the sovereign rights of the state is one which holds that both the state and any seller to it are free from the obligations of any so-called fair trade contract made pursuant to the statute under discussion and that the remedies provided by such statute against those who sell in violation of so-called fair trade contracts have no application to transactions to which the state is a party and are not available either against the state or the other party to such transactions.

Your question as to whether the so-called Fair Trade Practice Law has any application to the state or to sales to it or to any parties to such sales, is accordingly answered in the negative.

[¶ 62,500] Opinion of the Attorney General of Idaho.

Addressed to Mr. D. A. Stubblefield, Commissioner, Department of Agriculture, by Don J. McClenahan, Assistant Attorney General, for Robert E. Smylie, Attorney General. September 26, 1949.

An Idaho Act to Prohibit Unfair Marketing Practices in Dairy Products

Fluid Milk Market—Quota Basis of Payment—Price Discrimination.—The practice on the part of milk distributors of paying producers at a more favorable rate for milk quantities coming within average production quotas and at a less favorable rate for milk of the same grade and quality offered over and above such quotas, does not violate the Idaho law which prohibits discrimination and unfair competition in buying and selling dairy products as between different communities of the state.

See the Idaho Anti-Price Discrimination Act annotations, Vol. 2, ¶ 8212.

The Bureau of Dairying recently asked this office whether the quota basis of payment for producers of fluid or bottled milk is in violation of any of the laws of the State of Idaho. The facts involved in this situation are set forth in their letter and read as follows:

"At the present time it appears to be the practice of some processors and distributors of dairy products to establish a quota basis of payment for producers of fluid or bottled milk. As for example a producer offers for sale during September an average of 500 pounds of milk per day for which he receives twenty cents ($.20) per pound butter fat above the price paid for manufacturing or process milk which is made into butter and non fat milk powder. This average of 500 pounds then is established as the producers quota for the year.

"Then supposing that during the months of April, May, June and July, said producer ships 700 pounds per day of milk, of the same quality and since he is on the 500 pound per day quota he receives the premium on the 500 pounds or twenty cents ($.20) per pound fat above manufacturing or process milk price, but is paid only the processed or manufacturing milk price for the 200 pounds per day average which exceeds the quota as set by the distributor."

There has been some contention that this practice is in violation of the law prohibiting discrimination and unfair competition in buying and selling dairy products. (Chapter 10, Title 37, Idaho Code). As to discrimination in the buying of dairy products, Section 37-1001, Idaho Code, reads in pertinent part:

"37-1001. Discrimination by Buying at Higher Price—Prima Facie Evidence—Grades of Cream.—a. Any person, firm, corporation, or other organization, foreign or domestic, engaged in the business of buying milk, cream or butter fat for the

purpose of manufacture, that shall discriminate between different sections, communities, towns, villages or cities of this state, by buying such commodity at a higher price or rate in one section, community, town, village or city, than is paid for the same commodity by said firm, person, corporation, or other organization in another section, community, town, village or city, after making due allowance for the difference, if any, in the actual cost of transportation from the point of purchase to the locality of manufacture, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful . . ."

This particular section strikes at any discrimination in the buying of milk, cream, or butterfat as between different sections, communities, towns, villages or cities of this state. It prohibits the purchase of dairy products at a higher price or rate in one section, community, town, village or city than is paid for the same commodity by the same firm or person in another section, community, town, village or city. From the information presented in the Bureau's letter there appears to be no discrimination between communities, etc., by the various processors in their purchases from the producers. The quota system described by the Bureau does not indicate the discrimination prohibited by the above section.

This same chapter also prohibits unfair competition in the buying and selling of dairy products. This provision is in Section 37-1002, Idaho Code, which reads in part as follows:

". . . Any person, firm, corporation or other organization, foreign or domestic, doing business in this state and engaged in the purchase, sale, manufacture or distribution of any dairy product, that shall pay a price for any dairy product or do any act with the intention or for the purpose of creating a monopoly, or destroying the business of a competitor in any locality, or restraining trade or preventing, stifling or limiting competition by any person in such business or who in good faith intends or attempts to engage in such business, shall be guilty of unfair discrimination which is hereby prohibited and declared unlawful."

Also, Section 37-1003, Idaho Code, prohibits any scheme of special rebates, collateral contracts, or any device of any nature whereby discrimination is made possible.

The statement in the letter does not show that the processors and distributors are paying a price for any dairy product, or committing any act, with the intention of or for the purpose of creating a monopoly. The question of stifling or limiting competition does not arise from mere use of the quota system. There must be other acts evidencing an intention to create a monopoly or a monopolistic situation tending toward the destruction of the business of a competitor. Such acts do not appear in the facts which have been presented.

From the facts presented by the Bureau, it appears, therefore, that the quota basis of payment to producers of fluid or bottled milk is not an improper or unlawful practice. Such a practice may be productive of undesirable and unsatisfactory results but we find no barrier in the statutes which indict the system as unlawful.

[¶ 62,501] Ronson Art Metal Works, Inc. v. Rothman.

In the New York Supreme Court, New York County. Special Term, Part III, 122 N. Y. L. J. 779. October 10, 1949.

New York Fair Trade Act

Established Price for Trade-marked Products—Forfeiture—Abandonment.—A motion for a temporary injunction to restrain the sale of trade-marked products at less than the established resale prices was granted. There was no forfeiture or abandonment of the right to enforce a resale price policy.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.83, and the Resale Price Maintenance Commentary, Vol. 2, ¶ 7359.

MR. JUSTICE HOFSTADTER. Motion for a temporary injunction to restrain the sale of the plaintiff's trademarked products at prices less than the resale prices fixed by the plaintiff, in violation of the State Fair Trade Act (General Business Law, Article 24A) is granted. The plaintiff's failure to take action against all violators does not

forfeit its right to relief against the offending defendant (*Seagram-Distillers Corp'n v. Ackerman*, 263 App. Div., 106; *Nat. Distillers v. Columbus Circle Liquor Store*, 166 Misc., 719). It is not shown that the plaintiff's inaction, if any, was such as to constitute an abandonment of its maintenance of resale price policy. The action will, however, be set for trial for October 25, 1949, for which date the plaintiff will file a note of issue which the clerk is directed to accept. Undertaking $1,000. Settle order.

[¶ 62,502] North Little Rock Transportation Co., Inc. v. Casualty Reciprocal Exchange, et al.

In the United States District Court for the Eastern District of Arkansas, Western Division. Civil Action No. 1780. September 8, 1949.

Sherman Antitrust Act

Insurance and the Antitrust Laws—Price-Fixing—State Regulation.—In suing 49 casualty insurance companies, a bureau of casualty underwriters, and a rating agency, a taxicab company alleged that the action of these parties in cancelling its insurance contracts and that the action of the rating bureau in supplying certain information alleged to be responsible for its higher premium rate, constituted a pattern of action followed under contract or conspiracy in violation of the Sherman Act. It was held that the taxicab company was not entitled to treble damages or injunctive relief; the defendants' motion for summary judgment was granted. In the absence of public regulation the price-fixing activities of the bureau would constitute a violation of the Sherman Act, the court ruled. However the federal statute was not violated by activities which were authorized by the McCarron-Ferguson Act, a valid regulatory statute.

See the Sherman Act annotations, Vol. 1, ¶ 1240.2328.

For the plaintiff: Frederick U. Andres, Little Rock, Arkansas.

For the defendants: Gannaway & Gannaway, Little Rock, Arkansas, for Casualty Reciprocal Exchange; James B. Donovan, New York, New York, and Wright, Harrison, Lindsey & Upton (formerly Buzbee, Harrison & Wright), Little Rock, Arkansas, for all defendants other than Casualty Reciprocal Exchange.

For the intervenor: J. Herbert Graves, State Capitol, Little Rock, Arkansas.

Opinion of TRIMBLE, District Judge.

Facts

[*Digest*] The plaintiff, a taxicab company, operating in the area of Little Rock, Arkansas, brings this action against the Casualty Reciprocal Exchange, the National Bureau of Casualty Underwriters, and forty-nine casualty insurance companies, all authorized to and doing business in Arkansas.

National Bureau of Casualty Underwriters, referred to herein as Bureau, a voluntary, non-profit, unincorporated association of stock companies engaged in writing casualty insurance, is a rating agency. As such it secures and analyzes pertinent data from which it establishes for its members and subscribers, writing rules, risk classifications, policy provisions, forms, manual rates, minimum premiums and rating plans.

The Bureau is licensed and authorized to act as a rating organization for automobile liability insurance by the State of Arkansas, and all of the casualty insurance companies, parties to this action, are members or subscribers of the Bureau, except the Casualty Reciprocal Exchange. From July 24, 1946 to May 16, 1948 plaintiff was insured by defendant Exchange for automobile liability, covering its taxicab operations. The permissible loss ratio for such insurance is 64% of premiums, and the losses attributable to claims against the plaintiff during that period amounted to 136.1%. Plaintiff was paying to Exchange ordinary manual rates, based upon the average experience of all insureds, not adjusted because of the particular experience of individual risks. Effective May 16, 1948, Exchange cancelled the policy in accordance with its terms.

After seeking insurance elsewhere and being refused, plaintiff applied to the Arkansas Automobile Risk Plan, which was a

cooperative undertaking by all insurers licensed to transact such business in Arkansas, and under which each insurer accepts an equitable number of risks, in good faith seeking such insurance, and unable to obtain it. The plan was organized in 1947 pursuant to Act 116 of Acts of Arkansas, 1947, with the approval of the Insurance Commissioner of Arkansas. Under this plan the plaintiff was assigned to defendant Aetna Casualty and Surety Company, (a member of the Bureau), the risk was accepted and policy issued effective May 16, 1948. Aetna accepted an initial premium, did not apply the ordinary manual rates, the final premium to be computed when proper rate-making data became available, and provided that in calculating the proper rate for the risk, consideration would be given to plaintiff's experience.

At Aetna's request the Exchange furnished through proper channels information as to the accident experience of plaintiff under the Exchange policies. Although this information was not complete, when received it was furnished to the Bureau, and Aetna requested the Bureau to establish a rate for the risk.

Under the submission to the plaintiff of this rate so established, it complained to the Arkansas Insurance Department. The Department, at plaintiff's request, obtained from Exchange and sent to Bureau, all other obtainable information on plaintiff's experience under the Exchange policies.

On the basis of the completed information, Bureau recalculated the rate for the risk in accordance with the rating plan on file with the Department. The source from which the information came was not determinative of the rate and the rate would have been the same regardless of source of information.

Demand for payment of the established rate was made on July 29, 1948, with cancellation of the policy as the alternative, and the full sum was paid on July 31, 1948.

While members and subscribers to Bureau write 56% of all automobile liability insurance written in Arkansas, there are insurance carriers writing such insurance which are members of another licensed bureau, and insurers not members or subscribers to any rating bureau.

With two exceptions all members and subscribers of the Bureau use the same rates, rating plan and coverage.

After paying the additional premium demanded, plaintiff took no further action before the administrative body of the State, the Insurance Commissioner, and did not communicate further with any of the parties to this action.

Allegations

The action was begun on August 17, 1948, and, after setting up the facts, plaintiff says: that the conduct of the defendants described above "is a pattern of action followed under contract or conspiracy between them in restraint of trade or commerce among the several states and violates the Sherman Act.

Complaint also alleges that Act No. 116 of the Acts of the General Assembly, 1947, p. 265, Arkansas Statutes, 1947, Annotated, Vol. 6, p. 179, Secs. 66-417 *et seq.,* violates the provisions of Section 1 of the Sherman Act "to the extent that it purports to justify the conduct of the defendants and to give to said conduct the color of legality."

Plaintiff also contends that Public Law No. 15, the McCarron-Ferguson Act, Title 15 U. S. C. Secs. 1011, *et seq.,* is unconstitutional, in that: Congress may not delegate to individual states power to legislate within the Commerce Clause of the United States Constitution, and, Congress cannot suspend general laws for a period of time except under the war powers.

It then contends that if Public Law 15 is found to be constitutional, it is not applicable to Act 116 of the General Assembly of the State of Arkansas, 1947.

It is also contended that Act 116 of the Acts of the General Assembly of the State of Arkansas is invalid in that it conflicts with the State Constitution and the antitrust laws of Arkansas.

And that the acts of the defendants were not authorized by Act 116.

Briefs were submitted by all interested parties, and the cause is now submitted upon the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Statement of Applicable Law

The Court concludes the law to be:

The Sherman Act applies to transactions of insurance. *United States v. South-Eastern Underwriters Association,* 322 U. S. 533.

The McCarron-Ferguson Act, is constitutional. *Prudential Insurance Company v. Benjamin, Insurance Commissioner,* 328 U. S. 408. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, rehearing denied p. 658. The Sherman Act is not violated by acts authorized and regulated by state statute. *Parker, Director of Agriculture, et al. v. Brown,* 317 U. S. 341 at page 351. Also *Prudential Insurance Co. v. Benjamin, etc. supra.* This is also expressly provided by the McCarron-Ferguson Act, which exempts insurance from the Sherman Act to the extent that such business is regulated by state law. Act 116 of Arkansas, 1947, constitutes proper regulation within the meaning of that statute.

The McCarron-Ferguson Act is not a delegation "to individual States power to legislate in the regulation of insurance transactions coming within the Commerce Clause," but is a proper division of power between the United States and the several States, a rendering unto Caesar the things that are Caesar's. *Connecticut Light & Power Co. v. Federal Power Commission,* 324 U. S. 515. In this case the court found that the congressional action in extending federal jurisdiction to only "those matters which are not subject to regulation by the States—" constituted a legal standard that must be given effect in resolving conflicting claims by federal and state authorities of power to regulate. (p. 531.) Also *Prudential Insurance Company v. Benjamin, etc., supra.*

Act 116 of the Acts of the General Assembly of Arkansas is not in contravention of the laws or constitution of the State of Arkansas. *National Union Fire Insurance Company v. Dickinson, Auditor, et al.,* 128 Ark. 367. It is a valid regulatory statute and the acts of the defendants were within its scope, and in accordance with its provisions.

Nowhere in this record does it appear that any facts or conditions existed which would justify plaintiff in fearing intimidation, boycott or coercion, or show that any such boycott, intimidation or coercion was attempted or threatened. Certainly the fact that plaintiff was advised that the insurance contract would be cancelled in accordance with its terms, unless premium was paid at the established rate is not sufficient. Plaintiff already knew this when it accepted the contract, and common business practice would have brought home to it this knowledge and information.

The plaintiff is not entitled to judgment for treble damages nor for injunctive relief. *Keogh v. Chicago & Northwestern Ry. Co. et al.,* 260 U. S. 156. Defendants are entitled to have a summary judgment and summary judgment will be entered, adjudging the costs against the plaintiff. *International Salt Co. v. United States,* 332 U. S. 392.

[¶ 62,503] In the Matter of New England Theatres, Inc. and M & P Theatres Corporation v. Louis B. Lausier.

In the United States District Court for the Southern Division of the District of Maine. Civil Action No. 520. October 25, 1949.

Sherman Antitrust Act

Motion Picture Industry—Normally in Competition—Pooling Agreement Ordered Terminated.—In an action brought for a declaratory judgment, agreements to operate two theatres as a unit were ordered to be terminated. The two theatres were found to be normally in competition within the meaning of a decree entered in an action between the Government and certain film corporations, including the plaintiffs' parent company, which enjoined the making or performing of this type of agreement. In deciding the issue of whether or not the two were competitors, the Court declared that the important factor was their location. When operating within the same competitive area, two theatres are normally in competition even though the physical appointments and the type of picture shown by each are not comparable.

See the Sherman Act annotations, Vol. 1, ¶ 1220.273, 1640.689.

For the plaintiffs: Arthur G. Whittemore, Boston, Massachusetts.

For the defendant: Abraham Rudman, Bangor, Maine.

Opinion of the Court

Opinion of CLIFFORD, J., District Judge.

[*Digest*] This is a proceeding which seeks from this Court a declaration of rights and responsibilities existing under certain contracts entered into by the parties. The remedy requested is that set forth in the Declaratory Judgment Act.

Jurisdiction of this Court rests on two grounds. First, this proceeding concerns the application of the terms of a decree, (*United States v. Paramount Pictures, Inc., et al.,* 66 F. Supp. 323, as modified, 70 F. Supp. 53 (Dist. Ct., S. D., N. Y., 1946)), issued by a United States Expediting District Court for the Southern District of New York, under the Sherman Act Sections 1 and 2. Second, this is also a proceeding in which the plaintiff, New England Theatres, Inc., is a Delaware corporation, the plaintiff M & P Theatres Corporation is a Massachusetts corporation, and the defendant is an individual and a citizen of Maine, thus fulfilling the jurisdictional requirement of diversity of citizenship. The matter in controversy exceeds the sum of three thousand dollars.

Consideration of the present case involves no clash of jurisdiction with the United States Expediting Court for the Southern District of New York. The modified decree of the Expediting Court, *United States v. Paramount Pictures, Inc.,* 70 F. Supp. 53, 76, includes the ruling that "jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment *and no others* to apply to the Court at any time for such orders or directions as may be necessary. . . ." (emphasis added). In the present case, the defendant was not a party to the original judgment. As will appear, plaintiffs are subsidiaries of Paramount Pictures, Inc., one of the defendants in the original action; but neither plaintiff was itself a party to that action. The decree of the Expediting Court supports an inference that other courts may deal with questions involving persons not parties to its original judgment. This Court will therefore refuse to decline jurisdiction of the present case on any ground of comity.

New England Theatres, Inc. is now and was in August, 1937, owner of the Central Theatre in Biddeford, Maine. Louis B. Lausier is now and was in August, 1937, the lessee of the City Theatre in Biddeford, Maine. On August 26, 1937, New England Theatres, Inc. and Lausier executed a written agreement which provided that the City Theatre and the Central Theatre should be operated as a unit and that profits, after certain deductions, should be shared between the two parties. A copy of this contract is incorporated in the complaint as Exhibit No. 1 and still governs the business relations between the parties to it. Pursuant to authority given in this contract, New England Theatres, Inc. entered into a contract with the plaintiff M & P Theatres Corporation under which the latter agreed to furnish management services for the City and Central Theatres for certain compensation. This contract is incorporated in the complaint as Exhibit 2, and is also still in effect.

The plaintiffs have brought this action for a declaration as to the continued validity of the above-mentioned agreements as the result of litigation between the United States Government and certain producers, distributors, and exhibitors of film, including Paramount Pictures, Inc., the parent of the plaintiff corporations. This litigation, stated in 1938, proceeded before a special expediting court convened in the Southern District of New York, which issued an opinion and decree (*U. S. v. Paramount Pictures, Inc., et al.,* 66 Fed. Supp. 323, as modified, 70 Fed. Supp. 53 (Dist. Ct., S. D., N. Y., 1946)) enjoining the defendant from

> ". . . making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit . . ." 70 Fed. Supp., at p. 74.

Plaintiffs, in this Court, sought to bring about a final determination of the validity of the contracts by means of a summary judgment. It was adjudged, as a result of the summary judgment proceeding that:

> "A pooling agreement exists between one of the plaintiffs and the defendant, whereby the theatres under their control are operated as a unit. Their policies are collectively determined, and profits are shared by a prearranged percentage."

However, the Court found that:

> "There appears a genuine issue as to whether such theatres would be 'normally in competition' in the absence of any pooling agreement, such issue being one of a material fact."

The issue before this Court is a narrow one: Are the two Biddeford theatres, the City and the Central, "normally in competition" within the meaning of that phrase as used in the decree of the Expediting

Court? *United States v. Paramount Pictures, Inc., et al.*, 66 F. Supp. 323 (D.C. S.D., N. Y., 1946), aff'd in part, rev'd, in part, 334 U. S. 131, (1947). The plaintiffs contend that they are normally in competition; the defendant contends that they are not normally in competition.

Definition of Exhibitor

Both plaintiff and defendant have been heard concerning the further issue whether or not the defendant is an "exhibitor" within the meaning of that part of the decree enjoining pooling agreements.

Defendant has contended that he is not and has not been experienced in the business of exhibiting motion pictures; that he purchased the lease of the City Theatre only on the assumption that plaintiffs would undertake the active management of it; that he is merely an investor and not an operator or an exhibitor, and thus that the decree, which in terms applies to pooling agreements among exhibitors, should not be held to apply to the contracts at issue in this case.

The term "exhibitor" in the part of the decree pertinent to this case has a meaning different from the term "operator". The decree speaks of agreements whereby theatres of two or more exhibitors are operated as a unit, the implication being that one or more of the cooperating exhibitors may be wholly inactive in the management of the pool. Again, the concept of "exhibitor", insofar as the decree enjoining pooling agreements is concerned, is that of "theatre owner", as appears from the use of the two words, "exhibitors" and "owners", in conjunction in the following excerpt from the decree:

> ". . . theatres of two or more exhibitors normally in competition are operated as a unit or . . . whereby profits of the pooled theatres are divided among the owners. . . ." (*U. S. v. Paramount Pictures, Inc.*, 66 F. Supp. 323, at 358.)

The Supreme Court, in softening the effect of the lower court's decree, by exempting from its operation cases which "involve no more than innocent investments by those who are not actual or potential operators", (*U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, 153) (1947) was referring to cases of joint ownership and not specifically to cases involving pooling agreements between theatres separately owned.

This Court is of the opinion that the defendant is not merely an investor but is an exhibitor within the meaning of the decree relating to pooling agreements. The defendant when he first took a lease had no assurance that plaintiffs would in fact conclude an agreement with him to operate the theatre, and that he therefore initially undertook all the risks of an operator.

Defendant's first argument fails and he is subject to the injunction of the New York decree if the two theatres would be, in the absence of the existing contracts, "normally in competition."

Physical Appointments of Theatres

This Court finds that the City Theatre is an old fashioned hall, located on the second floor of the City Building, owned by the City of Biddeford, and was constructed over fifty years ago. The City Theatre is poorly appointed having a drab and dingy entrance, lobby, and rest rooms, with most of its auditorium seats on the flat floor and many of its side seats giving a distorted view of the screen. Some of the seats have been broken and patched. Very little money has been expended on its maintenance. In short, as one witness, experienced in the motion picture business, characterized the City Theatre, ". . . in the parlance of our industry, I would call that a shooting gallery." The City Theatre has for a number of years, under the combined management, shown first-run pictures of the so-called "B" or "action" variety, and has charged lower admission prices than has the Central.

The Central Theatre, on the other hand, located within a few blocks of the City Theatre, is a completely modern street-level theatre, was newly constructed within the past several years, with new appointments throughout, and offering a good view of the screen from all seats. Under the combined management the Central has consistently shown the first-run of the top grader or "A" type pictures, and has charged higher admission prices than those of the City. The evidence is undisputed that the combined gross income of the two theatres has come roughly 70% from the Central and roughly 30% from the City.

Competition Defined

The phrase "normally in competition" refers to the competitive situation which would exist between the theatres apart from the peculiar circumstances of a combined management, or pooling agreement. There

seems to be little question that Central would be able to compete successfully with City should the combined management agreement be dissolved, and that dissolution of the agreements would enure to the substantial benefit of Central, the plaintiffs' theatre.

What is meant by "competition"? Competition is defined in *Lipson v. Socony Vacuum Corporation,* 87 F. 2d 265, 270 (C. C. A. 1st, 1937) as "the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time." True, it has been said that "if methods become too widely separated, competition usually disappears, because the superiority of one must be admitted. Competition between sail and steam may still exist as to freight, but there is none as to passenger service," *Continental Securities Co. v. Interborough R. T. Co.,* 207 Fed. 467, 470 (D.C., S.D., N. Y., 1913); but we are not dealing with a case of competition analogous to that between sail and steam. Rather our case is one of the competition between a new steam passenger vessel and one forty or fifty years old. This Court is unwilling to state as a matter of law that there is no competition in the latter case.

The testimony in the present case included an undisputed estimate that the overlap of persons who might be inclined to patronize either theatre at any given time is in the neighborhood of twenty-five percent; that is, that this proportion of the patrons of one theatre might be drawn to a given performance of the other. This estimate is probably within the range of reason. It is reasonable also to suppose that an exceptional film at either theatre might drawn a far larger proportion of the patrons of the other. Certainly this would be true of an exceptional film showing at the Central.

If the present management agreement is terminated by this Court, the future of the City Theatre holds one of two possibilities. It may compete or it may close. Both theatres would be attempting to make a profit from the showing of motion pictures to an audience that might overlap to some degree. Each would attempt to get the best pictures it could afford and draw a larger percentage of the money being spent in Biddeford for amusement. Certainly with its present antiquated facilities City would labor under a substantial handicap and yield a gross income far below that yielded by Central. This discrepancy in gross income would inevitably tend to limit the effectiveness of City's bidding for the better pictures, both because of its lower purchasing power and because the distributors of pictures prefer to rent their better films to theatres showing the higher records of box office income.

A modernization of City's facilities might cost upwards of twenty-five thousand dollars. City would still have the permanent handicap of its second floor location. City is located in leased quarters, the lease having less than ten years yet to run. An investment in modernizing City might be forfeited in any event upon expiration of the lease; and it is possible that the lessor, being a city government, may have the power to terminate the lease at an earlier date, both possibilities rendering such an investment highly speculative.

The second possibility for the future of City must therefore be faced, namely, that it will be unable to make a profit and to survive at all under independent management. Its present thirty percent of the gross theatre income in Biddeford may be insufficient to keep it going. It will have difficulty in retaining a skilled manager, such persons preferring to associate themselves with newer theatres. These facts coupled with the risk of undertaking a modernization program, may well be enough to prevent any effective steps being taken to salvage the City Theatre. Thus it is entirely possible that dissolving the agreement may not in fact lead to competition, but may instead reduce to one the number of motion picture exhibitors in Biddeford, affording Biddeford actually less service than it has at present.

While this Court is in accord with the assertions made by the plaintiffs concerning Mr. Lausier's background, experience and ability, yet in the opinion of this Court it is problematical whether he would be qualified to manage the City Theatre independently. The objective facts in the case indicate that these personal considerations will be insufficient to overcome the real handicaps which will face the management of the City Theatre upon termination of the present agreement.

Relative Location of Theatres

Although this Court has attempted to point up the existing disparity in the physical properties of those two theatres, operating under a pooling agreement and single

management, yet in deciding the question whether or not they would be "normally in competition" the important factor is in the opinion of this Court the relative location of the two theatres. It finds, as a matter of law, that two motion picture theatres, operating in close proximity to each other, in other words, within the same competitive area, are "normally in competition", within the meaning of the decree in the *Paramount* case, notwithstanding the wide disparity in the physical attributes of the theatres and in the type of moving pictures they offer. This Court finds that motion picture houses in a single business area, as are those in present case, are necessarily competing for the consumer's entertainment dollar. The fact that that product offered by one competitor is so poor that the competitor might not survive in the absence of a pooling agreement is not pertinent to the discussion. It has always been one of the elements of true competition that consumers may find the product of one competitor so lacking to their taste that they will turn elsewhere and force that competitor out of business.

The theatres of plaintiff and defendant being "normally in competition", it follows, and this Court declares, that the agreements here in issue are governed by the decree of the Expediting Court against Paramount Pictures, Inc., and must be terminated as hereinafter provided.

This Court rules that the parties hereto shall be allowed a period of two years from the date of the order filed pursuant to this opinion, to terminate the agreements here in issue; that these agreements shall be legally binding on the parties, and performance thereof shall not be deemed in violation of the decree of the Expediting Court for the Southern District of New York, during such two year period; and that the agreements shall be terminated, in any event, at the expiration of such two year period.

The case will be retained on the docket for determination by a master of the amounts due from each party to the other upon termination of the agreements in the event that the parties are unable to agree among themselves upon a settlement of their respective claims.

[¶ 62,504] United States v. Harry A. DuBroy, et al.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil No. 26537. Filed October 13, 1949.

Memorandum on motions to make definite and certain and to strike.

Sherman Antitrust Act

Motions To Make More Certain—Pleading Not Vague or Ambiguous—Responsive Pleading.—In a Government civil suit alleging conspiracy to fix prices on ninety items of hard building materials, motions made by material dealers to have the ninety items listed and for other particulars were denied. The allegations were held to be clear enough to permit responsive pleading; all that could be gained by the granting of the motions would be discovery of evidence, which, the Court declared, was not the purpose of Section 12 (e) of the Rules.

See the Sherman Act annotations, Vol. 1, ¶ 1610.341.

For the plaintiff: George L. Derr, Don C. Miller, U. S. Attorney, Cleveland, Ohio.

For the defendants: Ben C. Green, Cleveland, Ohio.

JONES, J.: This is an antitrust action against 15 individual and corporate defendants.

Nine of the defendants have filed answers but four of the defendants have filed motions to make certain paragraphs of the complaint more definite and certain and to strike other portions of the complaint. The motions will be treated as if but one motion had been made by all defendants.

The complaint in part alleges that the defendants conspired to fix prices on some ninety items of "hard building materials" in violation of the Sherman Act; that more than fifty percent of the "hard building materials" distributed by the defendants is manufactured outside of the state of Ohio; that the defendants distribute a "substantial part" of all the "hard building materials" used in the Cleveland area; and that the

defendants first conspired "in or about the year 1944 and had continued to do so until the complaint was filed."

The motions ask that all of the ninety items be listed by the plaintiff; that the plaintiff disclose what the measure of fifty percent is, i.e., value, number or weight; that the plaintiff disclose the percentage of "hard building materials" distributed by the defendants; and that the exact dates of the conspiracy and the exact names of the defendants who first conspired be disclosed by the plaintiffs.

Section 12(e) of the Rules provides that a motion to make more definite may be granted if the pleading is so vague or ambiguous that a party cannot reasonably be required to form a responsive pleading.

The disposal of these motions therefore rests in the sound discretion of the Court. (*La. Farmers Protective Union, Inc. v. Great Atlantic and Pacific Tea Company of America, Inc.*, 31 F. Supp. 483.) Previously there was a division of authority on whether Rule 12(e) could be used by a party to prepare for trial. Since the Rules have been amended it seems clear that 12(e) can be used only to enable the party to frame a responsive pleading. The complaint is sufficiently clear to enable the defendants to respond. The complaint, by definition, indicates clearly the nature of the "hard building materials" and there is reason to believe that the exact nature of the ninety items is known to the defendants. (See *La. Farmers Protective Union, Inc. v. Great Atlantic and Pacific Tea Company of America, supra; Mitchell v. Brown,* 6 F. R. S. 12(e)231, Case 4.) The other portions that defendants request be amplified seem to be conclusions of fact based on evidence known to the plaintiff. These conclusions are sufficiently clear as to allow a responsive pleading by the defendant. All that could be gained by the granting of the motions would be the discovery of evidence, and 12(e), since its amendment in 1948, is not to be used as a discovery mechanism. Chapter 5 of the Rules may and should be used to obtain all the information asked for by the defendants in these motions.

Motions have also been filed to strike various paragraphs of the complaint. Such motions are not regarded favorably, and the allegations objected to will not be struck unless there is no reason whatsoever for the inclusion of the allegations in the complaint and a failure to strike will be unduly prejudicial. (*Steckel v. Beeghly,* 8 F. R. D. 116, an opinion of this Court.) Perhaps some of the allegations to which objection is raised are somewhat redundant. However, all facts alleged are material to the issues of the action, and furthermore, defendant, The Goff-Kirby Company, has made no showing of prejudice whatsoever. This fact alone is sufficient ground for overruling the motion of this defendant. The same reasoning applies to the defendant, The Zone Coal & Supply Company's motion to strike paragraph 16 from the complaint.

Defendant, The Zone Coal and Supply Company, does allege prejudice in its motion to strike all references to the co-conspirators from the complaint. The contention is based on the fact that proof of the acts of the co-conspirators could not be admitted as evidence at trial. The law is to the contrary. Evidence of acts of the co-conspirators may be admitted (*Boyd v. U. S.,* 29 F. 803). If such evidence is admissible, the allegations concerning the co-conspirators would seem relevant. Furthermore, such allegations not only are not prejudicial but are beneficial to the defendants in that they indicate some of the evidence to be presented by the plaintiff. This should help defendants to prepare for trial.

[¶ 62,505] W. F. Perkins v. King Soopers, Inc.

In the United States District Court for the County of Denver and State of Colorado. Civil Action No. A-66812. Division II. October 20, 1949.

Colorado Unfair Practices Act

No Intention To Destroy Competition—Injunction Dissolved.—An injunction to enjoin selling below cost was dissolved when it was held that the State failed to prove that a grocery chain operator intended to injure competitors and destroy competition.

See the Colorado Unfair Practices Act annotations, Vol. 2, ¶ 8088.

For the plaintiff: John W. Metzger, Attorney General by Sydney A. Johnson, Assistant Attorney General.

For the defendant: Ireland & Ireland of Denver, Colorado.

STEELE, District Judge: In my judgment the State has failed to prove a violation of the law by the defendant King Soopers, in that it failed to show that the defendant had the "purpose of injuring competitors and destroying competition," in selling the items alleged in the complaint at the prices therein stated.

For that reason the issues are found in favor of the defendant and against the plaintiff. The restraining order or injunction heretofore issued by the court is dissolved.

A motion for a new trial would be overruled if filed, and the filing of it is dispensed with.

Plaintiff's exceptions are noted and thirty days allowed within which to prepare and tender a Reporter's Transcript and record on error.

[¶ 62,506] Tiffin Building Corporation v. Balaban & Katz Corporation, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 48 C 1520. October 21, 1949.

Sherman Antitrust Act, Clayton Antitrust Act

Statute of Limitations—"Civil Proceedings" Interpreted—Treble Damage Action.—In deciding as to the right of a building corporation to sue a theatre concern for treble damages in regard to alleged antitrust violations occurring prior to 1941, it was held that the federal act which suspended the running of statutes of limitation applied to this, a private action, as well as to those brought by the Government. The words "civil proceedings" should not be restricted in their meaning when neither the statute nor its legislative history expressed any restriction.

See Sherman Act annotations, Vol. 1 ¶ 1640.435. Law at ¶ 351.

For the plaintiff: Seymour F. Simon, Chicago, Illinois.

For the defendants: Jacob I. Grossman & Alfred R. Teton, Mattew & Springer, Seeley & Burnham, c/o Mayer, Meyer, Austrian & Platt, Edward R. Johnston, Samuel Block, for Paramount, et al., all of Chicago, Illinois.

Memorandum

LA BUY, District Judge: The complaint herein is brought pursuant to the treble damage section of the Clayton Act (15 U. S. C. A. section 15) and alleges that defendants during the period January 1, 1941 to May 1, 1945 and prior thereto entered into a conspiracy in violation of the antitrust laws of the United States which conspiracy resulted in injury to plaintiff's business. The complaint was filed October 18, 1948 and is alleged to be based upon the complaint of the government in *United States v. Paramount Pictures et al.* (D. C. N. Y. 1946) 70 Fed. Supp. 53 aff'd in part and rev'd in part 334 U. S. 131.

Defendants plead affirmatively that the Illinois Revised Statute, Chapter 83, Section 16, bars any recovery sought for injuries suffered more than five years before October 18, 1948.

Plaintiff raises three points to substantiate its right to sue for injuries suffered in 1941 and 1942, but has withdrawn the first basis since its premise is applicable to criminal cases only wherein it is held that the statute does not run until the last act constituting the conspiracy is done. *Momand v. Universal Film Exchange* (D. C. Mass. 1942) 43 Fed. Supp. 996; and has also temporarily withdrawn its third contention that Section 16 of the antitrust laws suspends the statute of limitations in this action from July 30, 1938 when the United States filed suit for violation of the antitrust laws since this suit is based in whole or in part on matter complained of therein for the reason that such

contention is premature and is dependent upon evidence to be heard by the court.

If the evidence in this action should not disclose that the suspension provided by Section 16 of the antitrust laws applies, the parties have requested the court to decide at this time whether Act of Congress, October 10, 1942, Ch. 589, 56 Stat. 781, as amended June 30, 1945, Ch. 213, 59 Stat. 306, 15 U. S. C. A. Sec. 16 note tolled the Illinois statute of limitations as to the plaintiff's rights.

It is a rule that where a statute is susceptible on its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, mischiefs intended to be remedied, and extraneous circumstances and purposes intended to be accomplished thereby, but where the statute is clear upon its face, and standing alone, is fairly susceptible of one construction, that construction must be given thereto, *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers* (D. C. Va.) 53 Fed. Supp. 935, cert. den. 322 U. S. 756, rev'd 145 F. (2d) 10, aff'd 325 U. S. 161.

The statute here in question reads as follows:

> "An Act to suspend until June 30, 1945 the running of the statute of limitations applicable to violations of the anti-trust laws. The running of any existing statute of limitations applicable to violations of the anti-trust laws of the United States, now indictable or subject to civil proceedings, under any existing statutes, shall be suspended until June 30, 1945 or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses or transactions which are already barred by the provisions of existing laws."

The term which defendant's contend here has a restricted meaning is the term "subject to civil proceedings". Defendants urge that legislative history surrounding the passage of this act shows it was intended to apply only to government proceedings and not to private actions.

The antitrust law envisaged two classes of action: (1) those made available only to the government, which include criminal prosecutions and suits in equity, and (2) civil suits for treble damages to redress private injury. *United States v. Cooper,* (1941) 312 U. S. 600, 612. The term "proceeding" has been used in the antitrust laws in connection with any suit or proceeding brought by any other party than the government (Section 16, 15 U. S. C. A.) and has been used in referring to action by the government (Sections 4, 5, 6, 15 U. S. C. A.).

The term "proceeding" in common general usage means a prescribed course of action for enforcing legal rights and remedies according to the regular course of judicial procedure. Words & Phrases, Volume 34; Webster's International Dictionary.

In *United States v. Cooper, supra,* the interpretation of the word "person" as excluding the United States from bringing a treble damage suit was considered. Justice Roberts there said (605):

> "Decision is not to be reached by a strict construction of the words of the Act, nor by application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislative body logically might or should have made."

See also *Durkee Famous Foods v. Harrison* (D. C. Ill.) 46 Fed. Supp. 642 aff'd in part and rev'd in part 136 F. (2d) 303, cert. den. 320 U. S. 782; *Fleming v. A. H. Belo Corp.*, (D. C. Tex.) 36 Fed. Supp. 907 aff'd 121 F. (2d) 207, aff'd 316 U. S. 624; *Jewell Ridge Coal Corp. v. Local No. 6167, supra.*

There is no doubt in the instant case that the ordinary and natural sense of the words "civil proceedings" was to be used and there would be no need to look to the legislative history for aid in interpretation. However, Justice Roberts, after the guide above expressed, did consider the legislative history of the Sherman antitrust law and this court will do likewise as to this statute before the court. Defendants in their brief have referred to the reports of the Congressional committees and to letters from the Secretaries of War and Navy and the Attorney General which are directed to support its contention that the purpose of the suspension of the statutes of limitations was directed to criminal or civil prosecutions of the government as a part of the war effort. Though the legislative history presented may through implication be interpreted to

accomplish the purpose the defendant urges, it does not disclose any comment or phrase by any of the legislators or proponents thereof which would lead to the inevitable and clear conclusion that its operative effect was to be so restricted. In such a situation, where the purpose and intent of the statute is not negatived or defeated by the ordinary and natural interpretations of the words used, it is presumed the legislators intended them to be interpreted in their usual and accepted sense.

There is no limitation expressed in the legislative history and the words "civil proceedings" should not be restricted in their meaning when neither the statute itself nor the legislative history expresses none. The court is of the opinion the Act of Congress of October 10, 1942 extends to private suits as well as to those brought by the government.

The court has also considered the objections of the defendant Balaban & Katz to interrogatories propounded by the plaintiff on the ground they are not relevant and are burdensome. These objections are overruled and time in which defendant is to answer should be agreed upon by the parties. An order not inconsistent herewith should be presented for entry to the court within ten days.

[¶ 62,507] Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd. v. Inter-Island Steam Navigation Co., Ltd.

In the United States District Court for the District of Hawaii, October Term, 1948. Civil No. 817. December 17, 1948.

Ruling upon motion for production of documents F. R. C. P. Rule 34 as amended.

Sherman Antitrust Act, Clayton Antitrust Act

Production of Documents—Designation by Category—Motion Granted.—Upon a motion under Rule 34 for production for inspection of certain documents, it was held that a transportation company had sufficiently designated the documents it required by indicating them by category. To hold that each document must be specifically identified would only serve dilatory purposes. The motion was granted.

See the Sherman Act annotations, Vol. 1, ¶ 1640.624.

For Hawaiian Airlines, Limited and Inter-Island Steam Navigation Co., Ltd.: Garner Anthony, Robertson, Castle & Anthony, Honolulu, Hawaii.

For Trans-Pacific Airlines, Ltd.: Sai Chow Doo, Honolulu, Hawaii, Powell, Lear & Gaines, Washington, D. C.

Ruling Upon Motion for Production of Documents, F. R. C. P., Rule 34 as Amended

McLaughlin, Judge: [*Digest*] There is now before the court for disposition in advance of trial upon the anti-trust cross-complaint, an amended motion under Rule 34 as amended (28 U. S. C. following § 723c).

The grant or denial in whole or in part of this motion rests in the court's judicial discretion.[1]

Under its cross-complaint describing a civil cause of action under the Sherman and Clayton Acts, Trans-Pacific invokes Rule 34 and calls upon Hawaiian and Inter-Island to produce for inspection, *et cetera,* a voluminous amount of material. Trans-Pacific's requests describe 19 different categories. Some of the requests relate back to 1929 and others post-date the cross-complaint by pertaining to 1948. Abbreviated, the requests are for originals or copies of all and any:

(a) Reports filed with the Civil Aeronautics Board from 1940 to Nov. 3, 1948, by Hawaiian.

(b) Same as to tariffs filed.

(c) Same as to agreements filed since Jan. 1, 1939.

[1] *United States v. United Shoe Machinery Corp.,* 76 F. Supp. 315 (U. S. D. C. Mass. 1948).

(d) Same as to requests for approval of interlocking directorates since Jan. 1, 1939.

(e) Same as to requests for approval of stock control of Hawaiian by Inter-Island since Jan. 1, 1939.

(f) Annual corporate exhibits filed by both corporations with the Territory since 1939 (withdrawn in argument as since procured from Territorial Treasurer).

(g) Minutes and memoranda of meetings of directors and executive committee of both corporations since Jan. 30, 1929.

(h) and (i) Written communication by any means between the two corporations since Jan. 1, 1929, and up to Nov. 3, 1948.

(j) Contracts of carriage by either corporation from Jan. 1, 1939, to Nov. 3, 1948.

(k) The Apr. 21, 1947, contract between Hawaiian and The Farmers' Exchange, plus any and all similar contracts made by either corporation with others since Jan. 1, 1940, to Nov. 3, 1948 (allowed in part by consent).

(l) Data filed by Inter-Island with the Maritime Commission, including correspondence connected therewith, during the period Jan. 1, 1940, to Nov. 3, 1948.

(m) Written material including correspondence filed with or sent to the Civil Aeronautics Board in connection with Hawaiian's United States mail contract from Jan. 1, 1939, to Nov. 3, 1948.

(n) Written material, including correspondence, filed with or sent to the Civil Aeronautics Board by either corporation, during the period June 1, 1946, to Nov. 3, 1948, which in any way mention or concern Trans-Pacific or its officers, employees or stockholders, and including especially letters and other communications sent by or exchanged between Stanley Kennedy, president of Hawaiian, and any official, employee, member, or agent of the Civil Aeronautics Board from June 1, 1946, to Nov. 3, 1948.

(o) Written material possessed by either corporation with especial reference to contracts for the transportation of persons or property, relating or referring in any way to Trans-Pacific or any other air carrier in Hawaii from Jan. 1, 1939, to Nov. 3, 1948.

(p) Stenographic notes, with transcripts thereof, possessed by either corporation, made during or as a result of telephone conversations relating to or referring to Trans-Pacific or any air carrier competing with Hawaiian (presumably since Jan. 1, 1939).

(q) Written material relating to actual or contemplated press or radio releases referring or relating to competition between Hawaiian and Inter-Island and any other air carrier in Hawaii, or relating or referring to any plan to discontinue or diminish Inter-Island's ship passenger service; or referring or relating to any plan or program to effect any change in the holdings of stock in Hawaiian by Inter-Island; or pertaining to corporate re-organization or material change in the corporate structure or stock holdings in either Hawaiian or Inter-Island from Jan. 1, 1946, to Nov. 3, 1948.

(r) A list of the stockholders and stockholdings of said persons in either corporation as of May 1, 1947 and also as of Oct. 13, 1948.

(s) Documents possessed by either corporation concerning or relating to radio frequency channels, or to the performance of services connected with radio for any air carrier in Hawaii other than Hawaiian.

Hawaiian and Inter-Island assert that the motion is defective.

It is argued that while it is true that Rule 34 is susceptible of a use which is independent of Rules 26, 30 and 31, nevertheless as against the type of broad designation here presented under Rule 34 fairness should move the Court to deny the motion, because the movant can then by utilizing the other discovery rules find out exactly what it wants and move again under Rule 34 with a specific label on each requested document.

As illustrative of the point, reference is made to the fact that since this motion and as it is under advisement, Trans-Pacific is proceeding under Rule 30 to take the deposition of a person who is president of both Hawaiian and Inter-Island. Of this the Court is aware, for it has been called upon to order this deposition terminated or limited under Rule 30 (d). Hawaiian's and Inter-Island's Rule 30 (d) motion was orally denied after reading the transcript and listening to counsel's arguments. This transcript reveals, indeed, how a nice theory can be at odds with reality and give strength to the belief that the new rules are essentially practical.

The proper approach to a problem arising under any one of the deposition-discovery

rules is set forth by the Supreme Court.[2] And contrary to view previously held, it is now recognized that although the deposition-discovery rules are integrated mechanisms, they are each susceptible of independent use.[3] It is not necessary to first take depositions before resorting to Rule 34. Rules 26, 30, 31 and 34 may be utilized independently, simultaneously, or progressively, so long as the requirements of the rule or rules invoked are met.

That being so—as Hawaiian and Inter-Island concede—there remains the question of whether Trans-Pacific has made a proper designation of the documents it wishes to inspect.

It is first said that Trans-Pacific's designation is defective in that it is too broad, as it should be sufficiently specific to enable the person ordered to produce to go to his files and say, "Here it is."[4] But as the District Court for the Southern District of New York itself now recognizes, the license to fish granted by Rule 34 is not to be so restricted.

That other courts have followed a broader interpretation of the function of Rule 34, which this court also now adopts, is reflected in the reports of decisions both before and after the amendment to this rule.[6]

A civil lawsuit, therefore, being no longer susceptible of being made a game if the rules are properly invoked; it being no longer necessary to try a lawsuit in the dark in the federal courts;[7] and with "mutual knowledge of all relevant facts * * * essential to proper litigation",[8] the application here of the principle of fairness does not impress me as requiring a holding that Trans-Pacific can invoke the rule only after it has first and perhaps futilely utilized other discovery devices. Indeed, if Trans-Pacific has met this Rule's requirements, the cited authorities would call for a conclusion of unfairness if having the right the court should hold it to be precluded from exercising it until it first proceeded otherwise. To be sure if the Rule 34's requirements are not met, the motion will be denied with the suggestion that perhaps the use of the other discovery mechanisms might provide a basis for a renewed second such motion.[9]

Here, then, the essential question is: Is Trans-Pacific's designation of categories, as distinguished from a designation of each specific document wanted for inspection, sufficient to fulfill the requirement of "designated" as that word is used in Rule 34 as amended?

In view of the nature of this cross-complaint spelling out as it does charges of violations of the Sherman and Clayton Acts, and with adherence to the views expressed by Judge Wyzanski on this subject[10] to the effect that the interests of justice will be best promoted by holding the word "designated" to be complied with by an indication of the category of documents sought, while to hold that each document requested must be specifically identified in the "Here it is" manner would only serve dilatory purposes or tend to frustrate the disclosure of all the facts necessary to a proper decision, I deem Trans-Pacific's motion to sufficiently comply with the word "designated" appearing in Rule 34. Consequently, the motion is granted.

The granted motion obviously approves the inspection of documents long pre-dating Trans-Pacific's entry into the business of air transportation, and also post-dating the date of the cross-complaint. The former is allowed in view of the nature of the cross-complaint[11] while the latter is allowed upon

[2] *Hickman v. Taylor*, 329 U. S. 495 at 507 (1947).

[3] *Olson Transp. Co. v. Socony-Vacuum Oil Co.*, 7 F. R. D. 134 (D. C. E. D. Wis. 1944); *United States v. U. S. Alkali Export Ass'n, Inc.*, 7 F. R. D. 256 (D. C. S. D. N. Y. 1946).

[4] *United States v. American Optical Co.*, 2 F. R. D. 534 (D. C. S. D. N. Y. 1942); *Hillside Amusement Co. v. Warner Bros. Pictures, Inc.*, 7 F. R. D. 260 (D. C. S. D. N. Y. 1944).

[5] Reference to footnote 5 deleted.

[6] *United States v. United Shoe Machinery Corp., supra; Hirshhorn v. Nine Safety Appliances Co.*, 8 F. R. D. 11 at 21, D. C. W. D. Penn. 1948; *Lindsay v. Prince*, 8 F. R. D. 233 (D. C. N. D. Ohio 1948).

[7] *Hirshhorn v. Mine Safety Appliances Co., supra; Reeves v. Pennsylvania R. Co.*, 80 F. Supp. 107 (D. C. Delaware 1948).

[8] *Hickman v. Taylor, supra.*

[9] *Synek v. McCarthy*, 8 F. R. D. 323 (D. C. S. D. N. Y. 1948).

[10] *United States v. United Shoe Machinery Corp., supra; Hirshhorn v. Mine Safety Appliance Co., supra*, at p. 21.

[11] *United States v. United States Alkali Export, Ass'n, supra; Hillside Amusement Co. v. Warner Bros. Pictures, supra; United States v. United Shoe Machinery Corp., supra; Quemos Theatre Co. v. Warner Bros. Pictures*, 35 F. Supp. 949 (D. C. D. N. J. 1940).

the theory that subsequent actions may be relevant to and clarifying of prior acts and actions by Hawaiian and Inter-Island. The grant may also cover some material which the movant might be able to procure elsewhere (from the Civil Aeronautics Board, for example) or which it might already have itself in copy form. Delay, expense, and complicated legal questions will, nevertheless, be obviated by directing the production from an authentic source originals or copies of all matter covered by the grant, and it will also lay at rest needless quibbling as to such material.

Ordered granted:

1. Requests (a) to (e), inclusive.
2. Requests (g).
3. Requests (h) and (i), but only such material as bears a direct and reasonable relationship to the general air and water transportation business in the Territory and to actual, anticipated, probable, or possible competition, or lack thereof, in said business.
4. Requests (j) and (k), excluding run of the mill contracts, but including special or exclusive contracts of the type the Farmers' Exchange contract is alleged to be.
5. Requests (l) to (s), inclusive.

The temper of this litigation to date might well warrant a further order of the Court to insure a full measure of compliance.[12] But the exercise of this power shall be held in reserve and ungrudging compliance with this order will be presumed until and unless the contrary be affirmatively and satisfactorily shown.

[¶ 62,508] Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd. v. Inter-Island Steam Navigation Co., Ltd.

In the United States District Court for the District of Hawaii. Civil No. 817. June 7, 1948.

Sherman Antitrust Act, Clayton Antitrust Act

Scope of Antitrust Acts—Jurisdiction of Courts and Administrative Agencies.—Where a cross-complaint had been brought by one airline against a steamship company and its subsidiary airline charging a combination of the two carrier services to monopolize traffic in the islands, and use of certain unfair and discriminatory practices to implement the charged monopoly, a motion to dismiss on grounds that the matter called for the expert determination of the Civil Aeronautics Board and the Maritime Commission was denied, for the reason that the extent of relief obtainable before those agencies was not as wide as that allowed under the antitrust laws, and would not therefore permit a full finding upon the wrongs complained of, and for the further reason that the whole alleged course of conduct of the defendants stated a cause of action under antitrust laws, although the component wrongs charged might individually be more properly cognizable by the agencies.

See the Sherman Act annotations, Vol. 1, ¶ 122, 131, 1021.161; Clayton Act annotations, Vol. 1, ¶ 2021.10.

For plaintiff Hawaiian Airlines, Ltd. and third party defendant Inter-Island Steam Navigation Co., Ltd.: Garner Anthony; Robertson, Castle & Anthony, Honolulu, of counsel.

For defendant Trans-Pacific Airlines, Ltd.: Sai Chow Doo, Frederick L. Hewitt and Coates Lear, all of Honolulu; Blair & Blair, of Washington, and Fong, Miho & Choy, Honolulu, of counsel.

Ruling Upon Motion to Dismiss, F. R. C. P. Rule 12 (b) (6)

Opinion of McLaughlin, Judge:

[*Nature of Action*]

[*Digest*] To the petition of Hawaiian Airlines, Limited, for an injunction under § 1007 of the Civil Aeronautics Act (49 U. S. C. § 647) against the scheduled air carrier operations of the non-certificated but registered irregular air carrier defendant, Trans-Pacific Airlines, Ltd., filed a cross-complaint against Hawaiian and its parent corporation, Inter-Island Steam Navigation Company, Limited,

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[12] *United States v. United Shoe Machinery Corp., supra,* p. 317; *Olson Transp. Co. v. Socony-Vacuum Oil Co., supra,* at p. 136.

under the Sherman and Clayton Acts. Though later amended, it will here be denominated as the cross-complaint.

Pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure (28 U. S. C. foll. § 723 (c)), the anti-trust cross-complaint was severed from the original complaint for trial purposes. See 73 F. Supp. 68 (U. S. D. C. Hawaii 1947).

To the cross-complaint the defendants, Hawaiian and Inter-Island, have filed under Rule 12 (b) (6) a motion to dismiss, supported by an undenied affidavit, upon the sole ground that the matter complained of by Trans-Pacific is primarily within the jurisdiction of the Maritime Commission and the Civil Aeronautics Board. In this position the motion under Rule 12 (b) (6) becomes one for summary judgment under Rule 56.

Leave was granted to the Civil Aeronautics Board to appear in the cross-complaint case through the United States Attorney as a friend of the Court. Upon the motion extensive argument was had, and briefs were filed by the parties and also by the Civil Aeronautics Board.

[*Complaint*]

The matter complained of by Trans-Pacific upon the basis of §§ 1, 2 and 3 of the Sherman Act (15 U. S. C. §§ 1, 2 and 3) and §§ 3, 7 and 8 of the Clayton Act (15 U. S. C. §§ 14, 18 and 19) and the prayer for triple damages (15 U. S. C. § 15) and for an injunction (15 U. S. C. § 26) directing, amongst other things, the divestiture by Inter-Island of its stock control of Hawaiian, is that:

1. Operating over substantially parallel routes and rendering competing services, the control of the certificated air carrier, Hawaiian, by the water carrier, Inter-Island, constitutes a combination in restraint of trade in violation of the Sherman Act, which was illegally conceived in violation of § 7 of the Clayton Act.

2. The Inter-Island—Hawaiian combination has become a monopoly or is conspiring to attain that status.

3. Inter-Island's and Hawaiian's interlocking directorates constitute a violation of § 8 of the Clayton Act.

4. Pursuant to an unlawful combination and conspiracy to restrain trade, attempt to monopolize, and its unlawful monopolization of the air and water transportation of passengers and property between the islands of the Territory, Inter-Island and Hawaiian have, in violation of the Sherman and Clayton Acts:

(a) Decreased and planned to discontinue passenger service by Inter-Island so as to force passengers to its controlled air carrier, Hawaiian, the only certificated regular air carrier in the Territory;

(b) Coerced shippers of air freight to use Hawaiian rather than registered irregular air carriers upon the threat of discriminating against their water freight when they sought to ship by Inter-Island;

(c) Jointly conducted all-expense tours, additionally violating § 412 of the Civil Aeronautics Act;

(d) Engaged in predatory air freight rate cutting to drive competing irregular air freight carriers out of business;

(e) Contracted, in furtherance of the conspiracy, with the Farmers Exchange, a cooperative, whereby the Exchange has bound itself not to use the facilities of any other air carrier to transport its produce; and

(f) In consonance with the object of its conspiracy, sought and obtained with unclean hands an injunction against Trans-Pacific as a means of furthering Inter-Island's and Hawaiian's monopoly (*Hawaiian v. Trans-Pacific Airlines, supra*).

From this alleged unlawful combination and conspiracy, and the steps taken by the defendants in furtherance thereof, Trans-Pacific claims accrued damage in the amount of $336,000 to September 9, 1947, the date of the preliminary injunction in the air carrier part of the case, and at the rate of $1,000 per day since that time.

There is no dispute concerning the doctrine of primary jurisdiction, which stems from *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and developed in such succeeding cases as *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U. S. 156 (1922); *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474 (1932); *Central Transfer Co. v. Terminal R. R.*, 288 U. S. 469 (1933); *Terminal Warehouse v. Penn. R. R.*, 297 U. S. 500 (1936); and *Georgia v. Penn. R. R.*, 324 U. S. 439 (1945). Rather

the sole question raised by the motion relates to the applicability of that doctrine to the cross-complaint under consideration.

[*Jurisdictional Question*]

The defendants argued that each specified act alleged to have been done in furtherance of the claimed unlawful combination and conspiracy, etc., raises questions the determination of which calls for the expert competence and specialized administrative discretion of the appropriate regulatory body created by Congress to handle, in the first instance, such technical matters. Therefore, it is submitted, each of these acts is within either the jurisdiction of the Maritime Commission or the Civil Aeronautics Board, and at least until Trans-Pacific has exhausted the administrative remedies, this Court lacks jurisdiction to consider its complaint filed under the anti-trust laws. Indeed, it is submitted that available administrative remedies are exclusive, and the Court is wholly without jurisdiction.

It is conceded that perhaps the Maritime Commission would not have jurisdiction of a combination or conspiracy by or between these defendants since Hawaiian is not a carrier subject to the Shipping Act (46 U. S. C. § 814), but that clearly the Civil Aeronautics Board would have jurisdiction, for that Act covers such dealings by an air carrier with any other air carrier or other carrier (49 U. S. C. § 492 (a)).

At all events, referring upon this theory to its affidavit, the defendants say there really is nothing charged that has not already been approved by the Civil Aeronautics Board anyway, and hence the Court need not be concerned—as it is—over the apparent exemption of carriers regulated by different agencies from the anti-trust laws. With power in the Board to grant in the public interest exemption from such laws (49 U. S. C. § 494), Hawaiian represents that it has complied with all provisions of the Act and hence the Board knows all, and if Hawaiian be at fault the Board's duty under the Act would require it to move to correct the situation. Concretely it says it has filed all working agreements with the Board which either have been approved or not disapproved; data regarding all-expense tours similarly have been filed and treated by the Board; the Board has—as the Board in its brief admits—approved of Hawaiian's interlocking directorates as being not inconsistent with the public interest. Concerning the stock control of Hawaiaan by Inter-Island, defendants assert that if such be not in the public interest, despite the fact that § 408 of the Act (49 U. S. C. § 488) is prospective in operation and the immunity of § 414 (49 U. S. C. § 494) thus unavailable, nevertheless the Civil Aeronautics Board applies as a matter of policy the standards of § 408 to situations wherein stock control of a carrier by another carrier was acquired prior to the passage of the Act. Thus the Civil Aeronautics Board could suspend Hawaiian's certificate pursuant to § 401 (h) of the Act (49 U. S. C. § 481 (h)) until and unless Hawaiian's parent corporation sold enough stock in the air carrier to remove its control. That being so, by way of argument at least, it is said, therefore, this factor is also within the primary jurisdiction of the Board. Overall, too, it is stated that though Trans-Pacific complains about a monoply it fails to understand that the Board has granted a limited monopoly to Hawaiian by failing to date to certify other air carriers in Hawaii, and such in the Board's discretion must be deemed to have been found by it to be in the public interest.

Trans-Pacific's counter argument is that defendants refuse to recognize that this is an anti-trust case, the essence of the alleged grievance being the affirmative charge that the defendants here unlawfully combined and conspired, attempted to monopolize, and have monopolized transportation commerce between the islands of the Territory. Closing their eyes to this charge, Trans-Pacific accuses defendants of dismembering the charge by considering only the specific acts which have been alleged to illustrate the basic charge. *United States v. Patten*, 226 U. S. 525, 544 (1913); *American Tobacco Co. v. United States*, 147 F. 2d 93, 106 (CCA-6, 1944), aff'd 328 U. S. 781 (1946).

[*Decision*]

I do not believe this to be a case to which the rule of primary jurisdiction is applicable. The motion will accordingly be denied.

Having reviewed the arguments of the parties and the analysis of the problem provided by the Civil Aeronautics Board, the problem and principles involved are fully exposed. It will, therefore, suffice to state

the reasons for the conclusion which has been reached.

In the first place, to concentrate upon the specific acts and actions attributed to the defendants by the allegations of Trans-Pacific—as do the defendants—is to obtain a distorted conception of the fundamental charge of the cross-complaint.

Further, if to do so were the proper approach, as dissected it by no means follows from the facts at hand that the rule of primary jurisdiction is applicable. Aside from the interlocking directorates alleged to be violative of the Civil Aeronautics Act—which in and of itself is not by reason of Board approval thereof—no one of the other particular acts are charged by Trans-Pacific to be violations of either the Shipping Act or the Civil Aeronuautics Act. Rather they are labeled as violative of the anti-trust laws. Yet, granting that labels do not alter the nature of the acts, even if each one be violative of either one or the other of the two regulatory acts—though it be questionable that other than rate cutting and the all-expense tour plans might be—it still is far from clear that this would be a situation to which the primary jurisdiction doctrine should be applied because:

1. Trans-Pacific does not charge that it has been injured by these acts in such a way as to give it standing as a complainant before either agency. That is, there appears in and of itself to be nothing wrong in a water carrier going out of the passenger business; Trans-Pacific has not been a threatened shipper; the joint tour plan as such is not set out as being discriminatory; it does not charge the cut freight rates as such to be unreasonable; contract rates are not regulated rates; and of course the matter of the preliminary injunction has no relation to any provision of either act.

2. But whether any of the specific acts be violative of either act—and such seems most probable under only the Civil Aeronautics Act—neither agency is empowered to grant the type of relief prayed for. Neither agency is equipped to award damages, and the questions raised by the specifics are not ones raising questions of fact calling for uniformity of decision nor the application of expert knowledge of a particular industry.

3. Neither the Commission nor the Board has power to handle both defendants. This is of more significance as to the Board—for the Commission appears almost totally ineffective in these circumstances—for the power reposes with Inter-Island which the Board cannot either legally or practically reach by an order. It is in this particular that the *Cunard* case is distinguishable. There not only was the gist of the complaint rate discrimination, but all of the parties were amenable to the Maritime Commission, and it had power to see to it that its orders were obeyed. Here if the Commission and the Board had power to sit together and to take joint action if warranted against these defendants, then the rule strenuously urged upon this motion would have sensible application.

But debatable as all this may be, I deem it needlessly confusing and a distraction to a proper interpretation of the broad charge of the cross-complaint.

Against the motion, of course, the cross-complaint must be given its best construction. Thus viewed, as I read the document, Trans-Pacific fundamentally and essentially charges the defendants with having unlawfully combined, conspired, attempted to monopolize, and with unlawfully having monopolized the transportation commerce between the islands of the Territory. Upon this charge Trans-Pacific elaborates by describing acts and actions of defendants performed or taken in furtherance of the alleged unlawful purpose.

Of necessity Trans-Pacific of course must be deemed to understand the fact that Hawaiian, as a certificated carrier, has a limited monopoly of regular air transportation in the Territory by reason of being to date the only certificated air carrier in Hawaii. Trans-Pacific's principal charge it seems to me must be taken to mean, as the Board suggests, that the defendants have used their position of dominance and power even if legally acquired in a manner violative of the anti-trust laws and have suppressed free competition from such sources as Trans-Pacific to which the Board gave the right to compete in a narrow area as an irregular air carrier.

Such being the essence of the cross-complaint, upon the strength of the *Georgia* case, I am not at all convinced that either the Board or the Commission has authority from Congress to deal with such a charge.

Traditionally and by command of the anti-trust statutes jurisdiction of such a

charge rests with the courts. I see nothing in either the Shipping Act or the Civil Aeronautics Act which alters this view. See *Georgia* case at p. 456 *et seq.*

Yet though it be said that powers granted by the Shipping Act and the Civil Aeronautics Act be broader than those granted the Interstate Commerce Commission and consequently the *Georgia* case is not controlling—questionable as this assumption be —I still do not deem this to be factually the type of case to which the primary juristion rule has feasible application because:

1. The Commission is wholly lacking in effective power, for Hawaiian is not a person subject to the Shipping Act.

2. The Board, too, is not equipped with adequate power to handle the problem as

(a) Inter-Island acquired control of Hawaiian prior to the Civil Aeronautics Act and § 408 thereof is not retroactive;

(b) A charge of monopoly encompasses more than unfair methods of competition, so § 411 of the Civil Aeronautics Act is not large enough to handle the charge. And further, the Board could not order Inter-Island to dispose of its control of Hawaiian as it legally acquired it. The Board could not even reach Inter-Island. To say as defendants do that it could threaten Hawaiian with suspension of its certificate unless Inter-Island did what the Board might say should be done, does not impress me as either plausible or practical. Agencies no more than courts waste their efforts on useless orders. If the threat should be executed its lawfulness would be litigated while the public stood stranded.

(c) Under §§ 7 and 11 of the Clayton Act, the Board by virtue of § 1107 (g) of its Act could as a matter of power reach Inter-Island and if need be order it to divest itself of control of Hawaiian. But Trans-Pacific's complaint does not rest solely upon § 7 of the Clayton Act. And in terms of § 7, Inter-Island did not "acquire" control of an existing carrier. It created Hawaiian as its subsidiary, whereas with the sanction of the third paragraph of § 7 Inter-Island could well have engaged in 1929 and later in air transportation under its own name. So it is reasonable to suppose that forming Hawaiian did not substantially lessen competition, as indeed prior to Hawaiian's entering the air transportation field in the Territory there was no competition to suppress.

So it is for the reasons indicated, and with considerable reliance upon the *Georgia* case, that the motion to dismiss because of the doctrine of primary jurisdiction is denied.

Let it be understood, however, that the Court reserves the right to refer to the appropriate administrative agency questions involving rates, all-expense tour agreements or any other specific if it develops later to be advisable.

Settle order upon notice.

[¶ 62,509] Julius Schmid, Inc. v. William J. McKay, d/b/a Public Drug Co.

In the District Court of Garfield County, Oklahoma. No. 24,580. Oct. 24, 1949.

Oklahoma Fair Trade Act

Fair Trade Agreements—Temporary Injunction—Non-contracting Parties.—Where application was made for a temporary injunction to prohibit the sale of certain items at retail prices less than those allegedly fixed by fair trade agreements, a demurrer to such application, based on the grounds that the defendant retailer had not entered any fair trade agreement with the plaintiff, was overruled.

Fair Trade Prices—Injunctions—Arbitrary and Unreasonable Price.—Where it was found that defendant had sold only one item below established fair trade retail prices, and that the established fair trade price on that item was arbitrary and unreasonable since it allowed a profit of about 375 per cent, the court refused to issue an injunction which would require sales to be made at that unreasonable price.

Procedure—Stipulations as to Probable Evidence—Disposition on Merits based on Motion Arguments.—When parties to the suit stipulated that evidence which would be produced at a hearing on the merits would be the same as that produced at the hearing upon

application for a temporary injunction, the court proceeded to consider that same evidence for the purpose of also denying a petition for permanent injunction.

See the Oklahoma Fair Trade Act annotations, Vol. 2, ¶ 8684.

For the plaintiff: Simons, Simons, Mitchell & Headrick; Cecil E. Munn, all of Enid, Oklahoma.

For the defendant: Lou E. Roseboom, Enid, Oklahoma.

Journal Entry of Judgment

[*Nature of Action*]

WYBRANT, Judge: And now, on this the 3rd day of October, 1949, the above entitled matter comes on for hearing before the Honorable O. C. WYBRANT, Judge of the District Court, on the application of the Plaintiff for a temporary injunction against the defendant, and the plaintiff appears by and through its agents and representatives and also by its attorneys of record, Simons, Simons, Mitchell & Headrick and Cecil E. Munn, and the Defendant appears in person and by and through his attorney of record, Lou E. Roseboom.

Thereupon, the Plaintiff introduces its evidence in support of its application for a temporary injunction and rests its case and, thereupon, the Defendant demurs to the evidence introduced by and on behalf of the Plaintiff on the ground that it fails to support a cause of action against the Defendant and because it is not shown by the evidence that the Defendant ever entered into a contract with the Plaintiff and said demurrer is by the Court overruled and the Defendant allowed exceptions to said ruling.

Thereupon, the Defendant introduces his evidence and rests his case.

Thereupon, the Plaintiff introduces its rebuttal evidence and rests its case and the Defendant renews his demurrer to the Plaintiff's evidence, which is overruled and exceptions allowed.

Thereupon, the cause is argued orally by counsel for the Plaintiff and counsel for the Defendant and at the conclusion of argument by counsel, the Court, having fully considered the matter and being fully advised in the premises, finds as follows, to-wit:

[*Findings*]

1. That the Defendant has not violated the prescribed retail prices established under the evidence on any of the articles enumerated in Plaintiff's Exhibit 16 except Sheik Prophylactic Rubbers No. 25, which the evidence discloses were sold on three (3) occasions for $1.00 per dozen.

2. That the sale of the item referred to as Sheik No. 25 below the established Fair Trade Price, should not be enjoined by this Court for the reason that the evidence discloses that the Fair Trade price of such item provides for an arbitrary and unreasonable margin of profit to the retail dealer, being a profit of about 375%, and the Court further finds from the evidence that the Fair Trade price of said item fixed by the producer is arbitrary and capricious.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the temporary injunction sought herein by the Plaintiff be and it hereby is denied in all respects and the Plaintiff be and it hereby is ordered to pay the costs of this action.

[*Disposition of Merits*]

Thereupon, it is stipulated by and between the Plaintiff and Defendant that the evidence introduced on behalf of both parties on the hearing on Plaintiff's application for a temporary injunction in this cause, is identical with all the evidence which would be introduced by the parties on the trial of this action on its merits, and it is stipulated by and between the parties that all of said evidence, having been introduced and a record of same made, that upon said record the Court may proceed to enter judgment upon the merits of this cause, which stipulation and agreement of the parties is approved by the Court and the Court finds that it is authorized to consider and pass upon the merits of this cause at this time, including Plaintiff's prayer for a permanent injunction, and the Court finds that the Plaintiff's petition for a permanent injunction should be denied on the same grounds as heretofore stated in denying Plaintiff's application for a temporary injunction.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED AND DECREED that the per-

manent injunction sought by the Plaintiff herein be and it hereby is in all respects denied, to which findings, orders and judgments the Plaintiff excepted and excepts.

And now, on this 20th day of October, 1949, this cause comes on for hearing upon Plaintiff's motion for a new trial, both parties being present by their respective counsel, and the motion is presented to the Court and the Court finds that said motion should be overruled.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for a new trial be and it hereby is overruled, to which overruling and finding of the Court the Plaintiff excepts.

Thereupon, the Plaintiff gives notice in open Court of its intention to appeal from the judgment of this Court to the Supreme Court of the State of Oklahoma and the Clerk of this Court is directed to note such notice of appeal on the records of his office.

Thereupon, the Plaintiff requests and is given and allowed an extension of time of Sixty (60) days from the 21st day of October, 1949, within which time to make and serve a casemade, Ten (10) days thereafter for the suggestion of amendments, said casemade to be settled and signed in Five (5) days' notice in writing by either party.

[¶ 62,510] United States v. General Instrument Corp., et al.

In the District Court of the United States for the District of New Jersey. Civil No. 8586. October 28, 1949.

Opinion on Cross Motions for Summary Judgment.

Sherman Antitrust Act

Price Fixing—Patent Licenses—Patent Holding Company.—Price fixing, under the patent monopoly, when such price fixing is not the individual act of the original corporate owner of the patent, but rather the act of a patent holding company to which several such corporate patent owners have delegated authority to issue licenses, is found to be illegal when the incorporators of the holding company have a combined strength sufficient to dominate the industry.

See the Sherman Act annotations, Vol. 1, ¶ 1270.201.

Patent Pools—Infringement Suits—Monopoly Power.—The pooling of patents, although sometimes allowable when resulting from the contractual settlement of patent claims in lieu of litigation, is held to violate the Sherman Act when the pooling is achieved through the creation of a patent holding company organized by three radio condenser manufacturers controlling more than fifty per cent of the industry and in a position to exert a monopolistic influence thereon.

See the Sherman Act annotations, Vol. 1, ¶ 1210.315, 1270.201.

Covenants Not to Compete—Monopoly Power—Agreement Restricting Sale of Special Tools.—The agreement of one of the important radio condenser manufacturers not to compete with the others for ten years, his agreement further that the tools used by him will not be sold in the open market, and an agreement between the two other contracting parties limiting the disposition of the tools and providing for their storage in escrow, constitute suppression of competition and, when done by parties capable of controlling the industry, are illegal.

See the Sherman Act annotations, Vol. 1, ¶ 1210.401, 1220.151.

For the plaintiff: Marcus A. Hollabaugh, C. Brooke Armat and George L. Derr, Special Attorneys, Department of Justice, and Alfred E. Modarelli, United States Attorney.

For the defendants: Milton, McNulty & Augelli, by John A. Milton, for General Instrument Corporation, Abraham Blumenkrantz, Samuel Cohen and Condenser Development Corporation; Elmer G. Van Name, for Radio Condenser Company, Stanley S. Cramer and Russell E. Cramer; Charles Handler, for Variable Condenser Corporation, Charles H. Hyman, Edward Hyman and Nathan Hyman.

The Facts

FORMAN, Judge: [*Digest*] From the undisputed documents and evidence offered by the plaintiff and such admissible evidence as may be gleaned from the defendants' proofs before the court on these motions, the facts in this case appear to be as follows:

Prior to 1934 General Instrument Corporation and Radio Condenser Company were the two largest manufacturers of variable condensers, controlling between themselves a percentage in excess of 50 percent of the total production within the United States. Pursuant to a scheme proposed by Mr. Maxwell James, general counsel and director of General, negotiations were had culminating in the formation, on July 30, 1934, of a patent holding corporation, Condenser Development Corporation, hereinafter referred to as "Development", the parties to the agreement being General, Radio and Amsco. All present and future patents and patent rights were assigned to Development, and Development was to defend infringement suits brought against any of the parties, and further to institute infringement suits to protect its pooled patents.

Later in that same year, an infringement suit was brought by Development against Federal and also against several distributors of Reliance, two non-member manufacturers of condensers. Both suits were settled, one before trial and the other at the appeal level, when Federal and Reliance accepted licenses from Development. Under the Reliance agreement, customers were divided into three classes, with different prices for each class. A penalty for violating the fixed price agreement was to be distributed to Reliance and the three parties under Development, in proportion to their respective gross business. As a further part of the agreement, an administrator was provided for the industry, to whom was given the duty of supervising and deciding upon specifications of standard condensers, and prices and terms of sale proposed by the manufacturers.

In 1937, Variable, a newcomer to the industry, located two Wilhelm patents, and notified Development, which had just instituted infringement suit against one of Variable's distributors, that it believed that by manufacturing under them it could avoid infringing the Cramer patents which were the basis of Development's suit. After some investigation of the Wilhelm patents and negotiations with their exclusive licensee, Development obtained all rights in the patents on January 7, 1938. Variable, on February 4, 1938, acceded and took a license which contained essentially identical provisions as those in the Reliance license.

In 1939, when Amsco agreed to withdraw from the industry in the United States and Canada for a period of ten years, it was agreed, in order to secure Radio and General against the liberation of Amsco's tools in a market competitive with their own, that Amsco's tools usable in variable condenser manufacture would be held in storage under control of General and Radio. Shortly thereafter, in August, 1939, Radio organized a new corporation, Manufacturer's Supply, which purchased nearly all the Amsco tools and proceeded to utilize them for a time in factory space rented from Amsco.

Formal price fixing was abandoned following the decision, on December 18, 1939, of *Condenser Development Corporation v. Davega-City Radio, Inc.*, 108 F. 2d 174. On March 6, 1940, Radio cancelled the authority of Development to fix its prices. In April, Development notified others of its licensees that the price-fixing clauses in their licenses were cancelled. Thereafter differences in the prices of products sold to the same customers by Radio and General widened appreciably.

Following the expiration of the 1939 agreement in 1944, no formal action was taken until March 1, 1946, when Radio, General and Development signed an agreement providing for the assignment to Development of so-called Class B patents, and providing for meetings to be called for the purpose of discussing new patents obtained by the manufacturing members, and desirable patents obtainable from other patentees. Both manufacturers bound themselves not to acquire any non-exclusive licenses without first giving the other an opportunity to join in the licensing, and each agreed to purchase or obtain no patent without previous discussion with the other as to whether the patent should not be rather acquired by Development.

Conclusions

All of the parties having moved for summary judgments and there being no genuine issues as to the material facts heretofore set forth, after hearing the arguments of

the parties the court is constrained to the following conclusions.

From the initial 1934 agreement General and Radio controlled well over 50% of the radio condenser industry in the country and dominated the industry. Although they contended that the primary purpose of their agreements was to resolve patent litigation, the course of conduct followed by them demonstrates that it was to insulate their patents from outside and inside attacks in order that they might continue a dominating position in the variable condenser industry to their mutual advantage and to the restraint of trade in interstate commerce. They admitted that they agreed that where there was a joint interest, the pool would defend an infringement suit brought against either of the pooling parties but contended that there was nothing inherently wrong in a joint defense against infringement suits brought by others. Similarly they argued that the very purpose of settling patent disputes would have been defeated if a party could thereafter turn about and purchase a patent of someone else and use it as a threat of litigation against the other pooling parties and therefore a necessary incident to the purpose of the pooling arrangement was to place patents purchased from others in the same category as patents developed and owned by the respective parties. But their subsequent conduct demonstrates that there was an additional purpose guiding the Development parties and which brought about conditions deleterious to competition.

The effect of the creation of Development as a device whereby the patents of General and Radio together with Amsco could be lodged in a pool was to tighten the clamp of domination upon the industry, for by virtue of their agreements, General and Radio created in Development a device designed to stretch the monopoly of their respective individual patents to a monopoly of patents not normally available to them.

The defense asserted for them that all of this constituted a legal patent pool within the contemplation of the decisions of the United States Supreme Court is untenable. It is true, as they assert, that in the case of *Standard Oil Co. v. United States*, 283 U. S. 163, certain patent pooling was countenanced and that the court in that case specifically held that legitimately conflicting patent claims or threatened patent interferences could be settled by contract rather than litigation without violating the Sherman Act.

In *Standard Oil Co. v. United States, supra*, the Court held that there was shown no monopoly, no unreasonable restriction of cempetition, no proof that the defendants could by reason of their contracts fix the market price, and that only about 26% of the total production of the industry involved was affected.

In explaining the *Standard Oil* case in *U. S. v. Line Material Co.*, 333 U. S. 287, 313, the Supreme Court stated that:

> "Even in *Standard Oil Co. v. United States*, 283 U. S. 163, where an arrangement by which the patentees pooled their oil cracking patents and divided among themselves royalties from licensees fixed by the pooling contracts was upheld, the theory was reiterated that a price limitation for the product was unlawful *per se*. Pp. 170, 173, 175. Of course, if a purpose or plan to monopolize or restrain trade is found, the arrangement is unlawful. P. 174. The Government's contention in that case that the limitation on royalties in itself violated the Sherman Act by fixing an element in the price was dismissed because the Court was of the view that controlled royalties were effective as price regulators only when the patentees dominated the industry. P. 174. This domination was thought by this Court not to have been proven."

In this case General and Radio control more than 50% of the industry. After Amsco joined with them in the agreement of 1934, in quick succession they subjected Federal, Reliance, and Variable to litigation terminated by licenses, denied Rae a license, leaving American as the only unconquered competitor. It preserved its independence by resisting Development's suit and in 1939 inflicted the first major defeat upon the defendants when it emerged successful in the suit of *Condenser Development Corp. v. Davega-City Radio, Inc., supra*, in which one of the so-called basic patents was declared invalid.

Note has been taken of the seemingly plausible recitals by the defendants that their patents at times were held valid and infringed by trial courts and that their adjustment of their patent differences, at least in one case, was given informal court commendation. However, these were but individual incidents in the economic road traveled by the defendants toward their objective of domination of their industry and pale in significance when their activities are viewed in their entire and total aspect. *American*

Tobacco Co. v. United States, 328 U. S. 781, 809; *U. S. v. Griffith,* 334 U. S. 100, 105-106.

Direct price fixing was abandoned as such as of April 1940 when the notices were sent out to all parties in interest. The defendants submitted that this was pursuant to the decision in *Condenser Development Corp. v. Davega-City Radio, Inc.,* 108 F. 2d 174, rendered by the Second Circuit Court of Appeals on December 18, 1939, in which Cramer Patent No. 1,800,719 was declared invalid. However, concomitantly with this litigation and during the spring and summer of 1939, the Development parties conducted a self-study of the structure of their agreements vis-a-vis the anti-trust laws. They applied to counsel for an opinion as to the legality of their position. Heretofore there has been set out in full or in resume the correspondence of the parties and their counsel in this regard. It is plainly apparent therefrom that the parties suspected that they might be acting outside the law. The opinions of counsel hardened these suspicions into something more than conjecture. The course was laid out to be followed in the future. It is obvious that this was designed to accomplish the same objectives sought by their previous agreements and arrangements under a new, and if possible, legal form. The mere fact that the Development parties intended to accomplish a result by legal methods and claimed good intentions is not germane where infractions of the antitrust laws are involved.

That a specific intent is lacking to restrain trade or to establish a monopoly will not form a defense against an antitrust complaint for

> "It is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements." *U. S. v. Griffith,* 334 U. S. 100, 105.

The characterizations placed upon their conduct by the defendants or expressions of motive in their isolated arrangements avail nothing in the tooth of the sum total of their acts, for as was stated in the case of *American Tobacco Co. v. United States,* 328 U. S. 781

> "Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition." 328 U. S. at p. 809.

The Development parties contend that their price fixing arrangements prior to 1940 were legitimately based upon patents in compliance with the decision in *U. S. v. General Electric Co., et al.,* 272 U. S. 476. But the price fixing was not the individual act of the original corporate owner of the patent but of Development to whom the incorporating parties had delegated authority to license to their mutual advantage when the combination of strength was sufficient to dominate the industry.

In the case of *United States v. Line Material Co., supra,* competitors held interdependent patents and neither could be commercially exploited without the use of the other. In the light of this condition, one competitor granted a license to the other with a provision permitting licensing to manufacturers provided the equipment manufactured under the patents involved conformed to the price structure fixed by the patent owner. The same agreement was made by the other competitor. Thereafter, the holder of the minor patent issued a number of licenses to manufacturers containing sales limitations. Upon these facts the trial court held the arrangement not to be violative of the Sherman Act on the authority of the *General Electric* case. However, the United States Supreme Court reversed and held that the combination of different patentees for the purpose of fixing the sales price was unlawful under the Sherman Act and that others who subsequently entered into license arrangements containing price fixing provisions with knowledge of the contracts are equally subject to the prohibitions of the antitrust laws.

The *Line Material* case is immediately applicable, therefore, to the arrangement followed by the Development parties from 1934 to 1940. The only distinguishing feature is the fact that Development rather than one of the patent owners was the licensor by virtue of the assignment to it of the patents held by General and Radio but this feature is a mere matter of form and does not alter the substance of the arrangement.

There can be no question but what the agreement of August 7, 1934 with its creation of Development as the alter ego of the other contracting parties and its modifications of May 19, 1937 and June 9, 1939 with the deliberate price fixing arrangements arising therefrom are *prima facie* proof of a conspiracy to restrain competition in the variable condenser industry. *Schine Thea-*

tres v. U. S., 334 U. S. 110, 116, 117, 119; *United States v. United States Gypsum Co.*, 333 U. S. 364, 388-389; *United States v. Line Material Co.*, 333 U. S. 287, 314-315.

Commencing in the fall of 1940, the economy of the United States was geared to a concerted war effort and from 1942 to 1945 there was no civilian production as was admitted by the defendants in their brief. Priority and price controls rendered unnecessary any form of price stabilization by private contract and it was not until 1946, when the parties were free of controls, that the necessity for private agreement again arose. However, in 1944, the Department of Justice commenced an investigation of the activities of the defendants. Forewarned that their conduct was the subject of investigation, it was but natural for General and Radio, upon resumption of their relationships, to avoid a semblance of price fixing.

It would appear, at first blush, that the agreement of April 1939, in which Amsco sold its stock in Development, assigned its eleven patents and relinquished its license under all the patents for the sum of $50,000 paid by General and Radio in which was incorporated Amsco's covenant not to compete with them in the manufacture of variable condensers for a period of ten years and in which restrictions were placed upon Amsco's sale of its tools in the United States, was reasonable to protect the interest of the purchasers as they have argued. They likewise contended that the said agreement, when construed with the subsequent agreement of June 10, 1939 between General and Radio in which permission was granted General to purchase tools of Amsco and a similar permission accorded Radio by General provided either of them upon such purchase in turn restricted any sale of such tools, comprised, so to speak, a "part of the *res gestae* and should be considered as one transaction". This was true, but not in the sense implied by the defendants. Had this agreement of sale been effected between two independent parties perhaps the covenant and restrictions would have been valid, as argued by the defendants. But here two competitors, combined through the device of a patent holding corporation, jointly bargained for the advantages of the restrictive covenants from the outgoing Amsco and then proceeded to agree to restrict each other. The argument advanced by them presumed lawful initial arrangement as to tools in the agreement of April 28, 1939 and in the later agreement between the defendants of June 10, 1939. This is not tenable so far as the tools of Amsco were concerned. These contracts were but naked agreements between competitors designed to restrict the tools and equipment from falling into the open market. The fact that the tools came ultimately into the use of Radio, or its subsidiary, Manufacturer, in large part, does not validate the intentions or the expressed agreements of the parties as plainly enunciated in their contracts. The cases cited by the defendants would govern under circumstances different from those under which the parties in this case engaged. Hence it can only be held that these contracts in so far as restrictions on the use of tools were concerned were not only invalid in themselves as in restraint of trade in violation of the Sherman Anti-trust Act, but in view of the total relationship of all of the parties, they constituted an illuminating element in the entire light in which the parties dealt with the antitrust laws.

General and Radio are not in the position of the defendants in the case of *Standard Oil Co. v. United States, supra,* where the court declared patent pooling legal and used the following language:

> "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. . . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition." 283 U. S. at p. 171.

Rather are they within the contemplation of the Court in the same case when it said:

> "The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices." 283 U. S. at p. 174.

This doctrine was reemphasized in the case of *United States v. Line Material Co.*, 333 U. S. 287, 313-314.

The Development parties exceeded the boundaries of permitted cross licensing of the patents separately owned by them when

they vested in their creature, Development, the power to grant licenses and to use those licenses for aggressive or defensive purposes. This power with but insignificant modifications is as inherent in the 1946 agreement as it was in the 1934 agreement. Although direct price fixing present in the *Line Material* case is absent here, an equivalent power is established in the dominant position of the parties and the royalty mechanism centered in the hands of Development. In this manner the normal patent monopoly with its products of legitimate cross-licensing and royalties, is extended to give multiple advantages to individual patent holders dominant in the industry by combining their patents and affording the mechanism to reap mutual rewards greater than their individual patents would justify.

Once it is established that the agreement *per se* is the device which has vested the combination with power to restrain trade, it is unnecessary to show that the actual restraints have been applied. Domination of the industry with power to restrain is sufficient to bring the combination within the scope of the antitrust law. *American Tobacco Co. v. United States,* 328 U. S. 781:

> "Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be 'wholly nascent or abortive on the one hand, or successful on the other.'" *Associated Press v. United States,* 326 U. S. 1, 12.

Therefore, the 1946 agreement must be held to be in restraint of trade and an attempt to monopolize the variable condenser industry in the United States in violation of §§ 1 and 2 of the Sherman Act.

The position of Variable is that of a competitor of the Development parties who bowed to the exigencies of its situation and accepted the position of a licensee. During the period when it faced patent litigation by the Development parties it sought to escape its dilemma by attempting to purchase the Wilhelm patents. The conclusion must be that although the Wilhelm patents may have been of no material value to the Development parties in manufacturing variable condensers, their possession of them would weaken Variable by denying it a possible means of manufacturing without infringing Development patents. In spite of the protestations of the Development parties that their acquisition was based upon good motives, the natural effect was a factor in forcing Variable into their control and to compel it to accept a license with its restrictions.

However much Variable may have acted by compulsion, the case of *U. S. v. Line Material Co.,* 333 U. S. 287 controls, for it stands in no better position than the licensees in that case, wherein the Court said:

> "Licensees under the contract who as here enter into license arrangements, with price fixing provisions, with knowledge of the contract, are equally subject to the prohibitions." 333 U. S. at p. 315.

Price fixing provisions were, it is conceded, a factor in the above cited case, but their equivalents were present in the association of Variable in its agreement with the Development parties. This is made clear by its express assertion in its defense of the action brought against it in New York by Development's assignee for arrearages of royalties. Although that contest was amicably adjusted, when it burned at its heat Variable had no hesitation in forcefully claiming, in its defense against the demand for royalties, that it was being victimized by the activities of the Development parties which were as it, Variable, specifically alleged, in violation of the antitrust laws. So Variable rebelled but probably finding it economic to succumb, it gave thereafter full cooperation to the Development parties. It must be held a member of the price fixing combination in existence prior to 1940 and although evidence is lacking of subsequent price fixing, it has continued to be a licensee with knowledge of the iniquities of its rarangements down to the time of this suit. Therefore, it is a conspirator with General and Radio and a violator of §§ 1 and 2 of the Sherman Act.

In addition to the corporate defendants, General, Radio, Development and Variable, the following individual defendants were active parties to the agreements and the activities in connection therewith and must be held to have likewise violated §§ 1 and 2 of the Sherman Act: Abraham Blumenkrantz, Samuel Cohen, Stanley S. Cramer, Russell E. Cramer and Charles Hyman. Proof is lacking of any affirmative control exercised by the defendants Nathan and Edward Hyman (associated with Variable) that would make them parties to the conspiracy. Accordingly they are found not to

have participated and the motion for summary judgment in their favor will be granted. The motion of the plaintiff for summary judgment in its favor against the other defendants above named will be granted. The motion for summary judgment upon the part of the defendants General, Radio, Development, Variable, Blumenkrantz, Cohen, Stanley S. and Russell E. Cramer and Charles Hyman will be denied.

An order in conformity with this opinion embodying the terms of relief to which the plaintiff is entitled should be submitted on notice to the parties.

[¶ 62,511] United States v. American Can Company.

In the District Court of the United States for the Northern District of California, Southern Division. No. 26345-H. November 10, 1949.

Clayton Antitrust Act, Sherman Antitrust Act

Tying Agreements—Total Requirements Contracts—Canning Industry.—A leading can manufacturing company, which pursued a policy of leasing instead of selling can closing machines to its customers, was shown in the evidence against it to have conditioned its leases upon acceptance by the customer of contracts requiring the customer to purchase all his needed cans from the manufacturer for periods of five years. The tying of the two contracts was found by the court to have injuriously affected competition in an appreciable segment of interstate commerce and to constitute a violation of Section 3 of the Clayton Act.

See Clayton Act annotations, Vol. 1, ¶ 2023.36, 2023.37.

Tying Agreements—Machinery Leases—Monopoly Power.—The tying of five-year requirements contracts with leases of can closing machinery for the same period, where the leases were at rental values often below the cost of the machinery to the manufacturer, thus foreclosing competing lessors, is a restraint of trade excluding competitors from a substantial part of the market, and when engaged in by the leading manufacturer of cans, is an exercise of monopoly power. Such conduct is a violation of Sections 1 and 2 of the Sherman Act, although it is not within the language or intent of Section 3 of the Clayton Act.

See Sherman Act annotations, Vol. 1, ¶ 1220.101.

Total Requirements Contracts—Reasonable Restraints.—Requirements contracts are not *per se* illegal. Where a canner must be left a source of supply of cans which can be counted on to be constant and always available, the needs of the economic system in which he operates must be considered in determining the reasonableness of the restraint involved in such contracts. Although five-year total requirements contracts are unreasonable, one-year contracts, in the canning industry, would not be so.

See Sherman Act annotations, Vol. 1, ¶ 1021.251; Clayton Act annotations, Vol. 1, ¶ 2023.48.

For the plaintiff: Herbert A. Bergson, Ass't Attorney General, Washington, D. C.; Frank J. Hennessy, U. S. Attorney, San Francisco; William C. Dixon, Special Ass't to the Attorney General, Los Angeles; Wallace Howland, Special Ass't to the Attorney General, San Francisco; George W. Jansen, Trial Attorney, San Francisco; Lyle L. Jones, Arthur H. Tibbits and William R. Mills, San Francisco.

For the defendant: Simpson, Thacher & Bartlett, by Whitney North Seymour, Fifield Workum, Douglas A. Calkins, Armand F. MacManus, Chester C. Davis, David S. Junker, Richard Hawkins, Thomas Thacher, Sydney A. Woodd-Cahusac and Alexander R. Ormond, all of New York City, of counsel; Frederick M. Fisk and W. Burleigh Pattee, both of San Francisco, attorneys; Chickering & Gregory, San Francisco, of counsel.

Opinion

HARRIS, Judge: [*Digest*] This action was instituted by the government under the Sherman Act, Sections 1 and 2, and the Clayton Act, Section 3, seeking to enjoin the American Can Company from unlawful

practices, allegedly in violation of both acts. The primary question for determination is whether defendant's requirements contracts and closing machine leases are illegal in the particulars specified.

Plaintiff attacks defendant's contracts under which it sells its metal and fiber containers; plaintiff also challenges the legality of defendant's closing machine leases under which it lets its can closing machines which complete the metal and fiber containers. Plaintiff contends that the can contracts and closing machine leases constitute unreasonable restraints of trade and commerce and, in addition, that such contracts and leases, together with certain specified devices, means and methods constitute a violation of Section 3 of the Clayton Act. Plaintiff further contends that defendant's contracts and closing machine leases constitute a mode of operation which gives rise to an attempt to monopolize trade and commerce and has effectuated such a monopoly in certain parts of the trade and commerce in canning, in violation of Sections 1 and 2 of the Sherman Act.

Since the conclusion of the trial of the instant case, the Supreme Court has decided *Standard Oil Co. v. U. S.*, 337 U. S. 293, rhrg. den., 10 October 1949, 10 Supreme Ct. Bul. 11. Plaintiff contends that this case, together with *International Salt Co., Inc. v. U. S.*, 332 U. S. 392, is fully and finally determinative of the issue under Section 3 of the Clayton Act and that, as a matter of law under the undisputed facts, judgment must go in its favor; that is, the requirements contracts are illegal and that the closing machine leases are equally offensive and must be striken down by the Court.

[*Facts*]

In 1946, when the plaintiff commenced its suit against defendant, American manufactured more than 200 million dollars worth of cans out of a total tin plate worth upwards of 500 million dollars. On the basis of tin plate consumed, American's percentage of the whole was somewhat in excess of forty per cent.

American and Continental in 1946 together manufactured approximately seventy per cent of the cans produced in the industry and approximately eighty per cent of all cans made for sale. These figures may be raised to eighty-one per cent and ninety-three and six-tenths per cent, respectively, if the output of four additional companies—Crown, National, Heekin, and Pacific—is added. Their combined sales of both kinds of cans that year totaled approximately 461 million dollars. Their combined sales of general line cans in the amount of $151,736,000 was equivalent to approximately 66.9% of all cans made and 81% of all made for sale. In this group of six companies in 1946, American accounted for 47.9% of the sanitary cans and 52.2% of the general line cans. American and Continental together sold 86.1% of all the cans made.

From the above recital of facts, it is clear that from a national standpoint, defendant is the leader in the manufacture of cans, although it has competition in its business and is not in a position of complete monopoly. From a regional standpoint, the story of control is different. Thus, in such an area as Utah, defendant has the only plant which serves the needs of the packers in that state. A similar monopoly exists in Hawaii, while in Alaska defendant has 80% of the can business. As might be expected American is the dominant influence in specific sections of the United States.

With respect to closing machines: Since the canning industry progressed from the hole and cap cans, which were used at the turn of the century, to the sanitary or packers' cans which are closed by machines, American has moved into leadership in the manufacture and leasing of closing machines. Today it makes and leases to its customers substantially all of their closing machines.

In terms of closing machines leased to canners, American controls 54% of all such machines. In excess of 17,000 closing machines were on lease by the canning industry at the time of commencement of this litigation in 1946. Of this number, American had 9,258 machines. Continental far outdistances other canning concerns with approximately 36% of the total machines on lease. The independent can-closing machine makers are thus limited in their sales to a market of 12% of the closing machine business.

It is the fixed and uniform policy of American to lease rather than sell its closing machines. The only exceptions to this policy arise in the few instances in which American sells machines abroad or sells a few single spindle semi-automatic machines in the Ozarks. Other canmaking concerns follow American's policy.

The present case is not directed toward American in its capacity as manufacturer of closing machines. However, it should be noted that the practice of defendant in leasing at below cost figures has tended to restrict the market for closing machine manufacturers and has limited the number of concerns engaged in this business.

With respect to the requirements contracts: The Government contends that defendant's contracts are the major tool by which it is able to exclude or limit competition in the canning business and, hence, is able to maintain its dominant position. American now has a standard form of contract which the plaintiff chooses to call "total requirements contract". In a practical sense, defendant does enter into such a total requirements contract with most of its customers. Canners, according to the record, prefer to deal with a single can manufacturer in obtaining their products for a single plant. American's 1946 contract permits a customer to purchase a single line of cans or any number of kinds of cans on a requirement basis. In 1945 American did 92% of its business in sanitary cans on this basis. Over the years defendant has handled only minute portions of its sales on an open order basis.

Throughout its business life American has entered into requirements contracts of varied duration. These have ranged from three to twenty years. Recently, defendant prepared a standardized contract of uniform length of five years. For various reasons, defendant believes that a contract of such duration best serves the interest of both canner and canmaker.

[*Conclusions*]

The Closing Machine Leases executed by Customers with the Defendant are Violative of Section 3 of the Clayton Act:

In the light of *Standard Oil Company v. United States,* 337 U. S., *supra,* this phase of the case is reduced to comparative simplicity. In reaching the conclusion that the leasing practices must be proscribed, we must trace briefly the practices of American since the "tying provision" was admittedly removed from the lease contracts covering closing machines.

In May 1917, in the course of an investigation of American by the Federal Trade Commission, the defendant agreed to eliminate from its forms of contract and lease any clauses which the Commission considered objectionable. Defendant now asserts that it struck the offending "tying clause" from its leases in the latter part of 1917, and, that since the elimination of the clause, the provisions in the contract for the lease of closing machines has remained substantially identical, embodying the usual covenants customarily found in lease contracts.

Paragraph two, containing the "tying provision" reads:

> "Lessee agrees that it will pay the rental as above provided, and that it will not use or permit the user of any of said machines or additional equipment, if any, for any purpose except therewith to close cans which the lessee shall have bought from the lessor and will not, directly or indirectly, use or permit the use of, the same except as herein expressly authorized."

The Government contends that the provision, although eliminated from the lease forms, has been kept alive and in effect as a result of the practices engaged in by American of a "subtle and refined" character. The practices, in substance, are as follows:

Defendant leases closing machines only to customers who purchase their cans from it, and closing machine leases run for terms concurrent with the can contracts. Sales policies, as contained in memoranda and directives from the executive officers, bear out the Government's contentions that the "tying provision" for all practical purposes has remained in the contract negotiations. The evidence introduced by the Government in this connection abundantly supports this contention and no useful purpose could be served herein by lengthy excerpts from the record.

Defendant asserts that "unless the lessee, as a condition of his closing machinery lease, is obligated to buy from the defendant all the containers he closes on that machine, the Clayton Act has no application". That is precisely what American achieves as a matter of over-all policy!

The Court is inclined to view the written record as disclosing a pattern as to policy, pointing unerringly to the conclusion that, in the main, American would not lease closing machines without a corresponding sale of cans.

That the closing machines represent a most valuable sales tool becomes increasingly manifest when it is considered that

defendant has in excess of 9,000 machines on lease of an approximate value of 12 million dollars, many of which have been rented at nominal or low rental values in order to foreclose competition. The evidence herein discloses that American owns and controls more closing machines than the rest of the industry together, and demonstrates that defendant effectively ties the leasing of such machines to the sales of its cans. Defendant owns approximately 54% of all closing machines available for lease to the industry.

Finally, American contends that "in the absence of proof of the alleged condition, agreement or understanding not to use the goods of a competitor, and a proof that any such understanding may substantially lessen competition or tend to create a monopoly the Clayton Act has not been violated".

As a matter of law, this contention is set at rest by *Standard Oil Company v. United States,* 337 U. S., *supra.* Section 3 of the Clayton Act is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.

It is manifest to this Court from the record herein that abundant proof has been supplied by the Government, and the Court accordingly finds that the leasing practices of can closing machines violate the said Act for they affect injuriously a sizeable part of interstate commerce, i. e., an appreciable segment of interstate commerce.

The Devices, Means and Methods Used by Defendant in Accomplishing the Monopoly:

No useful purpose could be served by recounting herein the details of all the transactions spread over a period of years from 1930. They represent a saga of American business—so-called "big business". Taken alone, or disassociated from the general configuration or picture, many of the transactions would appear to be without probative value. However, as a composite they set a pattern of operations evidencing the extremes defendant saw fit to go in perpetuating the contractual relationship between defendant and the customer-user. The devices took many forms: defendant provided discounts in ancillary contracts; defendant paid large sums of money to obtain business of its customers; defendant furnished equipment, in addition to closing machines, at nominal rentals; defendant paid large claims when it appeared propitious and good policy; defendant purchased canmaking equipment from its customers for inflated values in order to obtain can business. The foregoing represent only part of the claims set up by the Government under the "inducements" phase of the case.

Defendant, in responding to the Government's contention that these transactions and incidents must be taken as part of the general configuration in interpreting the effect of the requirements contracts and the closing machine leases, says in part: "Certainly there is no evidence in this record that these 'inducements' were conditioned on the signing of a requirements contract".

To the contrary, there is evidence in the record, and inferences to be drawn therefrom, that the inducements referred to, in many instances, formed an important and vital part in the renewal or re-negotiation of requirements contracts.

Certain practices, as defendant claims, represent no more nor less than "ordinary business practices, such as the extension of credit, the servicing of leased machinery, the equalization of freight rates and similar activities one would expect to find in any industry in which competitors are seeking to serve the needs of their customers and keep their good will".

The incidents, when examined realistically and not as mere abstractions, are deeper than the typical run-of-the-mill, day-to-day business transactions. They represent a studied, methodical and effective method of retaining and acquiring by refined, gentlemanly and suave means, plus an occasional "commercial massage", the dominant position which American has had and maintained for at least a generation on and over the canning industry. A detailed analysis of this phase of the Government's case convinces that there is little room left in a competitive sense, for the independent small business man. As a competitive influence, he has slowly and sadly been relegated into the limbo of American enterprise.

The evidence establishes violations of Sections 1 and 2 of the Sherman Act:

The proof in this case compels the conclusion that the five year requirements contracts and closing machine leases unreasonably restrain trade in violation of the Sherman Act. The evidence discloses that competitors have been foreclosed from a substantial market by the contracts and leases.

The practices surrounding the leasing of closing machines, in view of Section 3 of

the Clayton Act, have received appropriate treatment and discussion, *supra;* although the "tying provision" has ostensibly been deleted from the leases, nevertheless, as a matter of practice and policy, the machines are still "tied" to the sale of cans.

Add to the foregoing element the requirements contract:

The form of contract finally promulgated by the defendant in 1946 is, in practical effect, a total requirements contract. It covers the sale by the supplier and the purchase by the user of all of the containers specified in the contract which the user shall require for his actual use in his operations in all specified points in the United States and its possessions and territories.

With the premise established that American is in a dominant role and a position of preeminent power in the industry, we may then examine the record to determine whether: (a) competition has been foreclosed; (b) from any substantial market.

In the instant case the Government's proof shows the use by defendant of approximately 4,000 requirements contracts involving 250 million dollars in business annually, and a domination in the canmaking industry for a period of almost fifty years. The evidence reveals the ownership and control of more closing machines than the rest of the industry as a whole, and it further demonstrates that defendant effectively ties in the leasing of the closing machines with the sale of cans under requirements contracts. Thus, Government argues that domination and control having been demonstrated, this Court must hold as a matter of law, in the light of the contracts entered into and the business controlled under the contracts, implemented with the devices, means and methods already alluded to, that competition is foreclosed over a period of many years with respect to a sizeable segment of the canmaking business, to wit, approximately 40%.

In short, it is contended that from the foregoing an *automatic* result follows and that where competition under such circumstances is excluded, that the restraint and monopolistic practices are unreasonable.

Apart from the inevitable conclusion reached that the requirements contracts and closing machine leases, backgrounded by the configuration of the devices and practices, offend against the Sherman Act, Sections 1 and 2 thereof, there is the problem of the user-consumer which must be approached, not as a legal abstraction, but realistically. He should not be left without a source of supply. The canners are subject in many instances to the whims of nature, over which they have no control. They are, therefore, required to have available a supply of tin containers, fluid in amount, and appropriate from the technological and marketing viewpoints. The general reason assigned for requirements contracts was that canners wished to be assured of receiving containers when, as, and if needed, regardless of any contingency which might affect the raw material supply or the market.

In its brief (page 217) the Government takes the position that, by reason of the impingement of the machinery lease contracts upon the requirements contract the term of the requirements contract, be it fifteen years, ten years, five years or one day, is immaterial. That the term requirements contracts perforce must be stricken as a whole. The basic answer to this contention is brief:

The Government has intertwined the lease contracts with the requirements contract without giving recognition to the separate status of each. Although admittedly the machinery lease contract impinges upon the requirements contract, nevertheless, the inherent vitality or lack of vitality is not to be determined from that circumstance alone. Rather the question of reasonableness must to some degree be determined by the force and effect of the contract upon trade and commerce, and, when we take the requirements contract in and of itself and examine it in the light of its possible effect upon trade and commerce, it must be concluded that the *five year* term creates an unreasonable restraint in the light of all the facts, factors, circumstances and background.

In finding the five year requirements contract illegal, we are not thereby compelled to declare void any and all requirements contracts. We *cannot* ignore the testimony of countless witnesses who indicated the vital necessity of some sort of supply contract. Several of them, of course, vigorously denounced the long-term period. Others believed emphatically in a term not to exceed one year, for, as it was pointed out, at the expiration date of such a period of time they could cast about in the open market.

Mindful that requirements contracts are not *per se* unlawful, and that one of the

elements which should be considered is the length thereof, it is only fair to conclude, after a careful review of the evidence, that a contract for a period of one year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the five year requirements contracts would be removed. Under a contract limited to one year, the user-consumer would be guaranteed and assured supply and protected by a definite obligation on the part of American to meet the totality of needs of the canner, while he, in turn, would have a fixed obligation to purchase his seasonable needs from American, thus making for mutuality of contract and obligation.

To strike down the requirements contracts and to declare them totally void as violative of the Sherman Act, without at the same time affording to the user-consumer a supply over a limited period of time, would be destructive, illogical, unsound and not in consonance with the acute and particular problems confronting the canning industry.

In this *particular case* we have concluded that the Court is not foreclosed from an examination into the needs and requirements of the industry with respect to a finding as to whether an unreasonable restraint and monopoly exist under Sections 1 and 2 of the Sherman Act. The requirements of the industry in our opinion have a bearing upon the problem herein although admittedly not finally determinative of the ultimate question to be resolved.

We find, therefore, that in the light of the evidence, the requirements contracts herein are unreasonable for the period or duration of five years and that a reasonable period of time for said duration is one year.

The Government contends that the requirements contracts also offend against Section 3 of the Clayton Act. From a review of the record, the Court perceived that these contracts properly fall within the proscription of Sections 1 and 2 of the Sherman Act and that their provisions must be dealt with accordingly. Defendant's requirements contracts do not come within either the language or the intent of Section 3 of the Clayton Act.

The Agreement to Fix Prices between American and Continental:

Apart from any claimed conspiracy, there is abundant evidence with respect to the agreement or agreements on the part of the officers of Continental and American to fix prices.

The pattern of evidence herein suggests more than a following on the part of Continental of the prices fixed and established by American.

It becomes unnecessary, under the issues as framed in this case, to make any finding with respect to a so-called conspiracy or to otherwise allude thereto. The conspiracy, or its absence, cannot serve as a premise in any logical reasoning leading to a conclusion with respect to the practices that are at issue. However, we do find that American and Continental, through their officers, agents, and servants, did directly agree to fix prices. This is manifest from the evidence, as well as the pattern of the price lists which appeared in the exhibits.

Affirmative Defenses of American Can Company:

The affirmative defenses set up by American have been either expressly or impliedly denied by the Court during the trial of the case. Defendant has alleged, first, that the issues raised by the complaint are *res judicata* by reason of the judgment in *U. S. v. American Can Co.*, 230 F. 859; 234 F. 1019. The Court has previously indicated that this asserted defense is unavailing and defendant itself has acquiesced in the Court's ruling by asserting that it would prefer a decision on the merits rather than rely upon a technical assertion. But defendant expressed such a desire "without waiving the defense", submitting that, at the very least, Judge Rose's decision should be considered a most persuasive precedent.

Defendant has alleged as a second affirmative defense: that the leases and total requirements contracts and issues regarding the legality thereof, are moot by reason of the dismissal of the 1924 complaint by the Federal Trade Commission. The decision or determination of the Commission is not binding upon this Court under the issues raised herein.

Plaintiff may submit herein Findings of Fact and Conclusions of Law in accordance with the foregoing opinion. With respect to the ultimate remedies or relief, ruling will be deferred until further hearing and upon notice.

[¶ 62,512] A. A. Chilcote v. United States.

In the United States Court of Appeals for the Sixth Circuit. No. 10,856. Filed October 13, 1949.

Sherman Antitrust Act

Contempt Proceedings—Failure to Respond Properly to Subpoena *Duces Tecum* and *Ad Testificandum*.—The entry of a finding of contempt in the trial court against the president of a corporation, who had the required documents transmitted by his attorney to government lawyers instead of appearing personally with the documents before the grand jury in response to subpoena *duces tecum* and *ad testificandum*, is approved by the court of appeals upon the reasons given by the district court.

See the Sherman Act annotations, Vol. 1, ¶ 1610.345.

Affirming decision of the United States District Court for the Northern District of Ohio, Eastern Division, reported at ¶ 62,353.

For the appellant Chilcote: C. W. Sellers and R. M. MacArthur, Cleveland, Ohio.

For the appellee: Don C. Miller and Lester Kaufman, Cleveland, Ohio.

Before SIMONS, MARTIN and MILLER, Circuit Judges.

Order

MILLER, Judge: This appeal was heard upon the record, briefs and oral argument of counsel for respective parties, and having been duly considered by the court;

IT IS ORDERED that the judgment appealed from be and is hereby affirmed for the reasons given by the District Court in its memorandum opinion of January 3, 1949 and upon the authority of *Wilson v. United States*, 221 U. S. 361, 374, 376.

[¶ 62,513] Samuel Shefsky, Phillip L. Rudich, L. R. S. Machine Company, Inc., and Michael J. Hughes & Company v. Mansew Corporation v. Cutting Room Appliances Corp.

United States Court of Appeals for the Second Circuit. No. 21420. Decided November 17, 1949.

Appeal from a judgment of the United States District Court for the Southern District of New York. Affirmed.

Sherman Antitrust Act, Clayton Antitrust Act

Federal Rules of Practice—Impleader—Content of Supporting Affidavit.—When a third party complaint is filed by the defendant in a patent infringement suit, and his supporting affidavit does not merely state that the appearance of the third party is necessary for complete relief, but goes further and makes allegations of conspiracy which in fact demonstrate that the third party is not necessary, then the third party complaint must, by virtue of Federal Rule 13(h), be dismissed.

See the Sherman Act annotations, Vol. 1, ¶ 1640.251; Clayton Act annotations, Vol. 1, ¶ 2024.81.

For third-party plaintiff, Mansew Corp.: Harris B. Steinberg (Jacob H. Bobrow, of counsel).

For third-party defendant, Cutting Room Appliance Corp.: Henry L. Burkitt.

Before L. HAND, SWAN and FRANK, Circuit Judges.

[Nature of Action]

On February 10, 1948, plaintiffs filed their complaint, naming Mansew Corporation as defendant, and alleging infringement by defendant of letters patent Nos. 2,192,446 and 2,422,914. The complaint alleged that the patents were owned by the individual plaintiffs and that they had granted an exclusive license to the plaintiff, the L. R. S. Machine Company, which had granted an exclusive license to the plaintiff, Michael J. Hughes & Company.

On May 19, before Mansew filed its answer, the district court, on Mansew's motion supported by an affidavit of Mansew's lawyer, made an *ex parte* order reading as follows: "IT IS ORDERED that Cutting Room Appliances Corp. be made a third party defendant in this action, and that leave be granted to serve a summons and a copy of the answer and third party complaint herein upon Cutting Room Appliances Corp., and it is further ordered that the title of the action herein be amended to read as above set forth." The supporting affidavit read in part as follows: "I make this affidavit in support of the defendant, Man-Sew Corporation's application for an order bringing in Cutting Room Appliances Corp. as a third party defendant in this action. * * * The defendant's answer, which is now being prepared, will set forth a number of defenses and will include counterclaims. One of such counterclaims will be for a declaratory judgment of invalidity and non-infringement of the patents involved, and another for damages and an injunction, pursuant to the provisions of the Clayton and Sherman Anti-Trust Acts, because of the conduct of these plaintiffs and the third party defendant, Cutting Room Appliances Corp., in conspiring to restrain trade and to secure an illegal monopoly in the manufacture and sale of garment trimming machines. The proposed third-party defendant, Cutting Room Appliances Corp., *as will be demonstrated herein,*[1] has taken a leading part in such activities in restraint of trade, and it is obvious that, in order for the defendant (and proposed third party plaintiff) to obtain full relief on its counterclaim, the proposed third party defendant, Cutting Room Appliances Corp., is a necessary party." The affidavit went on to state the following:

[*Statements in Affidavit*]

(1) Cutting Room Appliances (CRA) had published advertisements creating the impression that it was selling the "only fully automatic dress bottom trimmer authorized" by letters patent Nos. 2,192,446 and 2,422,914. (2) One of its advertisements contained this statement: "We think you should be advised that action has commenced to restrain, as infringement of these Letters Patent, manufacturer and sale of dress bottom trimmers by others, and that instructions have been issued vigorously to prosecute such action to a final decision. We think you should know that not merely the manufacturer, but also the user and seller of an infringing machine, may be enjoined, and may be held responsible for damage arising out of the use or sale of such infringing machine." (3) This statement had led Mansew's customers and prospective customers to believe that CRA was the plaintiff in the patent suit and would be the plaintiff in other similar contemplated suits. (4) CRA and plaintiff had apparently resorted to a campaign of falsehoods, vilification and abuse designed to injure the defendant's standing in the trade. Thus they had made statements that "Man-Sew was forced to withdraw their skirt trimmer from the market due to the fact that they were infringing on certain patents." (5) "Accordingly, it is obvious that, as far as the public is concerned, Cutting Room Appliances Corp., the proposed third-party defendant, has taken the lead in a conspiracy to restrain trade, and to secure an illegal monopoly, and to injure the defendant's business, and should be made a party to this action so that the merits of the defendant's counterclaim against it and the plaintiffs may be determined, with binding effect on all parties concerned."

[*Allegations of Counterclaim*]

On May 24, 1948, Mansew filed its unsworn answer. The answer contained, *inter alia,* a counterclaim against plaintiffs and a "third-party complaint" against CRA, which alleged the following: Plaintiffs and CRA, by bringing their suit were attempting to "misuse the patent system to obtain an illegal monopoly"; they had so acted as to create a monopoly in connection with their patents in violation of the Sherman and Clayton Acts, by "limiting and decreasing competition in, the trade in garment trimming machines, not covered by any valid claim of the patents in suit, in interstate commerce"; that they had "misrepresented the scope of said patents and the scope of the claimed rights of plaintiffs, to the trade and to the public in general, by circulating and publishing in trade papers, and by advertisements, circulars, letters, announcements, notices and oral communications, false, deceptive and misleading information, and threats of suits, seeking thereby to intimidate prospective purchasers of defend-

[1] Emphasis added.

ant's machines, and to restrain the free trade among the several states, and between this country and foreign countries, in garment trimming machines"; their conduct had resulted and would result in "material, irreparable and substantial loss and damage to defendant and in the loss of sales by defendant of its garment trimming machine which defendant would have otherwise made, except for the unlawful and unfair acts of plaintiffs and the third party defendant; "the exact amount of said damage and injury cannot be ascertained except by an accounting proceeding; * * * unless plaintiffs and the third party defendant are restrained and enjoined from continuance of such illegal and monopolistic activities, defendant will be subject to further serious and irreparable loss. * * *" This counterclaim asked an injunction, and other relief against plaintiffs and CRA.

On May 26, 1948, CRA was served. The summons signed by the Clerk was on a printed form which contained the following: "Note: This summons is issued pursuant to Rule 14 of the Federal Rules of Civil Procedure." On June 10, 1948, CRA moved to dismiss the "third party complaint." Attached to the motion papers was an affidavit of the lawyer for CRA which stated that the "complaint" had been filed under an order made "without the presence or consent of CRA"; that there was "no sound foundation for the bringing in of" CRA; and that Mansew had shown no basis for joining CRA under Rule 14. The district court entered a judgment dismissing this complaint without leave to amend. From this judgment, Mansew appeals.

[*Opinion*]

FRANK, Circuit Judge: The impleading order of February 10, 1948, bringing in CRA as a party, was *ex parte*. Whether a motion to dismiss a counterclaim would ordinarily be the proper method to raise the question of the validity of such an order, we need not decide, for here the affidavit attached to the motion sufficiently raised that question. True, in that affidavit CRA urged that the order was erroneous under Rule 14, whereas obviously the pertinent rule is Rule 13 (h); however, the note printed on the summons might well have misled CRA. Consequently, we think the motion to dismiss the counterclaim should be considered as a motion to vacate the impleading order as improper under Rule 13(h).[1]

That rule allows impleader only where "* * * the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim. * * *"[2] Here, when defendant sought impleader, its only basis was the supporting affidavit of defendant's lawyer. We may assume, *arguendo*, that that affidavit would have sustained the order if it had stated merely (a) that the counterclaim would allege that plaintiffs had violated the Sherman and Clayton Acts, and (b) that CRA had joined in the violations to such an extent that it was a necessary party if defendants were to obtain "complete relief" under the proposed counterclaim. But the affidavit went further. It thus said too much and, in so doing, said too little. For it alleged detailed facts which, so the affidavit asserted, "demonstrated" that the anti-trust laws had been violated. Those alleged facts fell far short of anything like such a showing.[3] The district court should therefore not have made the order joining CRA as a party.

Affirmed.

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[1] We have jurisdiction of this appeal because the dismissed counterclaim prayed an injunction.

[2] Rule 13 (h) reads as follows: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action."

[3] We need not consider whether, had the impleading order been valid, the counterclaim would have been sufficient or at least good enough to require that defendant be allowed to amend.

[¶ 62,514] Office Machine Dealers Ass'n of New York v. Tytell Typewriter Co., Inc.

In the Supreme Court of New York County. Special Term, Part I, 122 N. Y. L. J. 1295. November 18, 1949.

New York Fair Trade (Feld-Crawford) Act

Vacation of Injunctions—Terminated or Unenforced Fair Trade Agreements.—In deciding upon the motion of a defendant to dissolve an injunction prohibiting the sale of typewriters under an established price, when the moving party claims that attempts to enforce the agreement have broken down and that the agreement is in fact no longer effective, the question of the present status of the fair trade agreement is referred to a referee for determination.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.83, Resale Price Maintenance Commentary, Vol. 2, ¶ 7357.

KOCH, J.: [Digest] Defendant moves to vacate an injunction contained in a judgment of this court entered August 17, 1939, permanently restraining it from selling Royal portable typewriters at prices below those fixed by the manufacturer under a fair trade agreement. The vacatur of such a decree, if directed, should however be directed only upon a clear showing that the price fixing agreements are no longer effective.

Presumably the injunction was obtained at a time when effective fair trade agreements existed. If no effective fair trade agreements now exist should those enjoined from price cutting be prejudiced by selling at the fixed price when competitors sell below it with impunity?

Contrariwise how much of a burden may be placed on those obtaining permanent injunctions in fair trade cases? It would seem that such parties should not be obliged to prove their rights anew each time an application is made to punish a violation of the injunction.

Where as here one charged with violation of such an injunction makes a substantial showing, by affidavit, that the price fixing structure may have broken down, it seems reasonable that an opportunity should be granted to show by proper testimony of witnesses that no effective agreements exist. An opportunity should likewise be given to refute such testimony.

The question of the present existence of an effective fair price trade agreement with reference to the item, the sale of which below the fixed price is enjoined, will therefore be referred to a referee to hear and report.

[¶ 62,515] Chicago Seating Company v. S. Karpen & Bros.

In the United States Court of Appeals for the Seventh Circuit. No. 9871. November 22, 1949.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Clayton Antitrust Act, Robinson-Patman Act

Discrimination—Refusal to Sell—Selection of Customers.—The refusal of a special chair and furnishings manufacturer to sell such equipment to one contractor for resale to certain universities specifying such types of furniture in their bid solicitations, while such furniture and special applicable price-lists are sold and supplied to competitors of that contractor, does not constitute a discrimination within the Clayton Act as amended by the Robinson-Patman Act, since the discriminations proscribed by that law are those made between purchasers, and in the instant case the plaintiff contractor was not a purchaser. No law of the United States requires that a person must deal with everyone, and the Clayton Act by its own words permits the selection of customers in bona fide transactions.

See the Clayton Act annotations, Vol. 1, ¶ 2022.27; Robinson-Patman Act annotations, Vol. 1, ¶ 2212.165, 2212.475.

Discrimination—Services and Facilities—Furnishing Price Lists and Catalogues.—Price lists and catalogues are mere invitations to negotiate, and the supplying of such lists and catalogues does not constitute the furnishing of a service or facility connected

with the sale or offering for sale of a commodity. The refusal to supply them in individual cases does not constitute a discrimination in the furnishing of services or facilities.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2216.

Affirming District Court's dismissal of complaint, 83 Fed. Supp. 409, reported at ¶ 62,381.

Before KERNER, FINNEGAN and LINDLEY, Circuit Judges.

[*Nature of Appeal*]

FINNEGAN, Circuit Judge: By this appeal it is sought to reverse an order of the District Court which dismissed, on defendant's motion, an amended complaint seeking treble damages for violation of section 2 (e) of the Clayton Act as amended by the Robinson-Patman Act. Both appellant, Chicago Seating Company, and defendant-appellee, S. Karpen and Bros., are Illinois corporations.

The amended complaint alleged in paragraph one that both plaintiff and defendant are engaged in interstate commerce and that jurisdiction arises under the provisions of section 4 of the Clayton Act. It is then averred that the defendant is engaged in the business of manufacturing upholstered furniture and that its products are nationally known and distributed.

[*Discrimination Charged*]

Paragraph 3 charges that the defendant has engaged in a program of negotiating with certain public institutions in order that such institutions, in their building programs as well as in their solicitation of bids for furnishing their buildings, will specify that only certain specially designed items manufactured by it can be used in meeting the specifications of the said public bids; that such specially designed items are not included in defendant's regular price lists or catalogue, and that as a practical matter such conduct of the defendant excluded the substitution for "such specially designed items" of like items made by other manufacturers.

The complaint then alleges that the plaintiff has, since 1929, been engaged in interstate commerce in the business of furnishing hotels, schools, and other public institutions with furniture and similar accessories; that it has been and continues to be a purchaser of defendant's products. It charges that subsequently to acts of discrimination, alleged to be thereafter set forth in the complaint, it did, on December 15, 1948, order from defendant, and that on said date defendant did accept its orders for furniture manufactured by the defendant.

In paragraph 5 of the complaint section 2 (e) of the Clayton Act is set out, and it is averred that since November 23, 1948 the defendant has been discriminating against the plaintiff and in favor of certain of its purchasers for certain of its products *"by contracting to give and furnish, and by giving and furnishing certain services and facilities in connection with the handling, sale or offering for sale of its said products so purchased by its customers not accorded to all such purchasers, including the plaintiff on proportionately equal terms. Specifically the defendant, is favoring certain purchasers, as aforesaid, by furnishing them with prices on certain items specified in the advertised bids of certain public institutions, the prices of said items are not a part of the regular items shown in their catalogue and price list, and that as a direct result and consequence the competitors of the plaintiffs can bid on and thereby secure the business of the said public institutions, whereas the plaintiff, not being informed of the said prices of the defendant's special merchandise was thereby prevented and precluded from competing with other purchasers of defendant's products. The defendant's failure to accord the plaintiff the said service and facilities hereinabove described has substantially lessened the competition and has diverted trade from and caused a competitive disadvantage to the plaintiff."* (Italics supplied throughout.)

In paragraph 6 of the complaint it is charged that on November 20, 1948, the defendant in collusion with the University of Oklahoma advertised and solicited bids for the furnishing of its buildings, and that said bids specified certain specially designed units that were to be manufactured by S. Karpen & Bros., that the defendant made prices available to certain of its purchasers; that on or before November 24, 1948, the plaintiff requested the same facilities offered to its competitors; that the defendant advised the plaintiff that, while it would continue to sell plaintiff its regular line of merchandise, it would refrain from furnishing the plaintiff with said prices in order to eliminate the plaintiff from competition; that it would not permit the plaintiff to purchase for resale special products designed for pub-

lic institutions. It is alleged that as a direct result and consequence of the alleged discrimination against the plaintiff in refusing to furnish the same service and facilities, to-wit *the "prices of the certain special items and privileges of purchasing the same to the plaintiff for the defendant's specially designed products specified in the said bid,"* the plaintiff was unable to compete with its competitors and was thereby deprived of large profits which it otherwise would have made.

The complaint in paragraph 7 alleges that on August 27, 1948, the University of Illinois solicited bids for the furnishing of its buildings; that Karpen specially designed products were specified. It is alleged that, at that time, the defendant did furnish the plaintiff with prices and the privilege of purchasing said items; that as a consequence the plaintiff was awarded the contract by the University of Illinois.

Paragraph 7 alleges that on about December 6, 1948, the University of Illinois solicited from plaintiff and its competitors bids on additional furnishings which included specially designed Karpen products; that on December 8, 1948 and again on December 10, 1948, plaintiff requested that the defendant furnish it price lists and the privilege of purchase on additional Karpen items; that the defendant refused to quote prices or sell the plaintiff; that as a result and consequence thereof the plaintiff was prevented from bidding and its competitors who received the benefit of such services from the defendant did bid and one of them secured the contract; that plaintiff was thereby deprived of large profits which it would otherwise have made; that plaintiff is in danger of losing future business and to have its standing in the field of public institutions contracts impaired.

Paragraph 9 alleged that plaintiff has suffered actual damages in the sum of $25,000 and claims that by virtue of section 4 of the Clayton Act, as amended, it is entitled to treble damages. Wherefore it asks judgment.

Defendant moved to dismiss the amended complaint on three grounds:

(1) It does not allege facts showing an unlawful price discrimination within the terms of the Clayton Act, as amended;

(2) It does not allege facts showing that plaintiff purchased any goods from the defendant as to which there was any unlawful discrimination within the meaning of the Act; and

(3) It does not allege facts showing that the defendant did anything more than exercise its right under the Act to select its own customers.

[*Opinion*]

Section 2 (e) of the Clayton Act, as amended, provides:

> "Furnishing services of facilities for processing, handling, etc.—It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms." (Sec. 13 (e) Title 15 U. S. C. A.)

An examination of the amended complaint shows clearly that the plaintiff is predicating its action upon the defendant's refusal to furnish it a price list of specially designed items of furniture manufactured by the defendant. It is true that the complaint shows in paragraph 7 that on one occasion defendant did furnish to plaintiff prices on such specially designed items; that plaintiff then purchased some of such items and used them in executing a contract it had procured from the University of Illinois. There is no pretense of allegation that in said instance there was any discrimination against the plaintiff. Complaint is made because thereafter defendant refused to sell such specially designed items to plaintiff.

The same claim is found throughout the whole complaint; plaintiff charges that it has been damaged because defendant refused to sell it certain specially designed items. As to such items the plaintiff, except in the single instance noted, never became a purchaser. Since, as we have pointed out, there is no charge of discrimination in the only sale of the special items made to the plaintiff, it follows that there can be no discrimination against plaintiff and in favor of other purchasers of such items.

The case attempted to be stated in appellant's complaint is clearly distinguishable from the cases cited in its brief. In each such case there was not merely an allegation, but there was also proof of discrimination in favor of one purchaser against other purchasers of the same article. In the case at bar there is no allegation of

discrimination against plaintiff as a purchaser and in favor of any other purchaser of defendant's items.

[*Price Lists Not "Services or Facilities"*]

It is true that plaintiff does charge that defendant refused to furnish it prices. It is even said that defendant refused to sell to plaintiff. Even if true such charges do not constitute discrimination in favor of one purchaser against others under the provisions of the Clayton Act. Price lists and catalogues are mere invitations to negotiate and do not constitute a service or facility connected with the sale or offering for sale of a commodity. The refusal to furnish them is at most a refusal to negotiate.

As we see it, the laws of the United States do not require that persons engaged in private trade and commerce must deal with everyone. When they do deal they may not discriminate, but they do have the right to choose their customers. The Clayton Act as amended by the Robinson-Patman Act itself provides in section 2 (a)

> "Nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in constraint of trade." (Sec. 13 (a) Title 15 U. S. C. A.)

A trader engaged in private business may exercise his own discretion as to parties with whom he will deal. *Federal Trade Commission v. Raymond,* 263 U. S. 565; *United States v. Bausch and Lomb,* 321 U. S. 707.

A very similar situation appears in *Shaw, Inc. v. Wilson Jones Co.,* 105 F. 2d 331. In that case the appellant contended that the appellee has discriminated between different purchasers because the appellee refused to quote prices to appellant and further charged that appellee had quoted prices to a competitor and to him only. The court said on page 333:

> "* * * The phrase 'to discriminate in price,' employed in Section 2 (a) considered by itself and entirely out of its context, might be deemed to include a refusal to offer a price to a customer upon goods which the latter desired to offer for resale. Such a conclusion is insupportable, however, after consideration of the other language of the section. The discrimination in price referred to must be practiced 'between different purchasers.' Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the marketplace for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends."
>
> * * *
>
> "In the light of the foregoing we think that it is clear that the appellant has not alleged such facts as would constitute a cause of action under the provisions of Section 2 (a). Since no goods or commodities were offered to the appellant, the terms of the subsection are not met. The Act does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party. The discrimination in price prohibited by the subsection is discrimination in respect to commodities sold to purchasers.
>
> "The course of conduct exhibited by the appellee is not to be commended as exhibiting sound commercial practices, but this conduct is not within the prohibition of subsection (a).
>
> "Nor has the appellant stated a cause of action under subsection (e) for the reasons which we have heretofore stated."

[*Affirmed*]

In view of the foregoing, we are convinced that the action of the District Court in sustaining defendant's motion to dismiss the complaint was proper. Its judgment is therefore affirmed.

[¶ 62,516] Opinion of the Attorney General of New York.

Addressed to the Commissioner, Division of Standards and Purchase, by Nathaniel L. Goldstein, Attorney General. November 14, 1949.

New York Fair Trade Law

Fair Trade Agreements—Sales to State Excepted—Violative of Federal Law.—The Fair Trade Law of New York expressly exempts sales to the state government, or any administrative department or local subdivision thereof, from the application of any agreement restricting resale prices. Since the Federal law sanctions price fixing in interstate

commerce only where permissible in the state of resale, it follows that the attempt to fix prices on sales to the state would also violate the Federal antitrust laws and be unenforceable.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.40; Resale Price Maintenance Commentary, Vol. 2, ¶ 7116, 7288.

This will acknowledge receipt of your letter of October 31, 1949 and enclosure, requesting my opinion whether the State of New York is exempt from the Federal or the State of New York Fair Trade Law.

[*Sales to State Excepted*]

The New York Fair Trade Law is contained in Article XXIV-A of the General Business Law. As amended by the Laws of 1941, Chapter 39, § 369-a, subdivision 3 thereof provides as follows:

"3. This article shall not be deemed or construed to apply to, or to fix or limit prices at which any commodity may be sold or offered for sale to the state of New York or to any administrative department of the state government, to any political subdivision of the state, to any municipality, to any public corporation or authority now or hereafter created by the legislature, to any college or university library or any public library incorporated by an act of the legislature, or by the board of regents of the state education department or registered by the state education department."

[*Application of Federal Law*]

Price fixing contracts are excepted from the provisions of the Federal Anti-Trust Laws "when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made," * * * (15 U. S. C. A. § 1).

Inasmuch as the New York State Fair Trade Act does not apply to sales to the State, any fair trade agreement which attempted to fix prices on sales to the State involving interstate commerce would be in violation of the Federal Anti-Trust Laws and unenforceable.

It is my conclusion, therefore, that sales to the State are not affected by any fair trade agreements.

[¶ 62,517] W. F. Perkins, Director of Revenue of the State of Colorado, v. Conrad R. Becker.

In the District Court in and for the County of Jefferson and State of Colorado, Div. 3. Civil Action No. 6816. November 2, 1949.

Colorado Unfair Practices Act

Temporary Injunctions—Sufficiency of Notice—Notice Combined with Restraining Order.—When service was made of a temporary restraining order against a dealer charged with selling below cost, and in that order there was included a notice of hearing upon application for a temporary injunction against him, the court's invalidation of the restraining order after argument two days later invalidates also the injunction notice included therein. It is held, in such case, that if a temporary injunction is still desired, it must be applied for anew in the regular way.

See the Colorado Unfair Practices Act annotations, Vol. 2, ¶ 8088.50.

For the plaintiff: Sidney A. Johnson, Assistant Attorney General, and John F. Healey, Chief of Enforcement Division of the Department of Revenue, both of Denver, Colorado.

For the defendant: George J. Robinson and George G. Priest, of Robinson and Priest, Lakewood, Colorado.

Reporter's Transcript of Court's Findings

[*Digest*]

MR. ROBINSON: Upon agreement with counsel representing the plaintiff, and with the Court, this time was set for the hearing of our motion for the dissolution of the restraining order issued by this Court on the 24th day of October of this year.

(Whereupon argument was given by counsel on both sides upon the dissolution of the restraining order.)

THE COURT: Well, as to the matter which is before the Court, the Court is of the opinion that the restraining order is invalid, was improvidently issued.

As to a setting now for a hearing on the preliminary injunction, the circumstances of the case so far as they are before the Court don't indicate that there is any emergency requiring a hearing on the temporary injunction.

MR. HEALEY: What is the effect of the notice which was received by the respondent here to hear the injunction, the hearing on the preliminary injunction? Two days ago the notice was served. We are before the Court on two matters this morning, it seems to me, one in which we waived notice two days ago for the hearing on the dissolution of the temporary restraining order, and a continuance of a hearing on the temporary injunction from the date which was fixed two days ago in the notice to the respondent.

I remember very well, Mr. Robinson, your first suggestion that we call up at that time the hearing on the temporary restraining order and continue over until some later date the hearing on the temporary injunction. That was the first statement and the first request of counsel. However, subsequent to that, in open court, we agreed that we would waive notice—if Your Honor remembers that—we would waive notice on the hearing of the notice of the dissolution of the temporary restraining order and, also, maintain and continue to that date the hearing on the temporary injunction, which I think comes up today.

THE COURT: Well, it is not the understanding of the Court that this was set for a hearing on the application for the temporary injunction today.

MR. HEALEY: I may have misunderstood.

THE COURT: It went over so that some time might be fixed.

Where is your notice requiring this matter to be heard on an application for a temporary injunction?

MR. JOHNSON: The notice for hearing on the preliminary injunction was included with the restraining order which was served.

THE COURT: That is this order here which has been held invalid. No temporary restraining order shall be granted without notice, unless it appears from specific facts, and so forth, and there must be either an affidavit or a verified complaint.

MR. HEALEY: I am not coming back to the temporary restraining order.

THE COURT: The same thing applies to a preliminary injunction. Now, when you filed your complaint, you could have promptly made a motion for a temporary injunction, and given notice of it. It would have been heard on notice. You have a motion day the 7th of this month, if you want to call this up for a temporary injunction, it can be heard at that time. It doesn't seem to the Court, however, that this is the situation in regard to that. Ordinarily the Court, in these restraining orders and temporary injunctions has some control by way of a bond. Here, the plaintiff being a governmental agency, gives no bond, and the Court must even be more careful in those matters not to work an injustice by reason of a temporary restraining order. This temporary restraining order has, of course, been disposed of, and a temporary injunction can be asked for in the regular way, and proceed in the regular way.

MR. HEALEY: The notice and order, over the Court's signature, that the hearing would be held, served two days ago, is not that sufficient notice for a hearing on the temporary injunction?

THE COURT: "It is further ordered that the plaintiff's prayer for a preliminary injunction be set down for hearing on October 31st"—I think that was an *ex parte* order.

MR. HEALEY: But the service of that order and the return by the sheriff that he served that order, was not that sufficient notice for the hearing on the temporary injunction?

THE COURT: I think not, the order falls completely.

MR. HEALEY: The order falls completely?

THE COURT: Yes. It doesn't amount to a notice. In other words, you should give notice in the regular course under the rules for a hearing for a setting.

MR. HEALEY: We want to enter our exceptions to that ruling.

THE COURT: That is all that is before the Court today. The matter is disposed of.

[¶ 62,518] United States v. General Electric Co., Westinghouse Electric Corp., Delta-Star Electric Co., A. B. Chance Co., Cole Electric Co., Hi-Voltage Equipment Co., Pacific Electric Mfg. Corp., Railway and Industrial Engineering Co., Southern States Equipment Corp., Electrical Engineers Equipment Co.

In the United States District Court for the Southern District of California, Central Division. Civil Action No. 7899-M. November 4, 1949.

Sherman Antitrust Act

Consent Judgment—Electrical Equipment Patents—Non-Exclusive Licensing.—Manufacturers of electrical equipment and holders of patents relating thereto consent to a judgment terminating certain inter-company agreements, prohibiting contracts and combinations for price fixing and refusal to compete, prohibiting the interchange of certain kinds of business information, requiring certain reports to be made to the government, requiring a system of reasonable royalty, non-exclusive licensing of rights under patents, and permitting government inspection of records upon notice. Jurisdiction is retained for enforcement purposes, and to permit application by parties for amendment of the judgment.

See the Sherman Act annotations, Vol. 1, ¶ 1220.151, 1240.193, 1270.151, 1530.50.

For the plaintiff: William C. Dixon, Special Assistant, Attorney General, Los Angeles.

For the defendants: O'Melveny & Myers, Los Angeles, for General Electric Co.; Gibson, Dunn & Crutcher, Los Angeles, for Westinghouse Electric Corp.; Wright & Garrett, Los Angeles, for Delta-Star Electric Co. and Electric Engineers Equipment Co.; Orville A. Rohlf, San Francisco, for A. B. Chance Co.; Earl S. Patterson, Los Angeles, for Cole Electric Co.; Loeb and Loeb, Los Angeles, for Hi-Voltage Equipment Co.; Freston & Files, Los Angeles, for Pacific Electric Mfg. Corp.; Newlin, Holley, Sandmeyer & Tackabury, Los Angeles, for Railway and Industrial Engineering Co.; Charles E. Hobart, Los Angeles, for Southern States Equipment Corp.

Final Judgment

PAUL J. MCCORMICK, District Judge: Plaintiff, UNITED STATES OF AMERICA, having filed its Second Amended Complaint herein on November 4, 1949, and the defendants herein having appeared and filed their answers to the Second Amended Complaint denying the substantive allegations thereof; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission of any party defendant in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The Second Amended Complaint of November 4, 1949 states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, and acts amendatory thereof and supplemental thereto.

[*Terms Defined*]

II.

As used in this Final Judgment:

(a) "Disconnecting switches" shall mean switches, including the mechanism and linkage for manual or mechanical methods of operation, used for changing connections in electrical circuits, which do not have an interrupting rating and are intended to be operated only after the circuit has been opened by some other means.

(b) "Grounding switches" shall mean switches, including the mechanism and linkage for manual or mechanical methods of operation, which do not have an interrupting rating and by means of which an electrical circuit or a piece of apparatus may be connected to ground.

(c) "Patents" shall mean United States Letters Patent and Applications therefor, including all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications.

[*Application of Judgment*]

III.

The provisions of this Judgment applicable to any defendant shall apply to such defendant, its officers, directors, agents, employees, successors, assigns and all other persons acting under, through or for such defendant.

[*Termination of Agreements*]

IV.

(A) The following agreements are hereby terminated and the defendants Railway and Industrial Engineering Company, Westinghouse Electric Corporation, General Electric Company, Delta-Star Electric Company and Electrical Engineers Equipment Company are hereby enjoined and restrained from the further performance of said agreements, and of any agreements or arrangements amendatory thereof or supplemental thereto:

(1) Agreement between Railway and Industrial Engineering Company and Westinghouse Electric Corporation, dated December 3, 1942;

(2) Agreement between Railway and Industrial Engineering Company and General Electric Company, dated November 20, 1939;

(3) Agreement between Railway and Industrial Engineering Company and Delta-Star Electric Company, dated April 4, 1938;

(4) Agreement between Delta-Star Electric Company and Railway and Industrial Engineering Company, dated April 4, 1938; and

(5) Agreement between Westinghouse Electric Corporation and Electrical Engineers Equipment Company, dated January 3, 1940.

(B) The above named defendants are hereby enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph (A) of this Section IV.

[*Conspiracies Enjoined*]

V.

(A) Defendants are severally and jointly enjoined and restrained from combining or conspiring with, or from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program with any manufacturer of disconnecting or grounding switches to:

(1) Determine, fix, maintain or adhere to prices, differentials, discounts or other terms or conditions of sale for disconnecting or grounding switches to third persons;

(2) Refuse to submit a bid for the sale of disconnecting or grounding switches, or to make a bid therefor higher than, or identical with, the bid of any one else, or to submit collusively a bid therefor.

(B) Defendants are jointly and severally enjoined and restrained from:

(1) Circulating, exchanging, disclosing or communicating among or to other manufacturers of disconnecting or grounding switches:

(a) Quotations or bids for the sale of such switches to third persons;

(b) Information concerning the sale of such switches which is made generally available to the trade, in advance of its being made so available to the trade;

(c) Information as to prices, terms or conditions of sale of such switches not generally available to the trade, except exclusively in connection with a bona fide purchase or sale, or proposed purchase or sale of such switches by or to a defendant.

(2) Submitting bids for the sale of disconnecting or grounding switches for the purpose or with the intent of discouraging or precluding any person from becoming or continuing as a customer of such defendant. A course of action involving the submission of bids which provide higher prices or more unfavorable terms or conditions of sale than such defendant is then regularly offering to others similarly situated shall place upon such defendant the burden of disproving such purpose or intent.

[*Reports to Government*]

VI.

(A) Each defendant, its successors and assigns, are hereby ordered and directed, within thirteen (13) months from the effective date of this Judgment, to serve plaintiff with a statement, under oath, of:

(1) Its prices, terms, and conditions of sale that were in effect March 1, 1949, and that were applicable to disconnecting and grounding switches;

(2) Each change made by it during the period between March 1, 1949 and one year after the effective date of this Judgment with respect to any of said prices, terms, and conditions of sale;

(3) The effective date of each such change, the date it was announced to the trade, and the manner in which the announcement was made.

(B) Within six (6) months after service of the last of said statements upon plaintiff, plaintiff may move to amend this Judgment, with respect to the subject matter in Section V, after giving notice to each defendant adversely affected. Upon such motion any such defendant not consenting thereto, shall have a reasonable opportunity to be heard in opposition to the proposed amendment or any part thereof and, in connection with such opposition, may elect to have said Section V of this Judgment vacated in its entirety as to it. Neither the Judgment nor the consents hereto shall operate as a bar or estoppel against the rights of plaintiff and of such defendant, respectively (1) to offer evidence in support of and in opposition to such proposed amendment; and, (2) to have all the issues this Court deems relevant and material to the disposition of such motion litigated in such hearing.

[*Non-Exclusive Licensing*]

VII.

(A) The defendants General Electric Company, Westinghouse Electric Corporation, Delta-Star Electric Company, Electrical Engineers Equipment Company, Railway and Industrial Engineering Company, and each of them, are hereby ordered and directed to grant to each applicant therefor, including any defendant named in this Judgment, a non-exclusive license to make, use and vend any disconnecting or grounding switches, or any parts of such switches, under any, some or all patents relating to disconnecting and grounding switches now owned or controlled by such defendant, or which are issued or applied for within five (5) years from the date of this Judgment, and are hereby enjoined and restrained from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses unless it sells, transfers or assigns such patents and requires as a condition of such sale, transfer or assignment that the purchaser, transferee, or assignee shall observe the requirements of this Section VII and of Section VIII of this Judgment and the purchaser, transferee or assignee shall file with this Court prior to consummation of said transaction, an undertaking to be bound by said provisions of this Final Judgment.

(B) In the event that any one of the defendants, A. B. Chance Company, Cole Electric Company, Hi-Voltage Equipment Company, Pacific Electric Manufacturing Corporation, or Southern States Equipment Company, hereafter grants a license under any patents relating to disconnecting or grounding switches now owned or controlled by such defendant, or which are issued or applied for within five (5) years from the date of this Judgment, then and in such event all of the provisions of this Section VII shall become applicable to such defendant.

(C) Each defendant is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of subsections (A) or (B) of this Section VII except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the inspection of his books and records as hereinabove provided; (5) the license may provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving thirty (30) days notice in writing to the licensor; (6) the license must refer to and identify this Judgment.

(D) Upon receipt of a written request for a license under the provisions of subsections (A) or (B) of this Section VII, defendant shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to

the Attorney General. In any such proceeding, the burden of proof shall be on the defendant owning or controlling said patents to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by this Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend any disconnecting or grounding switches under the patents to which its application pertains without payment of royalty or other compensation as above provided, but subject to the provisions of subsection (E) of this Section.

(E) Where the applicant has the right to make, use and vend any disconnecting or grounding switches under subsection (D) of this Section VII, said applicant or the defendant owning or controlling said patents may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, defendant shall then issue and the applicant shall accept a license or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such section shall be ground for the dismissal of his application, and his rights under subsection (D) shall terminate as to such patents applied for. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant files his application with the Court.

(F) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents nor shall this Judgment be construed as importing any validity or value to any of the said patents.

(G) Each defendant is hereby enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any disconnecting or grounding switch patent, required to be licensed by this Section VII, which acts of infringement have occurred prior to the date of this Judgment.

[*Access to Records*]

VIII.

For the purpose of securing compliance with this Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to any defendant, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Judgment; and, (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding such matters. For the purpose of securing compliance with this Judgment, any defendant, upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such written reports with respect to any of the matters contained in this Judgment as from time to time may be necessary for the purpose of enforcement of this Judgment. No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

[*Jurisdiction Retained*]

IX.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, or the modification or termination of any of the provisions thereof, or the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 62,519] **Western Union Division, The Commercial Telegraphers' Union, A. F. L. v. United States, et al.**

In the Supreme Court of the United States. No. 375. November 7, 1949.

On appeal from the United States District Court for the District of Columbia.

Communications Act

Restraint of Trade by Mergers—Agency Agreements between Telephone and Telegraph Companies.—The Supreme Court affirms the decision of the district court holding that agency agreements between a telegraph company and various local telephone companies may cause some lessening of competition but does not constitute a merger resulting in restraint of trade.

See the monopoly provisions of the Communications Act, ¶ 682.

For the plaintiff: J. Howard McGrath, Attorney General; John H. Waters and William G. H. Acheson, Attorneys.

For the defendant: Frank Bloom and Dale D. Drain.

Affirming a decision of the District Court for the District of Columbia, ¶ 62,468.

PER CURIAM: The motion to affirm is granted and the judgment is affirmed. *McLean Trucking Co v. United States,* 321 U. S. 67. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

[¶ 62,520] **Blumenkranz v. Berners Pharmacy, Inc.**

In the New York County Supreme Court, Special Term, Part I. 122 N. Y. L. J. 1458. December 1, 1949.

New York Fair Trade (Feld-Crawford) Act

Fair Trade Agreements—Lack of Enforcement against Others as Defense to Injunction.—Upon the fifth contempt proceeding against a pharmacist for violating an injunction prohibiting sale of certain items below the price fixed by the manufacturer, the pharmacist made assertions that those price agreements were not being enforced against other pharmacists selling the same items, and although the averments of the defendant were not taken to establish the truth about the alleged situation, they did at least disclose facts justifying a setting aside of the injunction and the filing of an answer to the original injunction complaint, by the defendant.

See the New York Fair Trade Act annotations, Vol. 2, ¶ 8604.83, Resale Price Maintenance Commentary, Vol. 2, ¶ 7357.

WALTER, J.: [*Digest*] On June 8, 1945, there was entered, upon defendant's consent without trial or hearing, an order enjoining defendant from selling the products of certain named manufacturers at prices less than the minimum resale prices specified in fair trade agreements made by such manufacturers with respect thereto.

On this fifth motion to punish defendant for contempt in continuing violations of such injunction, defendant does not deny that it has sold below the specified prices but asserts that plaintiffs and other retail pharmacists are likewise selling such products below the stipulated minimum resale prices thereof; and cross-moves to vacate the injunction order and permit it to interpose an answer.

It asserts that its consent to the injunction was induced by representations that all violations of such fair trade agreements would be prosecuted and enjoined, but that in fact that has not been done and such violations are continuous and widespread and that by reason of such widespread price-cutting by its competitors, including plaintiffs, it has been and is forced to resort to similar price-cutting in order to stay in business.

I do not now say that the papers on this motion establish the truth of the assertion, but they at least disclose a situation which makes it proper that the subject be investigated upon a trial; and for that reason the motion to punish for contempt is denied and the cross-motion to vacate the injunction order of June 8, 1945, is granted, and defendant is given leave to answer the complaint.

[¶ 62,521] **Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.**

In the United States Court of Appeals for the Second Circuit. No. 18. October Term, 1949. December 1, 1949.

Appeal from the District Court for the Southern District of New York.

Robinson-Patman Price Discrimination Act

Discrimination in Services and Facilities—Furnishing of Cosmetics Demonstrators—Intrastate Transactions and Interstate Competition.—A retail dealer in cosmetics who purchased his supplies from a manufacturer in intrastate transactions nevertheless is held to have stated a valid cause of action when he alleged that discrimination against him by not furnishing cosmetics demonstrators resulted in loss of some of his business to retailers in other states to whom such demonstrator services were accorded by the manufacturer. The manufacturer was held to have violated the anti-discrimination act by granting demonstrators to those out-of-state dealers, even though the plaintiff dealer, being in the same state as the manufacturer, might not have been able to enforce his demand for the same kind of services.

See the Robinson-Patman Act annotations, Vol. 1, ¶ 2215.202, 2216.10.

For the plaintiff: Morris Siegel.

For the defendant: John R. Schoemer, Jr.

Reversing 81 Fed. Supp. 547, reported at ¶ 62,370.

Before L. HAND, SWAN and CLARK, Circuit Judges.

[*Nature of Action*]

L. HAND, Circuit Judge: This appeal is from a judgment, summarily dismissing an amended complaint under Rule 56, on the ground that there was "no genuine issue as to any material fact," in an action by the plaintiff for treble damages under the Robinson-Patman Act.[1] The following facts, appearing in the complaint and the accompanying affidavits, are to be taken as true. The plaintiff is a New York corporation, doing business in the City of New York, and the defendant is a Delaware corporation, which until January 1st, 1948, was the sole distributor of the cosmetic products of another corporation, Elizabeth Arden, Inc.; but which on that day leased the plant of Elizabeth Arden, Inc., and thereafter manufactured and sold the same products on its own account. The plaintiff owns a retail shop for the sale of cosmetics in the City of New York; its customers live in New York and New Jersey; and from 1938 until May, 1948, it was one of the defendant's "agencies" to sell the products of Elizabeth Arden, Inc. The defendant sold its products broadly during the time of the plaintiff's "agency," not only in New York and New Jersey, but in other states; and it supplied some "agencies" with assistants, known as "demonstrators," whose salaries it paid, in whole or in part; but the plaintiff was not among those to whom it did furnish a "demonstrator." The complaint alleged that "as a result of such discrimination" it "has been damaged in the sum of $15,600." Thus it appears that the complaint will permit the introduction of evidence to prove that the use of "demonstrators" by the plaintiff's New York and New Jersey competitors resulted in diverting some of its customers to them; and we shall dispose of the appeal upon this assumption. (The complaint also alleged that the defendant discriminated against the plaintiff "in allowing discounts, rebates, allowances or advertising charges to various competitors" in New York and New Jersey; but since it did not specify what these were, we shall confine ourselves to the discrimination in "demonstrators.") The judge dismissed the complaint upon the ground that all the transactions between the parties were in intrastate commerce and were therefore not covered by §§ d and e of Section 13 of the Robinson-Patman Act.

We held in *Elizabeth Arden, Inc. v. Federal Trade Commission*[2] that the same discrimination of which the plaintiff here complains was a violation of subdivision e of the Robinson-Patman Act;[3] following the Eighth

[1] Section 13, Title 15, U. S. Code.
[2] 156 Fed. (2d) 132.
[3] § 13 (e), Title 15, U. S. C.

Circuit[4] which had read this subdivision as though the words, "engaged in commerce," were written into it, as they were in subdivision d. This ruling leaves open only two questions in the case at bar; first, whether it was an actionable wrong to deny the plaintiff, whose business is altogether intrastate, a favor which the defendant granted to "agencies" in other states; and second, whether, if so, it was necessary under Rule 9 (g) to allege "special damages."

[*Acts Not Wholly Intra-State*]

It would not inevitably follow that the Act would have been beyond the power of Congress, even though it had expressly prescribed that a seller should not discriminate between his intrastate customers as well as between his interstate; for it might be necessary to go so far, in order effectively to prevent discrimination between interstate customers. If that had been necessary, the situation would be within the doctrine of the *Shreveport* case.[5] Be that as it may, it was not necessary to regulate the defendant's intrastate transactions in order to prevent the defendant through its New Jersey "agencies" from discriminating against the plaintiff. The Act does not undertake to forbid a seller to grant favors to his customers, any more than it undertakes to compel him to grant them; it only insists that the distribution, if any, shall be equal. Congress clearly had power to control the terms of the defendant's contracts with its New Jersey "agencies"; and that was power enough, because equality involves only a comparison of two terms to be equalized, and may be achieved either by raising or by lowering one of them. Thus, the defendant violated the Act when it granted "demonstrators" to its New Jersey "agencies," regardless of whether it could have been compelled to grant a "demonstrator" to the plaintiff. True, the injury suffered by the plaintiff was to its intrastate business, but that is irrelevant. It is enough that the wrong be one of federal cognizance; its consequences are actionable whether or not they affect interests which are also of federal cognizance. To recover for injuries done by a violation of the Pure Food and Drug Act, for example, the sufferer need not himself be engaged in any federal activity; federal legislation is passed for the benefit of all citizens whom it may affect; the means provided to protect their interests must be within the constitutional powers of Congress, but the interests protected need not be.

The defendant answers that this conclusion runs counter to the decision of the Supreme Court in *Federal Trade Commission v. Bunte Brothers*,[6] but an analysis of that decision shows the contrary. The Federal Trade Commission had there determined that, in selling candy, "break and take" packages were an "unfair method of competition," because they made the purchase a kind of a gamble. Although Bunte Brothers sold candy in "break and take" packages only within the State of Illinois, their use of them imposed a competitive handicap upon those candy makers who imported candy into that state, and whom the Commission had forbidden to use such packages. In order to put these importers on even terms with Bunte Brothers, the Commission ordered Bunte Brothers to "cease and desist" from using "break and take" packages; and it was this order that the court reversed. It did not hold that Congress might not have gone so far under the doctrine of the *Shreveport* case, *supra*,[7] but it did hold that Congress had not done so.

The decision is certainly not in point here, so far as concerns the competition with the plaintiff of the defendant's New Jersey favored "agencies," because, for the reasons already given, control over those "agencies" alone was enough. That was not true of Bunte Brothers, for nothing short of direct impact upon their selling would serve. However, the decision does raise a question as to any claim the plaintiff may make for losses arising from the competition of favored New York "agencies." That discrimination would be between favored and excluded "agencies," both intrastate; and, as we have already said, the question would be whether it was essential to include intrastate sales in order effectively to prevent discrimination in interstate. At first blush it is not apparent why that should be necessary, at least if there are enough favored "agencies" in other states to prevent diversion of customers from them to New York

[4] *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 Fed. (2d) 988, cert. den., 326 U. S. 773.
[5] *Houston, East and West Texas Railway Co. v. United States*, 234 U. S. 342.
[6] 312 U. S. 349.
[7] 234 U. S. 342.

"agencies," and enough favored "agencies" in New York to prevent diversion of customers from them to "agencies" in other states. However, the question cannot be answered *a priori;* and in the case at bar it will depend upon the character of the defendant's business. Moreover, the point was not argued upon this appeal, nor is it necessary to a decision, for, as we have said, the complaint in any event presented a case for relief as to the New Jersey favored "agencies." Upon the trial, if the plaintiff seeks to claim any diversion of its customers because of the competition of New York favored "agencies," the facts can be developed.

[*Measure of Damages*]

There remains the question of damages. The plaintiff will be entitled under its general allegation to prove all damages from the diversion of its customers to those New Jersey "agencies," to whom the defendant furnished "demonstrators," so far as that was due to the "demonstrators." Whether it may also recover for the diversion of customers to New York "agencies," to whom the defendant furnished "demonstrators," raises the question which we have just discussed. It will be desirable upon a trial to take a special verdict stating separately the loss, arising from the competition of New Jersey "agencies" and the loss, if any, arising from the competition of New York "agencies." There only remains the question whether the measure of the plaintiff's damages can in any event be the salary of a "demonstrator." The Eighth Circuit by a divided court held that it can,[8] and we agree that it would be a proper limit upon the plaintiff's recovery; for, if the loss caused by the diversion of its customers to favored "agencies" was greater than the cost of employing a "demonstrator," it would be its duty to minimize the damages by employing one; but we do not think that it is otherwise relevant. The only proper proof of damages is the loss to the plaintiff's business, and the salary of a "demonstrator" is not such a loss. Therefore, the allegation of the complaint was adequate, for the plaintiff's business losses are not "special damages."

Judgment reversed; cause remanded.

[Concurring Opinion]

SWAN, Circuit Judge: I concur only because I feel constrained to follow this court's decision in *Elizabeth Arden, Inc. v. Federal Trade Commission,* 156 F. 2d 132, cert. den. 331 U. S. 806. Were the question open I would give the statute, section 13 (e), a more restrictive reading and would hold that the forbidden "discrimination" must not only favor an interstate purchaser but must harm an interstate purchaser from the defendant. Cf. *Federal Trade Commission v. Bunte Brothers, Inc.,* 312 U. S. 349, 355; *Higgins v. Carr Bros. Co.,* 317 U. S. 572, 574.

[¶ 62,522] United States v. Yellow Cab Co., Chicago Yellow Cab Co., Inc., et al.

In the Supreme Court of the United States. No. 22. October Term, 1949. December 5, 1949.

Appeal from the United States District Court for the Northern District of Illinois.

Sherman Antitrust Act

Sufficiency of Evidence—Partiality of Judge Not Shown—Interlocking Management—Necessity of Intent in Proof.—Upon an appeal under the Expediting Act, where the issue submitted for review by the Supreme Court is the sufficiency of the evidence to support the trial court's findings of fact, virtually all the findings being challenged by the government, the court holds that no clear abuse of discretion is attributable to the lower court, and that the mere fact that all questions were resolved in favor of defendants cannot be said to indicate any partiality on the judge's part, where the evidence of the government consisted mainly of inferences drawn from exhibits, and the evidence of defendants consisted mainly of oral testimony contradicting those inferences.

A dissenting opinion holds that more weight should have been given to the inferences drawn from showings that the dominant stockholder of the cab manufacturing company was also an important manager of cab operating companies, and that error was committed in holding intent to suppress competition to be indispensable in proof of violation of the Sherman Act.

[8] *Elizabeth Arden Sales Corp. v. Gus Blass Co., supra,* 150 Fed. (2d) 988.

See the Sherman Act annotations, Vol. 1, ¶ 1021.161, 1021.271, 1021.581, 1210.337, 1610.301. 1610.316.

For the plaintiff: Charles Fahy and Philip Levy, of Washington, D. C.; Joseph Markle, Franklin Nevius, J. Randall Creel (Eidlitz, French, Fink & Markle, of counsel), all of New York City.

For the defendant: Sol L. Firstenberg and Jacob Bromley, New York City.

Affirming 80 Fed. Supp. 936, reported at ¶ 62,333.

MR. JUSTICE JACKSON delivered the opinion of the Court.

[*Nature of Appeal*]

This suit in equity, under §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, originally included three charges of violation: (1) conspiracy to restrain and monopolize transportation of interstate travelers by taxicab between Chicago railroad stations and their homes, offices and hotels; (2) conspiracy to eliminate competition for the business of transporting passengers between different Chicago railroad stations; and (3) conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in Chicago, New York, Pittsburgh and Minneapolis. On a previous appeal this Court held the first of the charges not to state a case within the statute, and that charge no longer concerns us. *United States v. Yellow Cab Co.*, 332 U. S. 218. The court below found that the Government failed to prove the second charge and no appeal is taken from that part of the judgment, so that charge has been eliminated. We have held that the residue of the complaint, embodying the third charge, alleges a cause of action within the statute, but only on the expressed assumption that the facts alleged are true, *United States v. Yellow Cab Company, supra*, at 224; but the trial court has found that the Government, at the trial, has failed on all the evidence to prove its case. 80 F. Supp. 936. The cause is before us by a direct appeal under the Expediting Act, 15 U. S. C. § 29, and not by an exercise of our discretionary jurisdiction.

The first question proposed by the Government is whether the evidence sustains the findings of fact by the District Court This is the basic issue, and the Government raises no question of law that has an existence independent of it. This issue of fact does not arise upon the trial court's disregard or misunderstanding of some definite and well-established fact. It extends to almost every detail of the decision, the Government saying that the trial court "ignored . . . substantially all of the facts which the Government deemed significant."

What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard.

These were the chief fact issues in a trial of three weeks' duration. The Government relied in large part on inferences from its 485 exhibits, introduced by nine witnesses. The defendants relied heavily on oral testimony to contradict those inferences. The record is before us in 1,674 closely-printed pages.

[*Judgment Supported by Evidence*]

The Government suggests that the opinion of the trial court "seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the Court." We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts. But we are unable to discover the slightest justification for the accusation that it did so "uncritically." Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it "ignored" them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge,

after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.

Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said, "We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the triers of fact. . . ." *Labor Board v. Pittsburgh Steamship Co.*, 337 U. S. 656, 659.

Rule 52, Federal Rules of Civil Procedure, provides, among other things:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

Judgment affirmed.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this case.

[Dissenting Opinion]

Mr. Justice Black, with whom Mr. Justice Reed concurs, dissenting.

The evidence showed here without dispute that a manufacturer of taxicabs through a series of stock purchases obtained 62% of the stock of a corporation which itself had large stock interests in local companies operating taxicabs. The man who was president, general manager, director, and dominant stockholder in the taxicab manufacturing company also held an important managerial position in the corporate network that carried on the business of the local taxicab operating companies. The findings of the District Court were that the affiliated ownership, management and control were not the result of any deliberate or calculated purpose of the manufacturing company to control the operating companies' purchases of taxicabs, and that no compulsion had been exercised to control such purchases. Consequently the trial court held that despite the integration of corporate management there was no violation of the Sherman Act. I think that the trial court erred in holding that a formed intent to suppress competition is an indispensable element of violations of the Sherman Act.

In *United States v. Griffith*, 334 U. S. 100, 105, 106, we said:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U. S. 525, 543; *United States v. Masonite Corp.*, 316 U. S. 265, 275. To require a greater showing would cripple the Act. . . . [E]ven if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act."

Measured by this test the findings of the trial court here fail to support its legal conclusions that no violation of the Sherman Act had been proven. Since the trial court

went on the assumption that subjective intent to suppress competition is an essential ingredient of Sherman law violations, it did not make specific findings as to whether the freedom of the taxicab companies to buy taxicabs from other manufacturers had been hobbled by the defendants' business arrangements, regardless of compulsion or intent to destroy competition. There was much evidence tending to show this hobbling of competition. I think that the allegations of the complaint were sufficiently broad to present this issue for adjudication by the court. Moreover, presentation of the issue was emphasized by the fact that a large amount of evidence to prove successful accomplishment of monopoly or restraints of trade was admitted without any objection by the defendants based on variance from the pleadings. See Federal Rule of Civil Procedure 15 (b).

There is evidence in the record to the effect that as a result of the corporate arrangements here the manufacturing company obtained sufficient power to dictate the terms of purchases by the local companies; there is also evidence that those companies did thereafter limit their purchases of taxicabs almost exclusively to those sold by the manufacturing defendant. Moreover, the evidence shows that such taxicabs were in some instances bought by the local company at prices above those paid by other taxicab companies wholly free to buy taxicabs in a competitive market. This evidence, if accepted, would support a finding of illegal restraint of trade or monopoly under the *Griffith* rule. I think the cause should be remanded for the trial court to consider the evidence and make findings on this aspect of the case.

[¶ 62,523] T. Bryce Venable, trading as Venable's Jewelers and Venable's Jewelry Store v. J. Engel & Co., Inc., etc.

In the Court of Appeals of Maryland. No. 10, October Term, 1949. Filed November 8, 1949.

Appeal from the Circuit Court for Worcester County.

Maryland Fair Trade Act

Fair Trade Agreements—Advertising Below Established Price—Wilfully or Knowingly Advertising.—The running of an advertisement offering watches at reduced prices and showing a fair trade watch with its name barely distinguishable in the picture does not violate a Fair Trade statute when in the advertisement no particular price is set on that watch.

See the Maryland Fair Trade Act annotations, Vol. 2, ¶ 8364.01, Resale Price Maintenance Commentary, Vol. 2, ¶ 7310.

Fair Trade Law—Strict Construction—Price Misrepresentation.—The display of a fair trade watch with a tag saying "Now ——", followed by a marked price which was in fact the fair trade price, does not amount to a violation of the fair trade agreement even though it may convey the implication that the price has been reduced. The Fair Trade Act, being in derogation of common law, must be strictly construed. The Fair Trade Act does not forbid false representations as to price.

See the Maryland Fair Trade Act annotations, Vol. 2, ¶ 8364.01, Resale Price Maintenance Commentary, Vol. 2, ¶ 7310.

For appellants: Godfrey Child, Pocomoke City, Md., and Samuel K. Dennis, Baltimore, Md.

For appellee: John O. Herrmann, Baltimore, Md. (Jacob S. New, Baltimore, on the brief).

Before MARBURY, Ch. J.; DELAPLAINE, COLLINS, GRASON, HENDERSON and MARKELL, JJ.

DELAPLAINE, J.: This suit was brought by Engel & Co., Inc., wholesale jeweler with principal place of business in Baltimore, to restrain T. Bryce Venable, trading in Pocomoke City and Crisfield as Venable's Jewelry Store, from wilfully and knowingly advertising, offering for sale or selling any Hamilton watches at less than the minimum resale

prices established by contract made in pursuance of the Fair Trade Act. Code 1939, Code Supp. 1947, art. 83, secs. 102-110.

By the contract made January 12, 1948, complainant as regional wholesale distributor for the Hamilton Watch Company, of Lancaster, Pennsylvania, appointed defendant a retailer of Hamilton watches, and defendant promised that he would not advertise, offer for sale or sell any of these watches at less than established minimum prices.

Subsequently defendant employed the National Sales Company, of New York, to promote a price reduction sale at his stores. A representative of that company, after inspecting defendant's stock of jewelry and watches, made plans for a sale to commence May 27, 1948. He designed a double page advertisement for insertion in the Eastern Shore News, a newspaper published in Onancock, Virginia, and selling about 500 copies on the Eastern Shore of Maryland. He also distributed thousands of copies of the advertisement in the form of handbills.

The advertisement contained ten small pictures of watches. In connection with these pictures was the following statement: "During this sale you can buy a good dependable watch. Reductions range up to one-half off." On the dial of one of the pictures was the word "Hamilton" in very small letters. When the attention of Otho Thompson, a competitor of defendant in Pocomoke City, was called to the word "Hamilton" in tiny letters on the picture, he mailed the advertisement to the Hamilton Watch Company at Lancaster, and that company thereupon forwarded it to complainant at Baltimore.

On June 16 complainant instituted suit for an injunction in the Circuit Court for Worcester County, alleging that defendant had violated the terms of the resale price contract. Defendant denied the allegation. At the trial of the case he asserted that he was not aware that the word "Hamilton" was on one of the illustrations in the advertisement until June 16, when he was notified of the institution of the suit. He explained that the representative of the National Sales Company had prepared the copy for the advertisement, listing the prices exactly as given to him, and that he had left blank spaces for the cuts to be furnished by the Eastern Shore News for pictures of jewelry and watches.

Section 107 of the Fair Trade Act provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of the Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. It is unquestioned that a court of equity may grant injunctive relief in a proper case for violation of a resale price contract made pursuant to the Fair Trade Act. *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A. 2d 176, 125 A. L. R. 1339; *Hutzler Bros. Co. v. Remington Putnam Book Co.*, 186 Md. 210, 46 A. 2d 101, 163 A. L. R. 884.

[*No Evidence of Sale*]

In the instant case complainant failed to produce any evidence that defendant had ever offered for sale or sold any Hamilton watches below the minimum prices established by the resale price contract. During the period of the price reduction sale, defendant had five Hamilton watches on display in the window of his jewelry store in Pocomoke City, but he declared that he did not sell one Hamilton watch during the sale. John G. Evans, of Atlantic City, employed as a traveling salesman by complainant, saw the five Hamilton watches in the window about the time of the institution of the suit, and admitted on the stand that the price marked on the card for each watch was the established price. Thompson, defendant's competitor, claimed that the word "reduced" appeared on each card; but complainant's traveling salesman substantiated the testimony of defendant that the word "now," and not the word "reduced," was on the card with the established price.

The chancellor granted a permanent injunction. He found (1) that defendant did not offer for sale or sell any Hamilton watches at less than the established prices, but (2) that he did advertise the watches for sale in violation of the terms of the contract. Hence, the question before us on this appeal from the chancellor's decree is merely whether defendant advertised any Hamilton watches for sale in violation of the terms of the contract. It is acknowledged, of course, that a court of equity must not issue an injunction to restrain an alleged wrong which complainant has not proved to have

occurred or which does not appear likely to occur. *Hecht Co. v. Rosenberg,* 165 Md. 116, 120, 166 A. 440.

While the advertisement in this case offered "good dependable" watches at reductions ranging up to ½ off, it did not expressly offer reductions on all watches, nor on Hamilton watches. Even assuming that the advertisement indicated by implication that defendant was offering Hamilton watches for sale at reduced prices, and that the word "Hamilton" on one of the pictures was clearly legible, the fact remains that the advertisement did not specify any price for any Hamilton watch. It is needless to conjecture whether defendant actually hoped to convey the impression that the prices of Hamilton watches had been reduced below the minimum resale prices. We take occasion to observe, however, that while the cards on some of the other watches were marked with two prices, i. e., the original price crossed out and the reduced price, the card on each Hamilton watch was marked with only the price established by the contract. Moreover, there was a wide difference between the Hamilton prices and the prices on other watches. In the advertisement some of the watches were priced at $19.75. The minimum established price for the Hamiltons was $52.25. If anyone had the impression that a Hamilton could be bought for $19.75, he would have found that his impression was erroneous by glancing in the window.

[*Law Strictly Construed*]

In any event, neither the advertisement of sale nor the window display of Hamilton watches constituted a breach of contract. The Fair Trade Act is in derogation of the general rule of the common law that any person has the right to sell his property at any price that he and the purchaser may agree upon, and the courts should accordingly construe the Act strictly and should not infer that the Legislature intended to change any common-law principle beyond what the Act explicitly provides. Years ago the practice of advertising prices as being reduced when they were actually not reduced was condemned by the Federal Trade Commission as an unfair method of competition in violation of the Federal Trade Commission Act. 15 U. S. C. A., sec. 45; *Federal Trade Commission v. Standard Education Society,* 302 U. S. 112, 58 S. Ct. 113, 82 L. Ed. 141; Henderson, The Federal Trade Commission, 196-200. Unlike the Federal Trade Commission Act and the Federal Securities Act, the Fair Trade Act does not forbid false representations as to prices. The purpose of the Fair Trade Act is to protect commodities subject to trade which, independent of their physical value, embody a trade-mark, brand or copyright which is recognized by governmental agencies as a valuable property right vested by law in the inventor or author. *Schill v. Remington Putnam Book Co.,* 179 Md. 83, 88, 22 A. 2d 128. The Act aims merely to prohibit retailers from wilfully and knowingly advertising, offering for sale or selling any such commodity at less than the price stipulated in the resale price contract. In this case complainant failed to prove that defendant had advertised any Hamilton watch for sale at less than the minimum established price. Assuming that defendant did offer price reductions on Hamilton watches, regardless of whether the word "now," or even the word "reduced," appeared on the cards in the window, he had the right to raise or reduce prices at any time and to offer the watches for sale at any prices he chose, provided that they were not below the established prices.

As complainant failed to prove the allegations of the bill that defendant had violated the terms of the contract, we must reverse the decree of the chancellor granting the injunction.

Decree reversed and bill of complaint dismissed, with costs.

[¶ 62,524] **Maurice B. Sandler v. Nathan M. Gordon et al.; Craig Laundry, Inc., appellant.**

In the California District Court of Appeals for the Second District, Division I. Civil No. 17050. October 20, 1949.

Appeal from a judgment of the Superior Court of Los Angeles County. Modified and affirmed.

California Unfair Practices Act

Sales Below Cost—Intent to Injure Competition—Meeting Competitor's Prices—Presumption of Intent.—Where it appeared that a laundry offered its services at prices below cost only for the purpose of meeting the legal prices of its competitors, it was held that there was lacking the intent to injure competitors or competition which would be requisite in proving violation of the Unfair Practices Act. The presumption that sales below cost are made to injure competition also disappears upon such a showing of evidence.

See the California Unfair Practices annotations, Vol. 2, ¶ 8068.10.

Unfair Competition—Enticement of Customers—Justification and Retaliation.—Exemplary damages were awarded upon finding that a laundry had engaged in unfair competitive practices by surreptitiously obtaining the customer lists of a competitor laundry and enticing those customers by offering free service to them for a limited time. The fact that the other laundry was offering its services below cost, and a desire to recapture customers lost to that laundry, were held insufficient justification for such illegal competitive methods.

See the California Unfair Practices annotations, Vol. 2, ¶ 8068.10, 8068.190, 8068.40.

For appellant Craig Laundry, Inc.: Fred Horowitz and Alvin F. Howard.

For respondent Maurice B. Sandler: Sydney J. Dunitz and Malcolm Archbald.

Before WHITE, P. J.; DORAN and DRAPEAU, JJ.

DRAPEAU, J.: [*Digest*] The [county] court found among other things: That plaintiff prepared and owned lists of customers, which defendant's employee Barr acquired by taking them from plaintiff's delivery truck as instructed by his employer;

That without the knowledge or consent of plaintiff, defendant using such lists located a large proportion of plaintiff's customers and offered and gave them free diaper laundry service;

That such conduct of defendant "was deliberately intended to ruthlessly and seriously injure plaintiff's business, and was prompted by ill will toward plaintiff; and in engaging in such conduct defendant was guilty of oppression and malice";

That a majority of such listed customers accepted defendant's offer and discontinued service with plaintiff;

That plaintiff sold certain service below his cost and below the lowest competitive price, but the purpose thereof was not to injure competitors or destroy competition;

That defendant's conduct was not justified by plaintiff's conduct, defendant's acts going "beyond any acts that might have been committed as so justified".

This action was brought under the Unfair Practices Act (Bus. & Prof. Code. § 17000 *et seq.*), section 17043 thereof making it unlawful either to sell at less than cost or give away any article or product, for the purpose of injuring competitors or destroying competition. However, section 17050(d) of the act permits sales below cost for the purpose of meeting competition.

Appellant by its answer admitted it offered free service to respondent's customers for limited periods of time, but sought to justify such conduct on the ground it was done to meet respondent's unfair practices, to wit: his advertisements that he would render certain designated services knowing that his cost therefor greatly exceeded the advertised price.

Robert Gordon, an officer of appellant corporation, managed the Crib Service and in September of 1947, he and Robert Cunningham, owner of the Tidy Didy Baby Laundry of Long Beach, called on respondent to protest with respect to a $1.00 a week diaper service which respondent was then advertising. According to the witness Gordon, respondent told these men that he was just starting, and in order to increase volume and build up his business, he had to cut prices. Thereafter, appellant "embarked on a plan to protect our interest there," which embodied a plan to take respondent's customers away from him.

With respect to his understanding of the meaning of the ad offering "complete baby laundry service for as low as $1 per week," respondent testified he meant "that my prices started at $1 per week and continued on upward depending upon the type of serv-

ice the customer desired and the number of times a week a delivery and pick-up were made. . . . I meant that, in our plant, we catered exclusively to babies. We handled no other line of laundry work whatsoever. We have a complete baby laundry service to offer each mother, whether she spends $1 a week with us or whether she spends four or $5 a week, as the case may be."

In answer to the question: "In connection with the price structure you set up for your business and in connection with the advertising you caused to have placed in the newspapers, did you have any intent to injure your competitors?" appellant stated: "None whatsoever." On recross-examination, respondent testified he intended to get as many customers as he could as the result of his advertising, and from whatever source possible. When asked "Then it was immaterial to you who had the customer at that time and what price they were paying. You were going to sell them for less and get the business?"—respondent replied: "I was going to sell them for my prices."

"The law prohibits, not all sales at less than cost, but only sales which are accompanied by the requisite intention or purpose —i. e., the purpose of injuring competitors or destroying competition. Unless the fact of intention is shown to have existed, the conclusion is that the sale did not constitute a violation of the statute." (11 Cal. Jur. 10-Yr. Supp. (1948 Pocket Part), p. 75 and authorities there cited.)

The testimony hereinbefore recited sufficiently rebuts the presumption raised by section 17071, *supra,* to wit: that any sales made by respondent below cost were for the purpose of destroying competition or injuring competitors; and substantially supports the trial court's finding complained of. Moreover, the evidence is sufficient to establish that respondent's advertising was placed and the sales were made "to meet the legal prices of a competitor," permitted by section 17050(d), *supra.*

Referring to the claim that punitive damages were improperly awarded, the court found that because of its conduct, appellant was guilty of oppression and malice. In such cases, exemplary damages may be imposed under section 3294 of the Civil Code.

[¶ 62,525] Opinion of the Attorney General of Kentucky.

Addressed to the Hon. William R. Smith, Secretary, Kentucky Retail Food Dealers' Association, by A. E. Funk, Attorney General, Guy L. Dickinson, Assistant Attorney General. November 30, 1949.

Kentucky Unfair Practices Act

Computation of Minimum Selling Price.—An item costing $1.00 per dozen, with 2 per cent discount allowed the retailer for cash payment within ten days, must be sold at no less than 9 cents in order not to violate the Unfair Practices Act, where 10 per cent of the cost of the item is allocable to the retailer's operating overhead.

See the Kentucky Unfair Practices annotations, Vol. 2, ¶ 8308.35.

We have your letter of November 29, 1949, enclosing copy of the Resolution, UNFAIR PRACTICE ACT, also copy of the Resolution, ATTEMPTS BY MANUFACTURERS TO ESTABLISH RETAIL PRICES.

You have called upon this department to give you an opinion on the example case listed below as to the minimum selling price of said article.

"Item A cost $1.00 per dozen less 2% cash discount if paid in ten days from date of invoice;

"The cost of operation in doing business is 10% in this particular store;

"What would be the minimum selling price of only one can of item A without violating the Unfair Practice Act."

We are of the opinion that the *minimum* selling price would be 9¢, taking into consideration that the 2% discount is deducted for cash payment in ten days.

[¶ 62,526] Pevely Dairy Co. v. United States; St. Louis Dairy Co. v. United States.

In the United States Court of Appeals for the Eighth Circuit. Nos. 13,789, 13,790. December 13, 1949.

Appeal from the United States District Court for the Eastern District of Missouri. Reversed and remanded for new trial.

Sherman Antitrust Act

Sufficiency of Indictment—Allegations of Interstate Commerce—Flow of Perishable Commodity.—Allegation that a charged conspiracy between dairies affected the consumers' price on milk purchased by the dairies from producers in another state, is held a sufficient statement of the interstate aspect of violation of the antitrust laws. Milk being a perishable commodity, it was within the contemplation of the dairies that the milk should continue its course to the consumer without being stored like ordinary merchandise and thus breaking the interstate movement.

See the Sherman Act annotations, Vol. 1, ¶ 1630.210, 1630.217.

Sufficiency of Evidence—Circumstantial Evidence—Uniform Prices—Evidence Consistent with Innocence.—A charge to the jury is correct which states that circumstantial evidence must not only prove guilt beyond a reasonable doubt but must further be inconsistent with any rational conclusion other than that of guilt.

Where producers' prices for milk are fixed by government regulation, where quality standards for milk are set by city ordinance, and where labor costs are fixed by union contract, all being the same to two dairies so that costs become substantially the same, uniformity in price and simultaneity in price changes could reasonably result from the operation of ordinary competitive economic forces, and where in addition the dairies introduce evidence tending to show competition in the industry, it is held that the circumstantial evidence is as consistent with innocent and lawful conduct as it is with guilt, and therefore is not sufficient to sustain a verdict of guilty.

See the Sherman Act annotations, Vol. 1, ¶ 1240.195, 1630.592, 1630.611, 1630.620.

Admissibility of Evidence—Prejudicial Statements.—Evidence introduced by the government, showing ownership of a defendant dairy by a foreign corporation and showing the high salaries paid to certain officers of the dairies, has no bearing on a question of conspiracy, is prejudicial, and warrants reversal of a verdict of guilty.

See the Sherman Act annotations, Vol. 1, ¶ 1630.622.

For the appellants: Jacob M. Lashly (Arthur V. Lashly, Paul B. Rava, and Lashly, Lashly, Miller & Clifford on the brief) for St. Louis Dairy Co.; Wm. H. Allen and James A. Finch (E. C. Hartman on the brief) for Pevely Dairy Co.

For the appellee: Walter D. Murphy and John R. Niesley, Special Attorneys, Department of Justice (George B. Haddock, Special Assistant to the Attorney General, Herbert A. Bergson, Assistant Attorney General, and Drake Watson, United States Attorney, on the brief).

For District Court ruling on motion to dismiss, see ¶ 62,311.

Before GARDNER, Chief Judge, and THOMAS and RIDDICK, Circuit Judges.

GARDNER, Chief Judge, delivered the opinion of the Court.

[*Nature of the Action*]

Appellants, Pevely Dairy Company and St. Louis Dairy Company, were convicted for engaging in a conspiracy to fix wholesale and retail prices on Grade A regular milk in the St. Louis area, within the State of Missouri, in violation of Section 1 of the Sherman Anti-Trust Act (15 U. S. C., Sec. 1). These two dairy companies, sometimes referred to in the record as handlers, were indicted with six individuals who were officers or employees of the dairy companies. The indictment charged that the corporate defendants, as handlers, sold and distributed approximately 63 per cent of the fluid milk consumed in the St. Louis area, and that for a period of approximately ten years prior to

the return of the indictment the defendants had engaged in an unlawful conspiracy to fix uniform and noncompetitive retail and wholesale prices of fluid milk; that the conspiracy consisted of an agreement and concert of action in that the corporate defendants would charge uniform and non-competitive retail and wholesale prices for fluid milk and that neither corporate defendant would make any change in price until an agreement had been reached that the other corporate defendant would make an identical change; that the corporate defendants on the several dates set out in the indictment, covering a period from July 3, 1946, to January 27, 1948 (which period, by supplemental bill of particulars, was extended to include changes in April, 1942, and June 30, 1946, and seven other such changes between April, 1938, and April 1, 1942), fixed uniform prices for fluid milk, both at wholesale and at retail; that the result of the conspiracy was to increase, stabilize and otherwise control and fix prices to consumers throughout the St. Louis area of milk produced in the States of Illinois and Missouri and shipped into the St. Louis area, and to suppress competition between the corporate defendants; that more than one-half of the fluid milk sold by the corporate defendants in the St. Louis area was produced in the State of Illinois and shipped into the St. Louis area; that fluid milk is perishable by nature, can not be stored, and must reach the consumer within a short time after production, and that from day to day there is a continuous flow of milk from producers in the States of Illinois and Missouri to retail and wholesale purchasers in the St. Louis area.

The corporate defendants, as well as the individual defendants, filed motions to dismiss on the ground that the indictment did not charge an offense under the laws of the United States, and particularly under Section 1 of the Sherman Anti-Trust Act, in that the restraints alleged were in intrastate commerce because the raw milk came to rest and was intermingled in Missouri before the corporate defendants processed and converted it into Grade A milk, and that the indictment failed to charge that the alleged price control constituted a direct and substantial burden upon interstate commerce. These motions to dismiss were overruled. The defendants filed motions for a bill of particulars which the court in part sustained, and in the bill of particulars furnished by the government it was recited that the government had no direct evidence of an express written or oral agreement among the defendants but that it would rely upon evidence from which an oral agreement might be implied.

Their motions to dismiss having been overruled, all defendants entered pleas of not guilty. At the conclusion of the government's evidence, and again at the conclusion of all the testimony, the defendants interposed motions for judgment of acquittal. The ruling of the court on these motions was reserved. The jury returned a verdict of guilty as to the corporate defendants and acquitted all the individual defendants. Subsequent to the verdict the corporate defendants filed their motions for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, which motions were overruled by the court and the corporate defendants were adjudged guilty and sentenced to pay fines of $5,000 each.

The Pevely Dairy Company and the St. Louis Dairy Company are the largest milk distributors in the St. Louis area. They are engaged in the selling of fluid milk, butter, eggs and various milk products in the City of St. Louis. There are approximately thirty-five dairies which sell milk products in this marketing area. The two corporate defendants handle approximately 63 per cent of the fluid milk in the St. Louis area. This milk was delivered by producers to the dairies in St. Louis by the producers' trucks or by independent truckers employed by the producers and the price paid by the dairies was an f. o. b. price at their plants in St. Louis, and any milk which did not meet the requirements of the St. Louis milk ordinance was rejected and remained the property of the producers. When the milk was received at the plants of the dairy companies at St. Louis it was inspected, cooled, pasteurized, bottled and capped before it was ready for sale and delivery. Further facts will be developed in the course of this opinion.

[*Arguments on Appeal*]

The appellants have taken separate appeals but their appeals have been submitted upon a single record and will be considered in one opinion. Reversal is sought on substantially the following grounds: (1) The indictment fails to charge a conspiracy in violation of the Sherman Anti-Trust Act in that the alleged restraints were in intrastate commerce because the raw milk transported

from Illinois came to rest, was intermingled with milk produced in Missouri, processed and converted into Grade A milk before it was sold, and in that the indictment charges that appellants were regulating milk prices wholly in the State of Missouri, and fails to allege that such alleged price control constituted a direct and substantial burden upon interstate commerce. (2) The government's testimony was insufficient to sustain a conviction for conspiracy, the evidence being wholly circumstantial and being as consistent with innocence as with guilt; and hence, the motions for acquittal at the close of the government's case should have been sustained. (3) The court erred in the admission of certain evidence. (4) The individual defendants who were the agents of the appellants and the immediate actors in the alleged conspiracy having been acquitted by the jury, the verdict of guilty as to appellants can not stand.

The Sherman Anti-Trust Act, so far as here material, reads as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Appellants in effect urge two grounds for their attack on the indictment. It is urged that the alleged restraint and conspiracy has to do only with the distribution of milk in the State of Missouri, and hence, this being an intrastate transaction, is not the subject of congressional control. All the acts charged against the appellants were alleged to have been committed within the State of Missouri. The indictment charged, however, that the alleged conspiracy "has had the effect, as intended by the defendants, of increasing, stabilizing, and otherwise controlling and fixing prices to consumers and other purchasers of fluid milk sold by the corporate defendants throughout the St. Louis area of fluid milk produced in the States of Illinois and Missouri and shipped from said States into said area, and of suppressing competition between the defendants * * * and has had the effect thereby of restraining the hereinbefore described interstate trade and commerce in fluid milk."

The indictment, in prior paragraphs, charged that the fluid milk sold and distributed in St. Louis was produced in the States of Illinois and Missouri and that the milk produced in Illinois was transported into St. Louis. The mere fact that the alleged conspiracy had to do solely with acts to be performed in the State of Missouri and was limited to the matter of the distribution of milk and the fixing of prices within the State of Missouri, is not necessarily determinative of the issue. If intrastate transactions affect interstate commerce they may properly be the subject of federal legislation. *Swift & Company v. United States*, 196 U. S. 375; *United States v. Women's Sportswear Mfgrs. Assn.*, 336 U. S. 460; *Standard Oil Company v. United States*, 337 U. S. 293. In *United States v. Women's Sportswear Mfgrs. Assn., supra*, it is, among other things, said,

> "The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

Under the Sherman Anti-Trust Act a combination formed for the purpose and with the effect of fixing the price of a commodity in interstate or foreign commerce is illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150. We must now accept the doctrine as well established that Congress, in enacting the Sherman Anti-Trust Act, intended to exercise its full constitutional power with respect to restraints on commercial competition. *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427; *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *United States v. Frankfort Distilleries*, 324 U. S. 293; *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533.

[*"Interstate Commerce" Sufficiently Alleged*]

We think the indictment sufficiently charged that the effect of the alleged conspiracy was

to restrain or stifle interstate commerce and that the trial court had jurisdiction of the offense charged, unless, as contended by the appellants, the milk, when it came to rest for the purpose of being processed and prepared for distribution by the appellants, lost its character as a commodity of interstate commerce.

On this phase of the case it is the contention of the government that the sales by appellants occurred in the course of interstate commerce because the flow of fluid milk from producers in Illinois remained in interstate commerce until it reached the utimate consumer and that the course of interstate commerce was not interrupted by the temporary stoppage which would not essentially obstruct or delay such flow.

Fluid milk is a perishable commodity which can not be stored as can ordinary merchandise. It is essential that the milk as transported from Illinois and received by appellants be sold and delivered each day and this was the manifest usage and course of business of the appellants. It was within the contemplation of the parties that the milk should continue its course until delivered by the handlers to consumers in the St. Louis area. As said by the Supreme Court in *Swift & Company v. United States, supra,* "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." The flow of milk until delivered by the distributors to the consumers in the St. Louis area, as charged in the indictment, establishes its interstate character. It was the expectation of both the producers and the handlers that the milk would be shipped in interstate commerce and we are of the view that the fluid milk thus shipped in interstate commerce remained in that commerce until it reached the ultimate consumers. *Binderup v. Pathe Exchange,* 263 U. S. 291; *United States v. South-Eastern Underwriters Assn., supra; White Bear Theater Corp. v. State Theater Corp.,* 8 Cir., 129 F. 2d 600. In *Binderup v. Pathe Exchange, supra,* the court said,

> "The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'"

We think the indictment sufficiently charged an offense under the Sherman Anti-Trust Act and that the court committed no error in denying appellants' motions to dismiss.

It is next contended by appellants that conceding that the indictment charges an offense of which the trial court had jurisdiction, the evidence failed to prove that they were guilty thereof, and hence, their motions for judgment of acquittal should have been sustained. This will necessitate a further survey of the evidence.

[*Evidence Wholly Circumstantial*]

It is conceded that the evidence was wholly circumstantial and it is undisputed. The court instructed the jury as to the applicable rule relative to the degree of proof necessary to warrant a conviction where, as here, the evidence is wholly circumstantial. These instructions were not excepted to by appellants, and hence, became the law of the case. We accept them as our guide in considering the question of the sufficiency of the evidence not only because they became the law of the case but because we think they are correct. The court, after advising the jury that there were two kinds of evidence, direct and circumstantal, said,

> "In order to justify a jury in finding a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendants, and each of the defendants, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence. Stated another way, not only must each fact relied upon to show guilt be proved beyond a reasonable doubt, but such fact must be consistent with all other facts introduced in a chain of circumstances, and such facts must further be inconsistent with any other rational conclusion than that of guilt of the defendants.
>
> "As I have said, the guilt of the defendants—and this applies to each of the defendants—can be shown by circumstantial evidence alone and whether the guilt of the defendants, and each of them, has been so established is for you to determine. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion."

The establishments of these appellants were located near each other in the St. Louis area. They both handled the same products, the price of which as delivered to them was fixed by government regulation. The qual-

ity of the milk for each was determined by ordinance of the City of St. Louis and all milk proffered to them which did not under test meet with the requirements of the ordinance was rejected. The cost of labor in processing the milk was determined by contracts with labor unions, so that the cost to each appellant was at all times substantially the same. Appellants were competitors and served substantially the same area and the product as processed was therefore a standardized product. It appears without dispute that the increases in the price of milk charged by the appellants was somewhat less than the increase in the cost of purchasing and processing the product. The circumstantial evidence relied upon as sustaining the verdict consists of the uniformity of the prices charged by the appellants for Grade A regular fluid milk sold by them, and the proximity in time of the price changes listed in the indictment and bill of particulars. In addition, the government showed certain conversations between two employees of the companies concerning price announcements for the period August, 1939 to August, 1941. The last of these conversations, it will be observed, occurred some seven years before the filing of the indictment. It appears from the undisputed evidence that the matter of price changes was thoroughly and analytically considered by the management of appellants, consisting of certain of their officers, at regular meetings, at which the economic factors bearing upon costs were ascertained, scrutinized and discussed, and that the changes made occurred only after a complete evaluation of the economic conditions and factors going into the cost of production. The evidence is to the effect that these factors were the only considerations influencing the price changes. It also appears that this system of determining prices was in accord with a system established by the International Association of Milk Dealers and which had been adopted by appellants prior to the return of the indictment. The details of the process of collecting the data pertinent to the cost of production would not seem to be here material because all this evidence is undisputed and the integrity of the cost accounting and allocation system used by appellants and the correctness of the conclusion reached is not challenged by any direct evidence. For each of the price changes charged in the indictment or set out in the bill of particulars detailed evidence was furnished concerning the economic reasons for each price change. For example, on April 8, 1938, there was a reduction of 1¢ a quart which resulted from the fact that the milk producers reduced the price that the appellants were required to pay. On August 7, 1939, there was an increased of 2¢ which was necessary to offset the loss on Grade A milk and to meet the increase of labor costs following a new industry-wide labor contract concluded in August. On February 9, 1940, there was an increase of ½¢ to meet increased labor costs resulting from the revamping of wage scales and overtime compensation paid in compliance with the Fair Labor Standards Act. On December 1, 1940, there was an increase of ½¢ necessitated by the increase in the producers' price ordered by the Secretary of Agriculture. On July 1, 1941, there was an increase of 1¢ which corresponded to a further increase in the price required to be paid the producers. On July 4, 1946, there was an increase of 1¢ necessitated by a .9¢ increased cost per quart resulting from a new labor contract. On October 5, 1946, an increase of 2¢ was made to offset a 2.1¢ increase in the price to be paid the producers. These details are simply typical and an examination of the record shows that each increase which is specifically charged either in the indictment or in the bill of particulars is rationally explained and accounted for and shown to have resulted from economic conditions which increased the cost of processing and distributing, and, as before suggested, this evidence is wholly without contradiction.

[*Attributable to Competition*]

The milk as handled by appellants was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces. Economists called as expert witnesses testified that in a market such as the fluid milk market in St. Louis, where there were standardized major cost factors, uniformity of price is to be expected. Thus, the Director of Dairy Marketing for the Illinois Agricultural Association testified that,

> "There is a very little difference in the milk of one dairy as to another, standard products as to butter fat tests, bacterial contents and other uniform requirements."

A Professor of Economics at St. Louis University testified as an expert witness as follows:

> "Speaking of Grade A milk market * * * we have here a highly standardized prod-

uct, the product of one dealer being the same as the product of another dealer."

As before observed, the cost factors are basically identical for both appellants. An economist testifying as an expert with reference to the sale price of standardized products, said,

"I would expect practically uniformity of price, with slight exceptions, and practically simultaneous change in price."

In a recent treatise by Edward H. Chamberlin, Professor of Economics at Harvard University, entitled "The Theory of Monopolistic Competition," it is said,

"One of the conditions of the problem must be the complete independence of the two sellers, for obviously, if they combine, there is monopoly. This independence must, however, be interpreted with care, for, in the nature of the case, when there are only two or a few sellers, their fortunes are not independent. There can be no actual, or tacit, agreement—that is all. Each is forced by the situation itself to take into account the policy of his rival in determining his own, and this can not be construed as a 'tacit agreement' between the two."

In an article entitled "Collusion," appearing in the December, 1948, issue of "Farm Economics," published by the Department of Agricultural Economics of the New York State College of Agriculture, appears the following:

"There is nothing peculiar in the fact that a change in the price of wheat or cotton occurs simultaneously in all markets. If the price of No. 1 Northern Spring Wheat in Minneapolis rises 5 cents a bushel, it advances 5 cents in Baltimore, 5 cents in Buffalo, 5 cents in Chicago, and 5 cents in all the small towns in Minnesota, North Dakota and Montana. These prices not only all advance by the same amount, but they advance on the same day. This is as it should be. There is no collusion. Under the free enterprise system, competition forces all handlers to pay the same price."

These economic principles must of necessity be recognized by the courts. Thus, in *Cement Manufacturers Protective Association v. United States,* 268 U. S. 588, the Supreme Court reversed a judgment granting an injunction for alleged violation of the Sherman Anti-Trust Act. In the course of that opinion Justice Stone speaking for the court, among other things, said:

"* * * the fact is that any change in quotation of price to dealers, promptly becomes well known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers.

"It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers.'"

In *United States v. Standard Oil Company,* 8 Cir., 47 F. 2d 288, referring to what inferences may fairly be drawn from circumstances, we said,

"While it is not the subject of direct evidence, yet it is fairly inferable from the situation shown by the evidence that, if the major companies follow the Socony price in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines."

[*Mere Uniformity Not Sufficient Evidence*]

We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act. It is to be observed too that the price changes in question were not simultaneous. Neither were the changes uniformly initiated by the same appellant. When a change was made by one of the appellants a like change was made by the other in a few days following. It is conceded that there was no direct proof of any agreement between the appellants for

the fixing of prices. In fact, the evidence is undisputed that every price change was made, not as the result of any understanding or agreement, but because of economic factors, and the same economic factors prompting a change by one of the appellants were equally applicable to the other.

There was evidence that prior to October 1, 1942, Mr. Wasser, an employee of Pevely Dairy Company, and Mr. Gee, an officer of the St. Louis Dairy Company, both having to do with sales, exchanged information as to prices which had already been fixed and were about to become effective. These witnesses were called by the government. Neither of them had any power of authority to fix prices and the information given was not with reference to any purpose to fix prices in the future but with reference to prices which had already been fixed. No such practice was followed by appellants during the seven years immediately preceding the finding of this indictment. The evidence is undisputed that they did not make any agreement with reference to the fixing of prices and it is equally undisputed that they did not communicate the knowledge of the changes determined upon by reason of any agreement between the dairy companies. This testimony, we think, forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices. Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses. Inferences are not themselves evidence but are the result of evidence and are based upon circumstances to take the place of actual proof. When, however, substantial proof is made contrary to the fact inferred, the inference is completely refuted. As said by us in *Cartello v. United States,* 93 F. 2d 412, speaking of circumstantial evidence,

> "To sustain conviction, it must not only have been consistent with the defendants' guilt, but must have been inconsistent with their innocence."

In *Wesson v. United States,* 8 Cir., 172 F. 2d 931, in reversing a conviction based upon circumstantial evidence, we said,

> "Inferences must be based upon proven facts or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. *Adair v. Reorganizaton Investment Co.,* 8 Cir., 125 F. 2d 901; *Southern R. Co. v. Stewart,* 8 Cir., 119 F. 2d 85; *Hoskins v. United States,* 8 Cir., 120 F. 2d 464; *Massachusetts Protective Assn. v. Mouber,* 8 Cir., 110 F. 2d 203. In *Read v. United States,* 8 Cir., 42 F. 2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well settled in this circuit. In *Salinger v. United States,* 8 Cir., 23 F. 2d 48, 52, this court said: "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused." ' "

In passing it should be observed that while the indictment charges a continuing conspiracy during a period of ten years, the fact is that during some three years of this alleged ten year period the prices which appellants were permitted to charge were fixed by the government. Instead of being a continuous period of ten years there were two separate periods. These conversations between representatives of the appellants all took place during the first period and it would seem that the three years during which the government fixed prices entirely destroyed the continuity of the period alleged. Whatever may have happened during this first period, being thus separated from what happened during the second period, would ordinarily, if charged as a separate offense, be barred by the three-year statute of limitations, and the evidence with reference to the conversations between these representatives, if admissible at all, could have but little bearing upon the course of conduct during the second period covered by the indictment. *United States v. Great Western Sugar Co.,* D. C., 39 F. 2d 152; In re *United Shoe Mach. Corp.,* D. C. Mass., 73 F. Supp. 207, at 211; *Patterson v. United States,* 8 Cir., 222 F. 599, at 627.

In this connection we note that all individual defendants were found not guilty. The appellants here are corporations. They

could act only through officers and agents, yet the only officers and agents who could possibly have committed the violations charged were acquitted. It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty as against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal. However, the verdict of not guilty as to the individual defendants in this case certainly stripped the verdict of guilty as to the corporation defendants of all semblance of logic or reason, and to our minds weakened the presumption of correctness usually attributable to the verdict of a jury. As said by us in *Wesson v. United States, supra,*

> "Certainly, the proven circumstances were as consistent with innocence as they were with guilt, and inferences may not be drawn from inferences. * * *
>
> "The circumstances as they stand out in the record are consistent with the direct, uncontradicted and unimpeached testimony of the defendant and his witness. Mere suspicion raised by the circumstances proved would not sustain a conviction, especially when such suspicion is removed by uncontradicted evidence."

[*Evidence Equally Consistent with Innocence*]

The circumstances relied upon in the instant case can not reasonably be said to be inconsistent with the innocence of the appellants. We are of the view that the proven circumstances, considered in a light most favorable to the government, are not inconsistent with the innocence of appellants, and hence, their motions for acquittal should have been sustained.

[*Evidence Wrongfully Admitted*]

While our conclusion on this phase of the case necessitates a reversal, there remains for consideration the ruling of the court on appellants' objections to the introduction of certain evidence. As this matter may again be presented on new trial we refer briefly to it here. Over objection of appellant St. Louis Dairy Company, the government was permitted to show that all of its stock was owned by the National Dairy Products Corporation of New York. The government also offered proof as to the salary or compensation paid the officers of appellants who were defendants. We think the admission of this class of testimony was erroneous, and in a case where the evidence is purely circumstantial and at best weak, the admission of such testimony was, we think, prejudicial and would require a reversal of this case. *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F. 2d 297; *Braatelien, et al. v. United States*, 8 Cir., 147 F. 2d 888; *O'Hara v. Lamb Const. Co.*, Mo., 197 S. W. 163. In *Union Electric Light & Power Co. v. Snyder Estate Co., supra,* which was a civil case, counsel for defendant questioned a witness relative to the ownership of the stock of the plaintiff. Referring to the admission of that evidence, we said,

> "This cross-examination impressed upon the jury the size and extent of the holdings of plaintiff, the foreign character of the controlling factors of plaintiff, and that the ownership of substantially all the stock of plaintiff was in the North American Edison Company. * * *
>
> "* * * These extraneous facts, if they are facts, served only to arouse the prejudice of the jury. * * *
>
> "This evidence not only took the jury far from the simple issue to be tried, but it distracted their attention from that issue, and brought before them the size and wealth of plaintiff and its affiliates, and the above-quoted argument of defendants' counsel was calculated to keep fresh in the minds of the jury the size and wealth and foreign character of the plaintiff."

It is noted too that in the instant case the government attorney, in his closing argument, called the jury's attention to the fact that, "There is no evidence but I presume there were dividends paid to the National Dairy Corporation." This was a direct reference to the ownership of the stock of one of the appellants by this foreign corporation. It was certainly not pertinent to any of the issues and could have had but one purpose and that was to prejudice the jury.

The judgments appealed from are therefore reversed and the cause remanded with directions to grant appellants a new trial.

[Dissents]

THOMAS, Circuit Judge, dissenting:

I agree with Judge Gardner that the indictment charges an offense under the Sherman Act, but I do not agree with the conclusions reached upon the other issues in the case. I, therefore, dissent.

RIDDICK, Circuit Judge, dissenting in part:

I agree that the evidence wholly fails to establish any agreement between the defend-

ants to fix the price of fluid milk sold to consumers or any concerted action to suppress competition between them in the sale and distribution of fluid milk in St. Louis. This, of course, requires reversal of the judgment below. But I am also of the opinion that the Government's action should be dismissed because the so-called current or flow of fluid milk in interstate commerce from producers in Illinois ended at the processing plants of the defendants.

The fluid milk which reached defendants' processing plants in St. Louis was raw milk. Its sale by the defendants to their customers in St. Louis was prohibited by the St. Louis Milk Ordinance. That portion of the raw milk from Illinois which failed to pass the inspection required by the St. Louis Milk Ordinance remained the property of the Illinois producer. The portion of it which met the test of inspection was commingled with inspected milk produced in Missouri, and, after the processing required by local law for its sale in St. Louis, was held exclusively for distribution to purchasers in St. Louis. Neither the Illinois shippers nor the defendants could have intended that the interstate transportation of the raw milk should proceed beyond defendants' processing plants since its further progress was prohibited by local law. And since the defendants processed the raw milk in various forms, including several kinds of fluid milk as well as butter, ice cream, and powdered milk, no producer in Illinois could have intended that milk shipped to one of the defendants in St. Louis would continue in commerce to the ultimate consumer as Grade A pasteurized fluid milk. The mere fact that defendants, because of the perishable character of fluid milk, were compelled to process and distribute that part of the raw milk received from Illinois which finally reached the St. Louis consumer in fluid form with all possible speed is not, in my opinion, sufficient to establish the interstate commerce in milk charged in the indictment.

[¶ 62,527] Max Weissbard and Harry Weissbard, individually and trading as Weissbard Bros. v. Potter Drug & Chemical Corp.

In the Superior Court of New Jersey, Chancery Division, Essex County. Civil No. C-347-49. November 29, 1949.

New Jersey Fair Trade Act

Fair Trade Contracts—Failure to Enforce—Declaratory Judgments—Necessary Parties.—A suit for declaratory judgment to the effect that a fair trade contract is unenforceable against a retailer because the manufacturer did not secure compliance from other retailers after being informed of their selling below the established price, is dismissed because the plaintiff named only the manufacturer as defendant and sought to have injunction issue prohibiting enforcement only as to plaintiff, whereas the declaratory judgments act requires that all persons be made parties who would be affected by the final adjudication, which in the instant case would include all other retailers who would be injured by plaintiff's being able to sell at lower prices than they.

See the New Jersey Fair Trade annotations, Vol. 2, ¶ 8564.30, 8564.80, Resale Price Maintenance Commentary, Vol. 2, ¶ 7357, 7361.

For the plaintiffs: Samuel Kaufman (Bilder, Bilder & Kaufman, Newark, N. J.).

For the defendant: Joseph H. Stamler (Lorentz & Stamler, Newark, N. J.).

FREUND, J. S. C.: [Digest] The plaintiffs are the owners of retail drug stores in the City of Newark. The defendant is the manufacturer of soap and ointment products marketed under the trade name "Cuticura". Pursuant to the provisions of the Fair Trade Act, the defendant executed a contract with one or more of its retailers in this State, fixing the minimum price at which its commodities might be sold at retail. Notice of the execution of this contract was given by the defendant to retailers, including the plaintiffs, and by reason thereof, the plaintiffs became bound to sell at the prices fixed by the defendant. The plaintiffs allege that they maintained such Fair Trade prices but discovered that a number of their competitors were selling the products below

the fixed prices, and they thereupon reduced prices to meet the competition. They notified the defendant of such underselling, but it failed to obtain from other retailers compliance with the price schedule.

The defendant has moved to vacate the restraint in the event that its motion for dismissal of the complaint be denied, and has filed affidavits of other retailers which allege that the plaintiffs were the violators of the price schedule and that plaintiffs' conduct produced the underselling — "the pot called the kettle black."

Both parties assert that the instant matter is of novel impression in this State and that *Stockman v. Wilson Distilling Co., Inc.*, 23 N. Y. S. 2d 510, (1940), affirmed 26 N. Y. S. 2d 510, motion for leave to appeal denied, 286 N. Y. 736, 35 N. E. 2d 201, is the only reported case on point. The defendant relies on the *Stockman* case and the plaintiffs attempt to distinguish it. There, as here, a proceeding was brought by the plaintiff, a retailer, against the defendant, the exclusive distributor of the commodity, upon practically the same facts and seeking the same relief. The Supreme Court of New York granted defendant's motion for dismissal of the complaint as insufficient in law.

Mr. Justice Steinbrink, whose opinion was adopted by the appellate court, said:

> "The purpose of the action is plain. The plaintiff seeks immunity from the prosecution of any action against him under the statute. It is equally plain that no such immunity can be afforded by means of a declaratory judgment, for even though it be assumed that the defendant is under a statutory duty to enforce its fair trade agreements and that it has, by failing to discharge that duty, abandoned its right under the agreements, nevertheless price cutting by the plaintiff would remain actionable 'at the suit of any person damaged thereby', including competing retailers. 'The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.' *James v. Alderton Dock Yards, Ltd.*, 256 N. Y. 298, at page 305, 176 N. E. 401, at page 404. A declaratory judgment could not serve that purpose, for the jural relations attaching to the fair trade agreements, affecting as it does all competing retailers, cannot be determined with finality in this action. The motion is consequently granted."

Significantly, the only defendant in this proceeding is the manufacturer and producer of the products. The retailer or retailers with whom the defendant entered into the Fair Trade contract are not parties to the suit. The plaintiffs admit that they received notice of the execution of the contract and "by reason of the statute, the contract and the notice thereof given to the plaintiffs, the plaintiffs became bound to sell all of the defendant's products at the prices fixed therefor by the defendant." A contract may not be declared null and void in the absence of a party to the contract. Indeed, the Declaratory Judgments statute expressly provides, R. S. 2:26-72, "When declaratory relief is sought, all parties having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding."

The complaint will be dismissed.

[¶ 62,528] Floyd W. Dunaway, et al. v. Standard Oil Company (New Jersey), et al.

In the United States Court of Appeals for the Fifth Circuit. No. 12861. December 19, 1949.

Appeal from the District Court of the United States for the Northern District of Texas.

Sherman Antitrust Act

Procedure—Appealability—Final and Interlocutory Orders—Effect of Dismissal of Certain Defendants Sued with Others upon Conspiracy.—In a treble damage suit wherein several defendants were sued individually and jointly, the quashing of service and dismissal of the action as to certain defendants does not amount to a dismissal of individual actions against them, which would be a final order, but is rather only a dismissal of certain defendants to a single action based upon their alleged joint illegal activities, and is therefore an interlocutory order, since the action is not ended while there are defendants remaining. The order not being final, the appeal from the dismissals is premature, and must itself be dismissed.

See the Sherman Act annotations, Vol. 1, ¶ 1640.622.

For the plaintiffs: Arthur H. Bartelt, Austin, Texas.

For the defendants: Cecil C. Cammack, Fort Worth; R. H. Kelley, Houston; T. E. Mosheim, Houston; William A. Dougherty, New York City; D. H. Culton, Amarillo; H. L. Adkins, Amarillo; Wm. Q. Boyce, Amarillo; Charles C. McDugald, Chicago; Paul A. McDermott, Fort Worth.

Before HUTCHESON, WALLER, and RUSSELL, Circuit Judges.

HUTCHESON, Circuit Judge: Alleging: that of the six defendants sued, five were organized under the laws of Delaware, and one under the laws of Colorado; that none of them, except Canadian River Gas Co., has been, or is now, licensed to do business in Texas, but that all, by virtue of combination and conspiracy, were suable in Texas, plaintiffs sued them as conspirators, seeking in concert to monopolize and to impose unlawful restraints on interstate commerce in connection with the production, transportation, and sale of natural gas.

Alleging with considerable fullness the details of the organized concert of action to effect the combination and conspiracy, and that it had resulted in damages to plaintiffs as lessors and owners of gas producing properties, in the sum of $920,000.00, the complaint prayed judgment against the defendants individually and jointly for treble damages.

The complaint alleging that the officials, agents, and employees of the Canadian were also agents of the other named defendants, and that service of papers on any one of them constitutes valid service on the respective defendants, the summons upon all defendants in this action was served "by delivering to E. C. Wagner [Vice-President of Canadian Gas Co.], the alleged agent of each of the above named companies, a copy of this summons and a copy of the bill of complaint attached".

Each of the defendants, except Canadian, filed motion to quash the service, and each, except Standard Oil Company, moved to dismiss the action for want of jurisdiction and venue. Each of the motions to quash was sustained, the cause was dismissed as to each of the moving defendants, and plaintiffs appealed from each of the orders.

Appellees, moving to dismiss the appeal as from not final, but interlocutory, orders, and pointing out: that the suit presented not many causes of action, one against each of the defendants, but one cause of action against all of the defendants jointly, for the damages inflicted by them acting in concert; and that the suit is still pendiing as to Canadian; urge upon us, upon the authority of our case, *Hunteman v. New Orleans Pub. Serv. Co., Inc., et al.,* 119 F(2) 465, and similar cases,[1] that the appeal must be dismissed.

Appellants, on their part, as vigorously insist that the invoked cases are not applicable here.

We cannot agree with appellants. We think it too clear for argument that the authorities appellees cite are controlling here. The action brought is one against the six defendants for the consequences of their joint and concurrent action. The dismissal of the five defendants has not brought it to an end. The orders are interlocutory and, therefore, subject to be set aside or modified at any time until the whole cause is disposed of, and being interlocutory, they are, therefore, not appealable. The appeals should be, and they are hereby

DISMISSED.

[Concurring Opinion]

WALLER, Circuit Judge, specially concurring: If the opinion in our case of *Hunteman v. New Orleans Public Service Co., Inc., et al.,* 119 F. 2d 465, is correct—and its correctness seems to be supported by much authority—then the orders quashing the process were interlocutory and the appeal is properly dismissed. But on account of the apparent finality with which some of the defendants were dismissed out of the case

[1] *Kuhn, et al. v. Canteen Food Serv., et al.,* 150 F. (2d) 55; *Hohorst v. Hamburg-Am. Packing Co.,* 148 U. S. 262; *Atwater v. N. A. Coal Co.,* 111 F. (2d) 124; *Hunter v. Fed. Life Ins. Co.,* 103 F. (2d) 192; *Southland Ind. v. Fed. Communications System,* 99 F. (2d) 117; *Fields v. Mut. Ben. Life Ins. Co.,* 93 F. (2d) 559; *Lockhart v. N. Y. Life Ins. Co.,* 71 F. (2d) 684; *Photometric Pro. Corp. v. Radtke,* 157 F. (2d) 849; *U. S. v. Braunstein,* 168 F. (2d) 749; *Western Contracting Co. v. National Sur. Corp.,* 163 F. (2d) 456.

because of the showing that they had never transacted business in the State of Texas, it seems to me to be incorrect to say that the dismissal orders in this respect were interlocutory.

Since the facts upon which the motions were predicated were neither disputed nor the evidence supporting same disproven, it would seem that such orders were without error and ought more properly to be affirmed. Without doubt, the orders quashing the process are interlocutory, but I deem the orders dismissing the defendants because of non-suability in Texas to have the quality of final judgments.

[¶ 62,529] Russellville Canning Co., a partnership v. American Can Co.

In the District Court of the United States for the Western District of Arkansas, Fort Smith Division. Civil No. 706. December 19, 1949.

Robinson-Patman Price Discrimination Act

Discrimination—Freight Equalization—Warehouse Not Bona Fide Equalization Point Where Majority of Shipments Still Made from Factory.—The establishment of a warehouse as the point from which freight charges are calculated in shipments to regional purchasers results in unlawful discrimination against the purchasers who are located farthest from the warehouse, if the warehouse is not the source of supply for the majority of the cans purchased and is therefore not a bona fide factor in the determination of costs of shipping. Even though such freight costs are actually less than the costs were from an earlier equalization point, which also was not a source of supply, discrimination nevertheless results when the complaining purchaser is not given as great a benefit as his competitors.

See the Robinson-Patman annotations, Vol. 1, ¶ 2212.590.

Discrimination—Quantity Discounts—Particularity in Determination of Cost Savings.—A quantity discount system operated on a yearly volume basis, and established upon experience instead of cost studies, and a system set up on the basis of average allocated handling costs for three broad predetermined purchaser groups, under which discounts did not therefore reflect accurately the costs and savings in dealing with each purchaser, do not fulfill the justification requirements of the statute. Although such an interpretation of the Act would impose added burdens on the manufacturer, the purpose of the law, which is the protection of small business, requires some semblance of individual cost justification.

See the Robinson-Patman annotations, Vol. 1, ¶ 2212.305.

Discrimination—Special Services and Facilities—Impossibility of Granting Services to Plaintiff No Defense to Charge of Discrimination.—The delivery of cans at reduced costs from the factory to a nearby purchaser by means of a conveyor runway is a facility or service the granting of which to one customer is no less a discrimination merely because the plaintiff's distance from the factory makes it impossible to install such a conveyor system for him also. Further discrimination is found in the use of the conveyor to deliver to the purchaser cans which are then transported by the customer to other of its plants.

See the Robinson-Patman annotations, Vol. 1, ¶ 2216.30.

Damages—Quantum of Proof in Private Action—Nature of Proof Not Different from That in FTC Action.—The establishment of proof that injury has been incurred through discriminatory practices does not require a showing that the complaining competitor has in fact been injured, but is shown by proof, in the words of the statute, that the effect of the alleged practices "*may be* substantially * * * to injure, destroy or prevent competition * * *." To require a different reading of the requirements would constitute unauthorized court legislation prejudicial to the rights of private parties. Further, difficulties in proving the *amount* of damages will not necessarily constitute a difficulty in proving the *fact* of damages which might require dismissal of the case.

See the Robinson-Patman annotations, Vol. 1, ¶ 2213.15.

For the plaintiff: J. M. Smallwood, Russellville, Ark.; Walton Hamilton (Arnold, Fortas & Porter), Washington, D. C.

For the defendant: Daily & Woods, Fort Smith, Ark.; G. C. Hardin, Fort Smith, Ark.; John F. MacLane, Charles J. Colgan, Cyrus R. Vance and Burton M. Abrams (Simpson, Thacher & Bartlett), New York, New York.

MILLER, Judge: [*Digest*] Plaintiff, Russellville Canning Company, a partnership organized and operating under the laws of the State of Arkansas, is suing defendant, American Can Company, a corporation organized and operating under the laws of the State of New Jersey and doing business in Arkansas, for treble damages under Section 4 of the Clayton Act, 15 U. S. C. A. Sec. 15, and bases its cause of action upon alleged violations by the defendant of the Robinson-Patman Act, 15 U. S. C. A. Sec. 13.

[*Nature of Charges*]

Plaintiff charges discriminations in the following particulars:

(1) Freight charges resulting from freight equalization with Fort Smith, Arkansas. Collateral thereto is a claim for damages for lost profits in 1945 allegedly caused by defendant's failure to deliver cans according to the contract between plaintiff and defendant.

(2) Quantity discount payments made to certain named customers of defendant and withheld from plaintiff. This claim is properly broken down into two parts, because of defendant's change in its quantity discount schedule on January 1, 1946. Prior to that date the maximum was 5% and subsequent thereto 3%.

(3) Runway allowance of 45¢ per thousand cans made to Morgan Packing Company at its Austin, Indiana, plant and not extended to plaintiff.

Plaintiff contends that such discriminations in price resulted in substantial injury to its business and property, and that it has suffered damages not only in the amount of the additional business expense imposed by the excess charges but in the impairment of its competitive position.

The Congress, in amending the Clayton Act by the Robinson-Patman Act, gave emphasis to the protection of small business, recognizing that the Clayton Act had been too restrictive in requiring a showing of general injury to competition, and by the enactment of the Robinson-Patman Act, intended to allow a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination." *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 49, and footnote 18 for statement of Senate Judiciary Committee.

The language of the statute requires only that the effect of the price discriminations "*may be* substantially to lessen competition * * * or to injure, destroy or prevent competition * * *." (Emphasis added.)

It would appear, therefore, that as a practical matter the requisite of adverse effect on competition will follow as a matter of course when it is shown that a seller has charged one purchaser a higher price for like goods than he has charged one or more of the purchaser's competitors. Certainly, this has been the result in the Federal Trade Commission cases.

When the plaintiff makes this showing, price differential with an adverse effect on competition, it has made out a *prima facie* case of unlawful discrimination. Under a proviso of Section 2(a), the defendant may justify price discriminations by showing that the differentials make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered.

[*Claimed Lack of Proof as to Injury*]

The defendant contends, and this contention was the basis of its motion to dismiss, that the testimony introduced by the plaintiff failed to establish injury, destruction or prevention of competition, required by Sec. 2(a), or injury to its business or property, required by Sec. 4, and that, therefore, plaintiff's case fell of its own weight, with the necessary result that the burden imposed upon the defendant to justify affirmatively the alleged discriminatory practices never arose. Defendant would distinguish between proceedings by the Federal Trade Commission and private actions, the former being principally injunction proceedings wherein it is necessary to forestall discriminations "in their incipiency," thereby preventing future discriminations regardless of what has occurred in the past, and the latter for the recovery of monetary damages for past injury. Thus, defendant contends, it is sufficient if the Federal Trade Commission establishes price discriminations the effect of which "may be" to adversely affect or

injure competition, but "in private actions brought for violations of subsection 2(a), the subjunctive "may be" of potential injury (upon which the Commission may act) must be converted into the indicative "does", denoting actual injury, destruction or prevention of competition inimicable to the individual plaintiff." Finally, defendant contends that plaintiff cannot recover "general damages" under Section 2(a); that "special damages" must be shown to be the result of defendant's acts; that no such showing has been made; and that, therefore, plaintiff has failed to establish a claim entitling it to relief.

[*Nature of Proof in Private and FTC Actions Not Different*]

To sustain defendant's contention the court would have to rewrite Section 2, for subsection (a) declares that price discriminations which "may", not "do", lessen or injure competition are unlawful, and no distinction is made between Federal Trade Commission proceedings and private actions. Therefore, in order for the plaintiff to make out a *prima facie* case of unlawful price discrimination, it need only establish that it was charged more for its cans (there is no question here but that products of like grade and quality are involved) than other customers of defendant who are competitors of plaintiff and that the effect of this discrimination "may be" to lessen or injure competition between plaintiff and the named competitors of plaintiff. Of course, in the usual case, if the purchaser has a valid claim, as the plaintiff does here, the proof will be sufficient to establish that the discriminations did injure competition. At this point the burden is cast upon the defendant to justify, if it can, such discrimination, and if a justification is not or cannot be sufficiently established, then the plaintiff has shown an unlawful discrimination under Section 2(a), or the "anything forbidden in the anti-trust laws" required by Section 4, and it may recover treble damages if it can show that it has been injured in its business or property by reason thereof.

The plaintiff admits, and the court agrees, that it cannot recover damages unless it has established an injury to its business or property, but this problem does not arise until an unlawful price discrimination has been established. In this regard only, is the burden on the plaintiff in a private action different from or greater than the burden in a Federal Trade Commission proceeding. And, as the court understands the law, normally the burden is greater only when the injured party seeks to recover special damages, as in the instant case, wherein the plaintiff is seeking to recover damages for the impairment of its competitive position. Thus, when it is established that a seller has charged one purchaser a higher price for like goods than he has charged one or more of the purchaser's competitors, and the seller cannot sufficiently justify the price differential, the purchaser paying the higher price normally will have established the necessary adverse effect upon competition (that he has been injured in his competitive opportunities) and the required injury to business and property, which, in the absence of extraordinary circumstances, will entitle him to damages in at least the amount of the discrimination.

[*Freight Shipments—Facts*]

It seems proper to discuss first the questions involved in the freight payments made by the plaintiff.

The material facts of this phase of the case may be briefly summarized as follows. On April 24, 1943, plaintiff, as buyer, signed an exclusive contract with defendant, as seller, for the purchase of all its requirements of sanitary cans and began regular operations on June 1, 1943. The contract expired on December 31, 1947, and was not renewed. *Inter alia* the contract contained the following provision:

> "No. 7 Deliveries: Cans named in this contract shall be delivered as wanted by Buyer, upon reasonable notice to Seller, F.O.B. Seller's factories, freight equalized with St. Louis, Missouri, except on such sizes and styles of cans as may not be made at Seller's St. Louis, Missouri, factory. Sizes and styles of cans Seller may not make at its St. Louis, Missouri, factory shall be F.O.B. point of shipment."

The contracts of a number of customers in the Ozark Region (which here means the Arkansas River Valley in Arkansas and Oklahoma and Northwestern Arkansas and Southwestern Missouri) also provided for St. Louis equalization. Some specified Maywood or Hoopeston, Illinois, these cities having been equalization points at the time the contracts were executed. None, however, provided for equalization with Fort Smith, Arkansas.

By the year 1940 the Ozark Region had developed to the point that the various canners were insisting upon the location of a can factory or similar facility in the Ozark Region to insure prompt delivery of cans and to place it on a par freightwise with other canning areas throughout the country. The defendant made a study of the situation and concluded that while a factory would not be justified at that time the situation could be reasonably met by the establishment of a warehouse at Fort Smith, Arkansas. Fort Smith was selected because of its size, central location and the availability of railroad and highway facilities. The warehouse opened on June 2, 1941, and continued in operation until December, 1946, when it was discontinued upon the completion of defendant's Fort Smith factory. After its opening, freight was equalized with Fort Smith to all customers in the region to whom it meant a lower freight cost. It should be noted here that freight equalization with Fort Smith continued until December 31, 1945, only, although the warehouse was operated until December, 1946, as above stated. From a total of 7,851,086 cans delivered in 1941 from the warehouse, the yearly total increased to a total of 24,730,148 in 1945, the year freight equalization with Fort Smith ceased. For the entire period of its operation there were 83,389,496 cans delivered from the warehouse, and during the peak year, 1945, approximately 30% of the region's demands were handled through the warehouse.

From the date it began operations, June 1, 1943, plaintiff received its cans with freight equalized with Fort Smith instead of St. Louis, as provided in its contract. The freight rate from St. Louis, Missouri, and from Terre Haute, Indiana, the defendant's factory from which most of the cans supplied to the Ozark Region were manufactured, was the same to Fort Smith, Arkansas, Alma, Arkansas, and Russellville, Arkansas. This means that the plaintiff, and Good Canning Company of Fort Smith, Arkansas, hereinafter referred to as Good, and Alma Canning Company of Alma, Arkansas, hereinafter referred to as Alma, would have expended the same amount of money for freight with freight equalized at St. Louis, whereas with freight equalized at Fort Smith, Good got its cans freight free, Alma with a small freight charge and plaintiff with a larger freight charge.

Plaintiff continued to receive its cans with freight equalized with Fort Smith until the end of 1944, after which it refused to accept shipments with freight equalization other than according to the letter of the contract. Thus, in February, 1945, plaintiff ordered nine cars of cans requesting shipment in accordance with its contract "letter for letter". The cans were shipped with Fort Smith equalization, and plaintiff refused to accept them, and did not accept them until defendant had proffered invoices showing St. Louis equalization and paid certain demurrage charges. In May, 1945, plaintiff ordered three cars of cans, which were refused until invoices showing St. Louis equalization were presented. These shipments, and the ensuing controversies, are the basis of plaintiff's claim for damages due to lost profits on Texas spinach and on mustard greens which it contends it was unable to can, and, thus, unable to fill standing Government orders. (This claim will be discussed subsequently). Thereafter, on all shipments defendant tendered dual invoices on each shipment, one set showing Fort Smith equalization and the other St. Louis, and in all instances plaintiff paid St. Louis equalization.

During the period between June 1, 1943, and December 31, 1945, plaintiff paid $23,235.39 in freight. Of this sum defendant has tendered back $5,286.55, being the amount paid in 1945 over and above freight charges equalized with Fort Smith.

Also, it might be noted here that defendant does not have a factory at St. Louis, but freight was equalized at that point because of the existence of a competitor's can factory in that city. In this case there is no question as to the legality of equalizing freight with St. Louis, if it had in fact been so equalized, because there would have been no discrimination between plaintiff and its Ozark Region competitors.

[*Proffered Justification for Equalized Freight*]

Defendant seeks to justify Fort Smith equalization in the following manner. (1) equalization with a factory is proper; (2) a bona fide warehouse is the equivalent of a factory for equalization purposes; and (3) the Fort Smith warehouse was a bona fide warehouse.

With the first contention the court finds no fault, for equalization with a factory, provided that factory is the normal source

of supply, results in the same net mill realization to the seller and though there be differences in the delivered prices to the purchasers, depending upon their location in relation to the factory, such differences are justified as delivery costs. Although the court is not directly concerned with the problem, it may be that there is nothing inherently evil or unlawful in basing point systems, either single or multiple, if they can be justified as good faith attempts to meet the low price of a competitor, provided there is no industry-wide or nation-wide collusion or conspiracy or combination in restraint of trade. However, since the court is not here concerned with lower prices to meet the price of a competitor, prices that bear relation to factors other than actual costs of production or delivery, are price discriminations within the prohibition of Section 2(a), provided, of course, there exists the required effect upon competition. *Corn Products Co. v. Federal Trade Commission,* 324 U. S. 726, 732. This problem usually arises in so called "delivered price" systems, for such systems inevitably involve phantom freight or freight absorption on the part of the seller and result in varying net mill realizations. For present purposes, there is no difference in legal effect between phantom freight and freight absorption. *Bond Crown & Cork Company v. Federal Trade Commission,* 4 Cir., 176 F. 2d 974. The former occurs when there is a charge for freight in the delivered price which was not actually incurred, because the distance from the basing or equalization point is greater than the distance from the mill to the point of delivery. And, the latter occurs when the freight included in the delivery price is less than that actually incurred, because the distance from the basing or equalization point is less than from the mill or factory to the point of delivery.

The second contention in the justification may be put aside until the third is considered, for in the event of an adverse conclusion on the third, it will be unnecessary to consider the second.

[*Equalizing from Warehouse Improper*]

As to the third, that the Fort Smith warehouse was a bona fide warehouse, it is necessary to approach the problem from the standpoint of the requirements of the law, and not from the standpoint of the good faith or generosity of the defendant in establishing the warehouse to aid the Ozark Region canners. The court finds no fault with and makes no criticism of the motives of defendant in establishing the warehouse, whether to aid the Ozark Region canners or to protect its own interests. Be that as it may, the fact remains that it cannot discriminate in the price of cans to its customers if the discrimination is condemned by Section 2(a). Assuming that freight may be equalized with a warehouse located away from the factory, in order for such a warehouse to be bona fide, it would have to be the actual source of supply of the cans. Unquestionably, this warehouse was not, as it never supplied more than 30% of the needs of the Ozark Region, which included many canners other than Good, Alma and plaintiff. For the period involved plaintiff obtained approximately 5% of its supply of cans from the warehouse. The great majority of the cans came, not from the warehouse, but directly from defendant's Terre Haute, Indiana, factory to plaintiff and its Ozark competitors. The prices on these shipments varied according to factors, phantom freight or freight absorption (according to the way the method of charging for freight in this case is viewed, probably freight absorption being the proper designation), which are unrelated to any proper element of actual costs. See: *Federal Trade Commission v. Cement Institute, et al.,* 333 U. S. 683, 723, 724.

The court uses "actual source of supply" in a reasonable sense, that is, that it be the source of supply under normal circumstances, recognizing that unusual conditions might arise where it is necessary to ship cans from other sources. In such instances, probably freight could be equalized with the normal source of supply without running afoul of Section 2(a), for it was not the purpose of the Congress to place an impossible burden on sellers. As above stated, the court finds it unnecessary to determine if a bona fide warehouse located away from the mill or factory could be a basing or equalization point, in view of its conclusion that this warehouse was not a bona fide one within the requirements of Section 2(a).

Also, it might be stated that "buyers locational advantages" referred to by defendant has reference to actual source of supply, as discussed above, for if it were otherwise, it would be subject to the whim of the seller to create a locational advantage on the part of favorite buyers by installing a warehouse nearby.

Turning now to a consideration of the effect of these practices on competition, the only reasonable conclusion to be reached is that they did have the necessary adverse effect on competition. Plaintiff was in direct price competition with Good, Alma and Charleston Canning Company (these companies were under common ownership after 1944) not only in disposing of its canned goods, which were substantially the same as the products packed by Good, Alma and Charleston, but in obtaining raw materials. When it is remembered that the price of cans is a substantial part of the cost of the finished product, it becomes clear that not only is there a reasonable possibility or probability that these discriminations in price injured competition between plaintiff and its named Ozark competitors but such discriminations did in fact so injure competition. Therefore, since defendant has not presented a sufficient justification, the discriminations in price became unlawful and forbidden by Section 2(a).

Furthermore, plaintiff was injured in its business and property by such price discriminations, and, in the opinion of the court, a protracted discussion is neither necessary nor desirable. This was an added business expense unlawfully placed upon plaintiff and necessarily adversely affected the chances of plaintiff to survive the keen competition. Indisputably, the difference of a few cents per case often makes the difference between a sale in the market, and likewise, the difference of a few cents makes the difference in obtaining the raw products necessary for operation. Defendant stresses the fact that the record fails to disclose many, or, indeed, any, instances where plaintiff was outbid for raw products or undersold in the market. However, in the opinion of the court, that is not of material importance, for the crux of the matter is, as the court views it, that because of the highly competitive nature of bidding for raw products and selling in the markets, plaintiff at least had to meet the prices of its named Ozark Region competitors or go out of business immediately. It did not choose to liquidate, certainly a natural choice, and in the long run the unlawful discriminations of defendant were bound to show up in profits and losses. Thus, plaintiff was injured in the most basic and fundamental way, from its point of view, a lessening of its chances of survival.

It will not do to say that plaintiff is but a small business, and that the price discriminations were not large from a monetary standpoint, or that other factors, such as a declining economy, over supply of raw materials, etc., contributed, because the fact still remains that plaintiff was subjected to price discriminations which worked to its disadvantage and to the advantage of its named Ozark Region competitors. It is to be remembered that Section 2(a) was designed to protect the small business man, and the court feels that the spirit and letter of that section compels the conclusion reached here, that the price discriminations, declared unlawful thereby, did injure the plaintiff in its business and property.

[*Quantity Discounts—Facts*]

The second proposition that should be discussed concerns the quantity discount systems used by the defendant.

The schedule of discounts contained in the form of contract executed by the plaintiff was promulgated late in 1936, retroactively effective to June 18, 1936, the effective date of the Robinson-Patman Act, and granted discounts on the basis of quantity purchased yearly, as follows: under $500,000 no discount; from $500,000 to $7,000,000 discounts from 1% to 4%; and above $7,000,000 a discount of 5%. The system was set up by the officials of defendant on the basis of "past experience" and was not the result of a cost study during the preceding years.

The system resulted in differences in price between plaintiff and certain named competitors, California Packing Corporation (Calpack), a New York corporation, Libby, McNeill & Libby, Inc. (Libby), a Maine corporation, and Stokely-Van Camp, Inc. (Stokely), an Indiana corporation. As the system resulted in plaintiff paying substantially more for its cans than its above named competitors, it had the requisite adverse effect on competition, and the discussion previously made on this point is applicable here and need not be repeated. Therefore, the burden devolved on defendant to justify the differences as representing "only due allowance for differences in the cost of * sale *." As the court understands it, the attempted justification does not concern itself with cost of manufacture or delivery. On page 67 of defendant's brief it states:

> "We may agree that the amount of the discount in question must be measured by relation to the cost savings resulting from

sales of the larger quantities to which the discount is applied and must represent no more than due allowance for such savings."

Defendant would discharge this burden by showing a cost study as follows: (Defendant's brief page 73)

> "In brief, sales expenses were divided among customers in Group A (over $7,000,000), Group B ($500,000 to $7,000,000), and Group C (under $500,000). Expenses were allocated primarily upon the basis of 'contact hours' of salesmen engaged in the sales of packers' cans, and the allocation of their time within the various quantity brackets. Sales office overhead and other undistributed expenses were allocated on a percentage basis, determined by the direct costs to which they were applicable."

This study was conducted from April 1, 1937, to December 31, 1941—four and three-quarter years. Thereafter the study was discontinued, and no study of costs was made during the period of the plaintiff's contract.

The actual functioning of the discount system resulted, during the period of the cost study, in but two purchasers qualifying for Group A, from a low of 19 to a high of 36 in Group B, and, of course, the remainder fell in Group C, from a low of 2109 to a high of 2960.

Effective January 1, 1946, the defendant inaugurated a new schedule of quantity discounts, and offered to each customer a new contract incorporating the new schedule. Such a contract was offered to the plaintiff, but it refused to accept the same and continued to operate under its old form, which, as above stated, expired December 31, 1947. The new schedule was much broader and more inclusive than the old. Included in it were sales of general line as well as packers or sanitary cans, with the schedule beginning at .2% on $50,000 annual purchases and ranging upwards in various brackets to a maximum of 3% on annual purchases of $4,000,000 or more. No attempted justification was made of the new schedule by defendant, it taking the position that since the plaintiff refused the new contract the new schedule is not properly involved in the case, and in any event, the justification of the old system implicitly covers justification of the new.

The law pertaining to this phase of the case is comparatively clear, having had recent consideration by the Supreme Court in *Federal Trade Commission v. Morton Salt Co., supra.*

In view of the condemnation contained in that case "that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability", the quantity discount system of defendant cannot be approved merely because it was commercially impractical if not impossible to suspend discounts after the enactment of the Robinson-Patman Act. The defendant assumed the risk of being subjected to a private action for damages, such as the instant case, if its system made other than "due allowance".

However, the Act does permit price differences representing actual cost savings, and it is necessary for the court to consider and determine the merits of the justification made by the defendant. It might be noted that this court does not function as an expert in the field, as does the Federal Trade Commission, and it is not the purpose of the court to formulate a discount system within the sanction of the Act. The sole function of the court in this regard is to ascertain whether the defendant has made the requisite justification of its system.

[*Averaged Costs Insufficient as Justification for Quantity Discount Differentials*]

The defendant's justification is based upon averages derived from an allocation of sales costs to the three groups into which it classified its customers for justification purposes. Separate costs were not presented for the three named competitors, Calpack, Libby and Stokley, nor for plaintiff. A literal interpretation of Section 2(a) would appear to call for a consideration of the sales costs to individual customers and to individual plants of customers who operate more than one. It is difficult to see in what other manner price differentials can be limited to the sphere of actual costs. Certainly, if the chief purpose of the Act, the protection of small businesses, is to be achieved in any degree, some semblance of individual cost justification should be required. If a system whereby all of the small customers are lumped together in one group solely because of their quantity buying ability (which is the practical effect of this system) is justifiable, then the Congress has done a futile thing in enacting this legislation, for, obviously, it has failed to correct the recognized evil whereby "a large

buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability". It is inconceivable that the Congress meant to permit such a situation to continue. This, in the opinion of the court, is the ultimate fault to be found with defendant's system and justification thereof. The purchaser in Group C was doomed by the system to remain there, so long as its volume of purchases did not exceed $500,000, regardless of the cost incurred in selling it, and its identity as an individual, for cost purposes, was completely lost. It is significant that the breaking point, $500,000, left the customers of defendant in substantially the same position as before the enactment of the Act, for roughly 2,700 fell below that point, thus receiving no discount, and some 30 fell into the other groups, with but 2 in Group A. In other words, the "little fellows" were at the same competitive disadvantage from a quantity purchasing and discount standpoint as before.

The court recognizes the contention of defendant that "quantity discounts are justified *vel non* either according to their impact on competition or potential injury to customers on the one hand, or by the relevance of the supporting study in justification of such discounts to basically sound accounting principles." Plaintiff and its named competitors receiving the maximum discount were active competitors in the same markets and often in the same stores, and the evidence in this case is more than ample to support the finding of the court that there existed the required adverse effect on competition. As to the latter point, the court is aware of the announcement of the Federal Trade Commission in the case of *Minneapolis-Honeywell Regulator Co.*, CCH TRADE REGULATION REPORTS ¶ 13,675 (1948), that "where they (cost studies) are made in good faith and in accordance with sound accounting principles, they should be given a very great weight." Although the court is not familiar with the details of the discount system or the justification involved therein, it does appear that the system was very comprehensive with numerous "breaking points", and was based upon a study made by an independent accounting service. Also, the system was revised several times to meet changing conditions. Under those circumstances the Federal Trade Commission concluded that the company had made a good faith effort and its system was the best that was possible under the circumstances. It may be that this is a reasonable approach to the problem, in view of the heavy burden on sellers, but defendant's system cannot qualify thereunder. Defendant had three broad classes, with practically all customers falling in Class C. It set up the system and then conducted studies for the test period to justify it (or to allocate costs already known), never changed it, and in fact, during the period of its dealings with plaintiff no study of costs whatsoever in regard to its discount system was made. This, in the opinion of the court, could not meet the most liberal "good faith cost study test".

The court realizes that the Act places a great burden on defendant, but it is also aware that that burden was deliberately so placed by the Congress. And, when the defendant made the quantity discounts, it necessarily ran the risk of violating the Act. and of bearing the consequences if it could not make the required justification.

As to whether a justification may be made other than on an individual cost basis, this court has no occasion to decide. Perhaps this is the only safe course to follow, but regardless of that, it is sufficient to hold here that defendant has not justified its quantity discount system as making only due allowance for differences in the cost of sale. At the very least, the Act requires a more definite and specific justification of cost savings than defendant has presented.

As to the plaintiff's claim for the period covered by the new discount system, no justification was made by the defendant, it taking the position that the plaintiff could not claim damages under the new contract because it refused to accept it, and in any event, the justification offered for the old system is ample for the new. It is the view of the court that plaintiff's claim is not founded in contract, and that the law cannot be superseded by the terms of a particular contract. The law condemns a price discrimination caused by quantity discounts which has the requisite adverse effect on competition, of which the court has found sufficient evidence here, unless it can be justified as making only due allowance for cost of sales.

In the opinion of the court, the evidence amply demonstrates that the unlawful price discriminations resulting from defendant's quantity discount systems injured plaintiff in its business and property.

[*Discrimination in Facilities Furnished*]

The third question that requires consideration and discussion arises from the contentions of the parties on the allowances or payments made to Morgan Packing Company, one of the named competitors of plaintiff.

Defendant has a can factory at Austin, Indiana, from which a runway, or can conveyor, carries cans to an adjacent canning plant belonging to Morgan Packing Company. Morgan also has five other canning plants in Indiana, all five of which are at a distance from Austin great enough to make rail or truck transportation necessary. For all practical purposes the entire supply of cans purchased by Morgan for its six plants are delivered over the runway at Austin.

Defendant granted to Morgan a discount from list price of 45¢ per thousand upon all cans delivered across the runway, which, as stated above, went to all six Morgan plants.

Plaintiff contends that in utilizing the runway for delivery to Morgan and in granting the 45¢ per thousand discount defendant has violated both Sections 2 (a) and 2 (e) of the Act, 15 U. S. C. A. Secs. 13 (a) and 13 (e).

Section 2 (e), *supra,* absolutely forbids disproportionate services or facilities, with no stated prerequisite of adverse effect on competition, as appears in Section 2 (a). See: *Elizabeth Arden, Inc., et al. v. Federal Trade Commission,* 2 Cir., 156 F. 2d 132, 134. It might be noted, however, that, in the opinion of the court, the facts of this phase of the case show the required adverse effect on competition.

It is not the province of the court to determine where the defendant should construct its can factories, or to censure the defendant for constructing them wherever it may desire. That is a matter within the good faith discretion of the defendant.

[*Impossibility of Furnishing Proportionate Services No Defense*]

Obviously a runway is only practical when the can factory is adjacent to a customer's canning plant, with the necessary result that runway facilities may be furnished to only a few of defendant's more fortunate customers. Therefore, in so far as the physical facility is concerned, as a practical matter, it would be impossible for defendant to furnish proportionally equal runway facilities to all of its customers. However, the fact that it is impractical, or even impossible, to furnish proportionally equal facilities to all customers cannot serve as a justification for furnishing the facilities to those where it is practical, if the furnishing of such facilities discriminates in favor of those receiving them. In other words, Section 2 (e) condemns the discrimination, not the furnishing of facilities. And, the condemnation is just as applicable when the facilities cannot be furnished to all as when they are not furnished to all. This is consistent with the congressional intent to prohibit discriminations, either direct or indirect, which necessarily result in favored customers paying less than other customers for the same commodity.

The defendant may in good faith construct its factories in certain localities and thereby incidentally create a locational advantage to those customers situated nearby. In such a case, defendant may sell f. o. b. the factory, provided it is the normal source of supply, and the nearer customers will receive their cans at a smaller delivered price than those less favorably situated. This, however, is not discriminatory for the difference is justified in delivery costs. When, however, additional facilities, the runway here, are furnished so that those near the factory receive their cans at a price lower than that normally incident to locational advantage, a discrimination does exist, and the seller, defendant here, must either furnish proportionally equal facilities to all customers purchasing that commodity, discontinue the furnishing of such facilities, or, in this case, discontinue the granting of a discount based upon the existence of the facilities. If this is not the law, then the way is open for sellers so inclined to circumvent the letter and spirit of the Robinson-Patman Act, the purpose of which is to prevent discriminations in price to favored customers.

That the furnishing of this facility (and the facility may be said to be furnished regardless of who constructed it, for it is the utilization thereof to achieve the desired end, a lower price, that condemns it) resulted in a discrimination between Morgan and plaintiff cannot be denied. Plaintiff and Morgan were in competition, as will be discussed later, and Morgan received its cans, of like type, size and quality as those of plaintiff, for substantially less than plaintiff. Furthermore, the result of the furnishing of

this runway at Austin was that Morgan received the discount for cans used in its plants not connected with the runway. In the opinion of the court, it was just such discriminatory arrangements as this that the Act was designed to prevent.

[*Broad View Taken as to "Competition"*]

Defendant contends that plaintiff and Morgan were not competitors. It is true that they did not pack the same products. Plaintiff packed green beans, spinach, mustard and turnip greens, while Morgan packed beans (packed with pork and kidney beans), pumpkin, kraut, hominy, beets, soup, spaghetti, carrots, carrots and peas, catsup, tomato juice, tomato pulp or puree and mixed vegetables.

The ends sought to be achieved and the evils sought to be eliminated by the Robinson-Patman Act can be fully realized only by taking a broad view of competition. Here, although plaintiff and Morgan did not pack the identical products, they both packed canned vegetables, sold them in the same markets, and the products of both often appeared on the same shelf in the same grocery store. Certainly, each was seeking what the other was endeavoring to gain at the same time; each was actively competing for the housewife's dollar, and often for the dollar of the same housewife. Thus viewed, there can be no doubt but that Morgan was a competitor of plaintiff within the contemplation of Section 2 (a). Furthermore, there can be no doubt that the price discrimination between plaintiff and its competitor, Morgan, had the necessary adverse effect upon competition, and the burden devolved upon defendant to justify the differential.

The fault found by the court with defendant's justification is more fully set forth in the findings of fact, the substance of which is that defendant has failed to justify the allowance as reflecting actual cost savings. In general, defendant compared cost figures between the Austin plant, which was designed specifically to serve Morgan over the runway, and the Terre Haute plant, which had no runway facilities and was designed to serve the general run of customers by rail; the court found that the two situations are too different for accurate comparison; the figures of comparative costs run in terms of averages and cover only one year, and that single year is multiplied by five to get the five year period used for comparison; the figures used are too general as to kinds and types of labor and how the labor was employed, the costs incurred in the operation of the runway are not separated from costs incurred in the production of sanitary cans, and the line of jurisdiction between defendant and Morgan on the runway is not drawn; and defendant made no attempt to find and to isolate the comparative costs of delivery of cans of like size and kind with those used by plaintiff.

As stated in regard to the quantity discount system, at the very least, the Act requires a more definite and specific justification of cost savings than defendant has presented.

[*Statute of Limitations Suspended as to Private Actions*]

Having discussed and resolved the contentions on the merits against the defendant, it becomes necessary to dicuss and determine the extent of the damages suffered by the plaintiff. However, before proceeding to a discussion of the question of damages, it is necessary to consider the contention of defendant that plaintiff's claim for damages that occurred prior to three years preceding the filing of the complaint is barred by the applicable statute of limitations of the State of Arkansas. The defendant urges that there can be no recovery for damages to the business or property of plaintiff between June 1, 1943, the date upon which plaintiff began to purchase cans from defendant, and November 2, 1943. (The original complaint was filed November 2, 1946, and by supplemental complaint was extended to cover time to expiration of contract, December 31, 1947. See: *Lawlor v. Loewe*, 235 U. S. 522, 536.)

Plaintiff contends that assuming the applicable statute is Arkansas Statutes, 1947, Section 37-206, which fixes a three year period of limitation, the running of the statute was suspended by Act of Congress and consequently is not a bar to any of plaintiff's claim for damages.

The Act of Congress referred to was first passed October 10, 1942, 56 Stat. 781, and was amended June 30, 1945, so that the suspension period ran from October 10, 1942, to June 30, 1946. It reads as follows:

"That the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil pro-

ceedings under any existing statutes, shall be suspended until June 30, 1946, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but is shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

As to this Act, it is defendant's position that it is applicable only to civil and criminal suits instituted on behalf of the United States Government.

Ordinarily, if the intended meaning of statutory language is clear, no resort should be made to the legislative history. Only where language is susceptible of two or more constructions should the court look outside of the Act for the intended meaning. Giving to the language used in this Act its usual and accepted meaning, the conclusion is irresistible that the suspension applies equally to private and Government actions. The parties to this suit draw different conclusions from the legislative history, but, in the opinion of the court, nothing appears from that history which clearly indicates an intention to limit the application of the Act to Government actions only. Therefore, the Act should be administered as written, and the language "civil proceedings" given its usual and accepted meaning. *Tiffin Building Corporation v. Balaban & Katz Corporation,* D. C. N. D. Ill., — F. Supp. — (October 21, 1949). Accordingly, this contention of the defendant is rejected, and plaintiff may recover for any damages incurred from the date it began purchasing cans from defendant, June 1, 1943.

[*Measure of Damages*]

The defendant contends that general damages are not recoverable under Section 2(a), and would distinguish the case of *Elizabeth Arden Sales Corporation v. Gus Blass Co.* [150 F. 2d 988], which allowed general damages. It argues that Section 2(e), involved in that case, incorporates the "most favored customer" doctrine in that under 2(e) disparate treatment in the furnishing of services and facilities is unlawful in and of itself without a showing of adverse effect upon competition, whereas in Section 2(a) unlawfulness of differences in price "turns upon proof that the questioned differences in price either specifically injures the individual who does not receive the lower price, or has or may well have an adverse effect upon competition generally."

In the opinion of the court, the distinction made by defendant is not sound. All subsections of Section 2 were designed to effectuate the policy behind the enactment of the Clayton Act, and the Robinson-Patman amendment thereto, it being the obvious purpose of the Congress to make the provisions comprehensive in order to prevent indirect as well as direct violations. And, when the requisite adverse effect on competition has been established, as in the instant case, there appears to be no valid reason to differentiate between 2(a) and 2(e) in the assessment of damages for injury to business and property.

In this regard, it should be noted that the court has condemned the runway allowance to Morgan under either or both Section 2(a) and Section 2(e). The *Elizabeth Arden* case, *supra,* (8 Cir.), is direct authority for the imposition of general damages under 2(e), because of the additional expense imposed upon plaintiff by reason of the allowance to Morgan, a competitor, and the withholding of a similar allowance to plaintiff. However, the other phases of plaintiff's case fall under Section 2(a), and, for this reason, the above expression of the court's views was necessary.

Furthermore, plaintiff claims damages for injury to its competitive position. In assessing damages of this nature, it is difficult to arrive at an exact figure due to the character of the only available evidence, but the court is not without guidance in the matter. It has been pointed out by the Supreme Court that "the rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Company v. Paterson Parchment Paper Company et al.,* 282 U. S. 555, 562. In this case it has been adequately established that the plaintiff has been damaged and that damage is definitely attributable to the wrong of defendant, so the only remaining question is the amount to be assessed as damages.

An analysis of can purchases (all of the named competitors purchased their entire supply of cans from defendant) shows that plaintiff's Ozark Region competitors did not reach their peak until 1946, and plaintiff's nation-wide competitors, who were the

principal beneficiaries of the systems of quantity discount, continued to increase their purchases year by year, and in the face of a diminishing national demand, they obtained a larger and larger share of the national market at the expense of the smaller canners. While many factors may have played a part in affecting the competitive positions of plaintiff and its named competitors, the trade practices of defendant were the only common factors operating upon the destinies of all, and those practices worked to improve the competitive position of the named competitors while weakening the competitive position of plaintiff.

The cumulative effect of the unlawful discriminations first made itself felt in 1945, when plaintiff alone showed a marked decline. It was during the first part of 1945 that plaintiff's controversy with defendant over the 12 cars of cans, hereinabove referred to, arose. Defendant contends that any losses suffered by plaintiff on account of the delay incurred in the delivery of the cans was plaintiff's own fault, and that it was the duty of plaintiff to accept the cars and thereby mitigate any damages that might arise. With this the court cannot agree, for plaintiff was but insisting that it get its cans in accordance with the contract and the law. Plaintiff had specifically warned defendant that it would refuse shipments not so made. Had plaintiff accepted these shipments as billed, it would have in effect continued to be a party to a violation of the terms of its contract and the law. It was not necessary for plaintiff to do so, and it should not be penalized now for its insistence on compliance with the contract and the law. Defendant had adequate notice of plaintiff's position on the matter, and defendant's actions thereafter were deliberate and with full knowledge of that position. Therefore, defendant is responsible for any legal damages flowing from its adopted course of conduct. However, this phase of the case should not be treated separately and is properly a part of plaintiff's claim for damages to its competitive position. It will be so treated by the court.

The evidence is legally sufficient to enable the court to make a just and reasonable estimate of the damages incurred by plaintiff.

Thus, it appears that plaintiff has sufficiently established general damages under Sections 2 (a) and 2 (e), which may be determined with exactness, and, also, damage to its competitive position for which it is entitled to a sum which will reasonably compensate it therefor. However, there is necessarily a degree of overlapping when the assessment exceeds the amount of price differentials on account of freight charges, quantity discounts and runway allowances. In the final analysis it is believed that one award should be made which, within the theory of the law as understood by the court and as set forth hereinabove, represents reasonable compensation for the injury suffered by plaintiff to its business and property. Accordingly, the lump sum of $125,000.00 has been fixed as damages.

[¶ 62,530] Rochette & Parzini Corporation v. Campo.

In the New York Supreme Court Appellate Division for the First Department No. 2797. 122 N. Y. L. J. 1523. December 6, 1949.

New York Antitrust Act

Refusal to Supply Labor—Labor Not a Commodity Subject to Monopolization.—A lower court opinion finding monopolization of labor in a union's refusal to supply labor to an employer is reversed without opinion upon the authority of a Sherman Act case holding labor not to be a commodity subject to the antitrust laws.

See the New York Antitrust Act annotations, Vol. 2, ¶ 8615.20.

Reversing a decision of the New York Supreme Court for Bronx County, reported at ¶ 62,415.

Before PECK, P. J.; GLENNON, DORE, COHN and CALLAHAN, JJ.

Judgment unanimously reversed, with costs to the appellants, and the complaint dismissed on the authority of *Hunt v. Crumboch* (325 U. S. 821). No opinion. Order filed.

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